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THE
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WITH KEY-NUMBER ANNOTATIONS

VOLUME 139
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CONTAINING THE DECISIONS OF THE

SUPREME AND LOWER COURTS OF RECORD
OF NEW YORK STATE

WITH TABLE OF NEW YORK SUPPLEMENT CASES THAT HAVE
BEEN PASSED UPON BY THE COURT OF APPEALS

AND

TABLE OF STATUTES CONSTRUED

FEBRUARY 3 — MARCH 10, 1913

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THE NEW YORK SUPPLEMENT VOLUME 139

(79 Misc. Rep. 49.)

GERSMANN v. WALPOLE et al.

(Supreme Court Court, Appellate Term, First Department. January 9, 1913.)

1. WORK AND LABOR (§ 14*)—ACTIONS—CONTRACTS—PERFORMANCE.

Recovery on a written building contract and enforcement of a mechanic's lien on the building cannot be had in an action on quantum meruit, unless substantial compliance be shown; mere excuses not being a sufficient substitute for actual performance.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 29-33; Dec. Dig. § 14.*]

2. JURY (§ 14*)—JURY TRIAL—EQUITABLE PROCEEDINGS.

Where an undertaking has been given to discharge a mechanic's lien, and the sureties are made parties defendant, the action to foreclose is triable by the court without a jury; the court having a constitutional right to determine the disputed facts, as the proceeding is an equitable one.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 40-60, 66-83; Dec. Dig. § 14.*]

3. JURY (§ 13*)—JURY TRIAL—EQUITABLE ACTION—COUNTERCLAIM FOR MONEY ONLY.

No right to a jury trial upon a counterclaim interposed in an equity suit exists at common law, and consequently, where one is interposed in which the defendant demands a judgment for money only, the trial of such issue by jury is discretionary.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 35-83; Dec. Dig. § 13.*]

4. JURY (§ 25*)—EQUITABLE ACTIONS—DEMAND.

Under court rule 31, the privilege of a jury trial on the issue raised by counterclaim must be applied for within 10 days after joinder of issue, and consequently an application made months after the joinder of issue is properly denied.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 154-173; Dec. § 25.*]

5. APPEAL AND ERROR (§ 127*)—DECISIONS REVIEWABLE—DEFAULT JUDGMENT.
No appeal lies from a judgment by default.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 885-889, 891; Dec. Dig. § 127.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
139 N.Y.S.—1

Appeal from City Court of New York, Special Term.

Action by Rudolph Gersmann against Mary Walpole and others. From a judgment for plaintiff, defendants appeal. Judgment as to the named defendant reversed and remanded.

The trial was by the court, and the notice of appeal brings up for review an order denying a motion made by defendant Walpole for an order framing the issues arising upon her counterclaim and for a jury trial.

Argued December term, 1912, before SEABURY, GUY, and GERARD, JJ.

Wise & Seligsberg, of New York City (Clifford H. Owen, of New York City, of counsel), for appellants.

Katz & Sommerich, of New York City (L. E. Schlechter, of New York City, of counsel), for respondent.

GUY, J. The action is brought to foreclose a mechanic's lien, where an undertaking has been given to discharge the lien. The complaint alleges a quantum meruit for \$335 and interest. Both the owner and the sureties were made defendants, and both of them appeal.

The answer of the owner denied the material allegations of the complaint and set up a counterclaim of \$5,000 for breach of contract. The court found that the reasonable value of the work done and materials furnished was \$1,485, of which \$1,150 had been paid; also that plaintiff had substantially performed. The pleadings admitted the execution of an incomplete building contract.

[1] The plaintiff testified to the conclusion that he had done all the work specified in the contract, and had been paid all that was due except \$335. He and his witness admitted that several violations had been discovered and ordered by the tenement house department to be removed, some of which had been removed, but one, costing \$15 to rectify, had not been removed. Defendant's architect and others testified to substantial defects and omissions, one of which would cost \$100 to \$150 to rectify. In rebuttal, plaintiff failed to deny or meet this.

Plaintiff contends that this is an action on quantum meruit. This contention is erroneous; but, even if it were sound, plaintiff cannot recover on quantum meruit under a written contract without proving substantial performance. *Hogg v. Larchmont Yacht Club* (Sup.) 134 N. Y. Supp. 1079; *Tinley v. Van Wert*, 119 App. Div. 738, 104 N. Y. Supp. 3. Excuses are not a substitute for substantial performance, conclusions as to performance are not proof thereof, and the very substantial defects, omissions, and violations proven defeat a recovery. *Easthampton Lumber Co. v. Worthington*, 186 N. Y. 407, 408, 413, 79 N. E. 323; *Id.*, 186 N. Y. 581, 582, 79 N. E. 325; *Fox v. Davidson*, 36 App. Div. 159, 161, 162, 55 N. Y. Supp. 524; *Smith v. Ruggerio*, 52 App. Div. 382, 65 N. Y. Supp. 89, affirmed 173 N. Y. 614, 66 N. E. 1116.

[2] Defendant Walpole also brings up for review the order denying her motion to frame certain issues arising upon the counterclaim and for a jury trial of said issues. An action to foreclose a mechan-

ic's lien, where an undertaking has been given to discharge the lien, and where the sureties on the undertaking are parties defendant, is triable by the court without a jury. *Schillinger Cement Co. v. Arnott*, 152 N. Y. 584, 590, 592, 46 N. E. 956; *Valett v. Baker*, 129 App. Div. 514, 515, 114 N. Y. Supp. 214; *Mertz v. Press*, 99 App. Div. 444, 91 N. Y. Supp. 264. The right of a trial justice in an equity suit to satisfy his own conscience as to the facts without the aid of a jury is as much of a constitutional right as is the right of jury trial in action at law where the material facts are disputed. *Shepard v. Manhattan Ry. Co.*, 131 N. Y. 215, 223-226, 30 N. E. 187.

[3, 4] Where a counterclaim is interposed in an equity action in which defendant demands judgment for a sum of money only, as a "counterclaim in an equity suit is not a case where the right to a jury trial existed at common law," a trial of such issue by a jury is discretionary. *Mackellar v. Rogers*, 109 N. Y. 468, 472, 17 N. E. 350; *Bennett v. Edison Ill. Co.*, 164 N. Y. 131-133, 58 N. E. 7; *Smith v. Fleischman*, 23 App. Div. 355-359, 48 N. Y. Supp. 234. The privilege of a jury trial of the issue raised by a counterclaim must be applied for within 10 days after the joinder of issue. Rule 31; *Arnot v. Nevins*, 44 App. Div. 61, 62, 60 N. Y. Supp. 401. In the case at bar issue was joined December 26, 1911, the motion to frame issues was delayed until May 31st following, and the motion was therefore properly denied.

[5] The defendants Farrel and O'Mally defaulted in the court below and a judgment was entered against them by default. The appeal taken by them must therefore be dismissed, but without prejudice to such action in the lower court as they may be advised.

Judgment as to defendant Walpole reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

GOLDSTEIN v. HERSHKOWITZ.

(Supreme Court, Appellate Term, First Department. January 9, 1913.)

LANDLORD AND TENANT (§ 164*)—NEGLIGENCE OF LANDLORD.

A landlord was not guilty of negligence for failure to nail a rug to the floor in the hall of a tenement house, as a result of which an infant child of tenants was injured.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 630-641; Dec. Dig. § 164.*]

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by Morris Goldstein, as guardian ad litem of Reuben Goldstein, an infant, etc., against David Hershkowitz. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued December term, 1912, before SEABURY, GUY, and GERARD, JJ.

James J. Mahoney, of New York City (Edward I. Taylor, of New York City, of counsel), for appellant.

Samuel Saltzman, of New York City, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM. The plaintiff, an infant, was injured by slipping upon and falling over a rug laid in the front hall of a tenement house in which plaintiff's parents were tenants. We do not think that any actionable negligence can be predicated upon the mere failure to nail a rug to the floor.

Judgment reversed, and a new trial ordered, with costs to the appellant to abide the event.

(79 Misc. Rep. 31.)

HIRSCH v. LICHTENSTEIN.

(Supreme Court, Appellate Term, First Department. January 9, 1913.)

1. TRIAL (§ 165*)—NONSUIT—EVIDENCE.

A nonsuit is proper only when plaintiff's evidence, considered in the most favorable light, fails to show a cause of action.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

2. LANDLORD AND TENANT (§ 22*)—BREACH OF LEASE BY TENANT—NONSUIT—EVIDENCE.

Where the evidence in a landlord's action for breach of a lease showed an agreement between the lessor and lessee as to the terms of the lease, and bound defendant to sign a written lease, and also showed defendant's breach, and there was evidence that defendant authorized plaintiff to let the house to some one else, so as to reduce the loss which he expected to sustain from his breach, it was error to grant a nonsuit.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 55-59; Dec. Dig. § 22.*]

3. EVIDENCE (§ 271*)—LETTERS—SELF-SERVING DECLARATIONS.

Where, in a landlord's action for breach of a lease, certain of defendant's letters offered by plaintiff were admissible to show the consummation and terms of the lease, it was improper to exclude as self-serving declarations certain of plaintiff's letters which were necessary to render defendant's letters intelligible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.*]

Appeal from City Court of New York, Trial Term.

Action by Charles S. Hirsch against Solomon K. Lichtenstein. From judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued December term, 1912, before SEABURY, GUY, and GERARD, JJ.

Samuel H. Guggenheimer, of New York City (Adam K. Stricker, of New York City, of counsel), for appellant.

Wise & Lichtenstein, of New York City (Arthur S. Friend, of New York City, of counsel), for respondent.

SEABURY, J. This action is brought to recover damages for the breach of an oral agreement alleged to have been made between the parties to this action, whereby the plaintiff agreed to let and the defendant agreed to lease a certain cottage at Elberon, N. J., from May 29, 1912, to July 15, 1912, for the sum of \$1,200. The court below dismissed the complaint at the close of plaintiff's case.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1, 2] In determining whether or not the plaintiff was properly non-suited, the plaintiff is entitled to the most favorable inferences which may be drawn from the facts proved. *Kraus v. Birnbaum*, 200 N. Y. 130, 93 N. E. 474. The evidence showed that in February, 1912, the plaintiff and defendant had a conversation relative to the renting of the Elberon cottage, which was owned by the plaintiff. The plaintiff told the defendant that the rent would be \$1,600, and the defendant said that, as he expected to spend part of the season in Maine, he would not require it for the full season, and asked:

"Suppose if I take it up until July 15th, what would the rent be?"

To this inquiry the plaintiff replied, "\$1,200." The defendant said that he would talk the matter over with his wife. A few days later, the defendant called the plaintiff on the telephone, and said that he had spoken to his wife about the cottage, and that they would not want it longer than July 15th; but it would be necessary to make some repairs to the house, and that he wished the plaintiff would arrange with the defendant's wife as to these repairs. On the evening of the same day, the defendant's wife telephoned the plaintiff, and said that the house needed painting on the inside and outside, and that she wanted a carpet put in one of the bedrooms. The plaintiff agreed to comply with all these requests, and the defendant's wife then said:

"All right; then I will tell Sol [defendant] to take the cottage."

On the following morning, the plaintiff had a conversation with the defendant, in which he told him that he had spoken to the defendant's wife, and that "everything is arranged," and the defendant asked him to send the lease to him. In this conversation the plaintiff testified that the defendant said that:

"He would take it until the 15th of July, and the rent was to be \$1,200."

The plaintiff sent a written lease to the defendant, which the latter did not return. After some correspondence between the parties, which the court below excluded, the plaintiff had another conversation with the defendant, and inquired about the lease, and the defendant said:

"I have opened it now, and it is all right, and we understand each other, and I will send it to you to-night."

Other correspondence was had on the subject, but the defendant did not sign the lease, but discussed with the plaintiff the possibility of renting the cottage to some one else. The plaintiff told the defendant that, if he desired, he would endeavor to rent it to some one else, but that it was getting late in the season, and that the defendant had better try to rent the cottage himself. In one of the conversations which the defendant had with the plaintiff, the defendant said:

"You ought to get more for it [than \$900], but, if you cannot get over \$1,000, rent it to him [a prospective tenant]. I do not want to lose any more than that."

There was other evidence to the same effect, and at the close of the plaintiff's case the learned court below dismissed the complaint, on the ground that the plaintiff had failed to establish a cause of action against the defendant. What more it was necessary for the plaintiff to

prove in order to establish a prima facie case is not clear to us. The agreement which was entered into specified the lessor and lessee, described the property to be leased, stated the term of the lease, fixing the day upon which it was to commence and the day upon which it was to end, and the amount of the rent to be paid. Nothing more than this was required by law in order to establish a cause of action. Not only was the defendant's breach of his contract proved, but there was evidence that the defendant authorized the plaintiff to let the house to some one else, so as to reduce the loss which the defendant expected to sustain by reason of his failure to make the lease which he had agreed to enter into.

[3] During the time intervening between the several conversations referred to above between the plaintiff and the defendant, several letters passed between the parties. Some of the letters were written by the plaintiff and some by the defendant, and all of the defendant's letters referred specifically to the letters of the plaintiff, to which they were written in reply. These letters were offered in evidence upon the trial and excluded by the learned court below upon objection being made that they were "self-serving declarations" and "too remote." The letters of the defendant, which the plaintiff offered, could not properly be excluded on the ground that they were self-serving, and as the letters of the defendant would not have been intelligible, unless read in connection with the letters of the plaintiff, in response to which they were written, the whole correspondence should have been received in evidence. The letters of the parties were as admissible as the conversations between the parties, which the court received in evidence. The objection urged by counsel that the letters should be excluded because "too remote" seems to us not to require discussion.

Judgment reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

(153 App. Div. 865.)

POST et al. v. THOMAS et al.

(Supreme Court, Appellate Division, First Department. December 13, 1912.)

1. BROKERS (§ 9*)—STOCKBROKERS—POWERS.

Where an agent for subscribers to a stock pool account has authority to manage the pool and close it out when he sees fit, his agency is terminated when he causes a transfer of the account to another account of which he has also control.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 10; Dec. Dig. § 9.*]

2. PRINCIPAL AND AGENT (§§ 69, 164*)—SALE BY AGENT TO HIMSELF—VALIDITY.

An agent may not sell to himself without his principal's consent; but the latter, on discovering the facts, may adopt and acquiesce in the act.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 130-145, 622-625; Dec. Dig. §§ 69, 164.*]

3. BROKERS (§ 9*)—TRANSACTIONS—CLOSING OUT—ACTS CONSTITUTING.

A stock brokerage firm carried a stock pool account for defendants T., H., and O., who were speculating in a certain stock. T. purchased the interest of O. in the account, and notified the brokers thereof, stating that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

his interest was a two-thirds interest, while H. owned a one-third interest, and that the account was not a joint one, but did not notify the firm that H. knew of his acquisition of O.'s interest. There was no real market for the stock, and the account was on T.'s order transferred to the account of a syndicate of which he was manager. Subsequently the account, pursuant to T.'s order, was retransferred to the original account. *Held*, that the transfer of the account was as to H., ignorant of the transaction, a closing out of the pool account.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 10; Dec. Dig. § 9.*]

4. **BROKERS (§ 74*)—RELEASE (§ 12*)—CONSIDERATION.**

A stock brokerage firm carried for T., H., and O. a stock pool account. T. purchased the interest of O. in the account and notified the firm thereof, stating that his interest and the interest of H. were not joint, but did not notify them that H. knew of the purchase. Pursuant to T.'s direction, the firm transferred the account to the account of a syndicate of which he was manager. Subsequently, pursuant to T.'s directions, and without H.'s knowledge, the account was retransferred to the original account. Thereafter T. was released from liability on the theory that H. was liable, though the transfer operated to close out the original account as to him. *Held* that, since T. was the only person liable on the account when the release was executed, the release was without consideration, and the firm, not being bound to know that T. was the sole debtor, could sue him for the balance due on the original account.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 62; Dec. Dig. § 74;* *Release*, Cent. Dig. §§ 12-20; Dec. Dig. § 12.*]

Ingraham, P. J., and Laughlin, J., dissenting.

Appeal from Order Entered on Report of Referee.

Action by Edwin M. Post and another against Edward R. Thomas and others. From a judgment for plaintiffs, entered on the report of a referee, defendant Thomas appeals. Affirmed.

See, also, 144 App. Div. 897, 129 N. Y. Supp. 1143.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and MILLER, JJ.

Edward L. Blackman, of New York City, for appellant.

William G. Wilson, for plaintiffs-respondents Post and Warner.

Origen S. Seymour, of New York City (Nathaniel R. Bronson, of Waterbury, Conn., and Henry M. Kidder, of Fremont, Neb., on the brief), for respondent Hamilton.

SCOTT, J. [1] In my opinion the judgment should be affirmed. It makes little matter, as it seems to me, whether the members of the pool are to be regarded as partners, or as joint adventurers. Whatever their relations were to each other, the defendant Thomas acted as agent for the subscribers to the pool, and I think that we may assume for the purpose of this appeal that he was authorized so to act, and that it was confided to his discretion to manage it, and, when he saw fit, to close it out. I think that he did close it out when he caused the account to be transferred to his own account, or, what is the same thing, to the Silver Syndicate account. That ended his agency so far as Hamilton was concerned, and there is nothing to show that he ever received authority from Hamilton to re-embark in the speculation.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[2, 3] Of course, as Hamilton's agent, he could not sell to himself without Hamilton's consent; but the latter, when he had discovered that his agent had undertaken to sell out to himself, was entitled to adopt and acquiesce in his act. It will not do, as it seems to me, to say that the transfer of the account to the Silver Syndicate account, and its retransfer a week afterwards, was a mere bookkeeping transaction. It is true that the transaction was effected by entries on the books of Post and Thomas; but so far as Hamilton was concerned it was a closing out of the pool account.

[4] If I am right in this, Thomas was the sole person liable on the "K. & K. Syndicate account" when the paper relied upon as a release was executed, and if he was so liable that release was without consideration. Plaintiff was not bound to know then that Thomas was the sole debtor. He may well have believed, from Thomas' statements and actions, that Hamilton had consented to the transfer and retransfer of the "K. & K. Syndicate account" and remained jointly or partly liable therefor. Indeed, it is probable that he did so believe; for he testified that a part of the consideration upon which the release was given was the promise that he should be furnished with evidence that Hamilton was liable for one-third of the balance remaining unpaid upon the account.

The judgment should be affirmed, with costs.

CLARKE and MILLER, JJ., concur.

LAUGHLIN, J. (dissenting). The plaintiffs were the general partners of the stock brokerage firm of Post & Co., and they brought this action to recover the balance of a pool account which said firm carried for the defendants, who were buying and selling the capital stock of the Keokuk & Des Moines Railroad Company, upon the theory that the defendants are jointly liable therefor. The complaint was dismissed as to the defendants Orlando F. Thomas and Hamilton upon the theory that they were discharged from liability by a transaction between the plaintiffs' firm and Edward R. Thomas, by which the pool account was transferred to another account carried by said firm, which he owned or managed. The plaintiffs have not appealed. The only object of the appellant, in appealing from the judgment in so far as it dismisses the complaint as against Hamilton, was to protect his right to contribution against Hamilton in the event that there should be a new trial.

The pool was originally formed by the defendants and one Carlton, and the account was originally opened in September, 1901, with the stock brokerage firm of Thomas & Post, composed of the plaintiff Edwin M. Post, and the defendants Edward R. and Orlando F. Thomas. The referee found that by mutual consent Carlton severed his connection with the pool about a week or ten days after the time it started, and that finding has been acquiesced in, and therefore it is not necessary to consider whether it is supported by the evidence. In September, 1902, the firm of Thomas & Post was dissolved, and two new firms were formed, one the firm of Thomas & Thomas, composed of the defendants Edward R. and Orlando F. Thomas and one

Beekman, and the other the firm of Post & Co., composed of the plaintiffs as general partners and two others as special partners. At that time this pool account was transferred to the firm of Thomas & Thomas, and was carried by it until April 1, 1903, when that firm was dissolved, and this and all other accounts and business were transferred to Post & Co.

At the start, the plaintiff Post was invited to become a member of the pool; but he declined, and he took part in an interview by which the agreement for the formation of the pool, which rested in parol, was made. According to his testimony, each of the members of the pool was to contribute one-third of the amount required to margin the account—he apparently did not know that Carlton was to become a member of the pool at that time—and an amount was to be thus contributed which he then deemed sufficient to carry the speculation to a successful conclusion. Each of the four members of the pool had individual accounts with Thomas & Post, and each of these accounts was charged with \$5,000, and the same amount was credited to the pool account, which was opened in the name of "K. & K. Syndicate." Thereafter each of the three remaining members of the pool contributed an additional \$5,000, and shortly before the pool account was taken over by the plaintiffs' firm. The firm of Thomas & Thomas, which then held it, wrote the plaintiffs' firm on March 25, 1903, as follows:

"In transferring accounts to you from Thomas & Thomas, all accounts are to stand on their own merits; that is, a statement of the exact condition of each account is to be rendered, showing the exact amount of money necessary to take up the account and the securities therein. The K. & K. pool is to be kept intact; orders being given to Mr. O. F. Thomas, or Mr. E. R. Thomas. However, Mr. E. R. Thomas is to deposit \$25,000 on his part, and Mr. O. F. Thomas \$25,000 in cash, and suitable arrangement will be made with Mr. Hamilton for a protection of his one-third interest."

Thereafter, and before the transfer of the account to plaintiffs' firm, each of the Thomases contributed \$25,000, and shortly after the transfer of the account the plaintiffs' firm wrote to Hamilton, asking him to contribute \$25,000 as margins to strengthen his interest in the syndicate. He neither answered this letter, nor complied with the request, and he has made no further contribution to the pool account.

Concerning the original agreement, Hamilton testified that the contributions which he made were on the distinct understanding that that was the extent of his liability, and the Thomases both testified in substance that there was to be no joint liability, and each member of the pool was to be liable merely for his proportionate share. The plaintiff Post testified that there was no express agreement so far as he knew with respect to whether the members of the pool were to be jointly and severally liable, or only severally liable; but it clearly appears that he understood that as between themselves they were to contribute in equal shares. It further appears, by his testimony and his attitude toward the various transactions, that he and his firm considered that any member of the pool could terminate his liability by transferring his interest, and that the several members were liable to his firm, for contributions to maintain the necessary margin, in equal proportions.

On or about the 13th day of April, 1903, the appellant purchased the interest of Orlando F. Thomas in the pool account, and wrote the plaintiffs' firm relating to other matters, and with reference to this account, as follows:

"I also wish to inform you that I have purchased from Mr. O. F. Thomas his one-third interest in the account on your books known as the 'Keokuk & Des Moines Pool,' and that I hereby assume all his liability and credit in the same. I wish it clearly understood that my present interest in this pool is a two-thirds interest, and that I am responsible for two-thirds of its losses, and am entitled to two-thirds of its profits after I am credited with the \$50,000 margin which I now have on my two-thirds share in excess of Mr. Hamilton's proportionate margin, the other one-third being owned by Mr. C. A. Hamilton, and that this account is in no sense a joint account. In other words, myself and Mr. Hamilton are each liable for our share, and not for the share of the other. Will you kindly confirm the receipt of this letter."

On the same day Orlando F. Thomas wrote the plaintiffs' firm, stating, among other things, as follows:

"Furthermore, that I have sold to Mr. E. R. Thomas my one-third interest in the 'Keokuk & Des Moines Syndicate,' including whatever margin I may have against it, and no further liability attaches to me."

The plaintiffs' firm, on the receipt of these letters, wrote the appellant under date of April 14, 1903, as follows:

"Concerning the 'Keokuk & Des Moines Syndicate,' we now understand that you are sole owner and liable for two-thirds of the same, and that Mr. O. F. Thomas has no further interest in said syndicate, the remaining one-third being the property of C. A. Hamilton."

And they also wrote Orlando F. Thomas on the same day as follows:

"As we understand it, * * * that you have disposed of, to Mr. E. R. Thomas, your one-third interest in the 'Keokuk & Des Moines Syndicate,' including all margin thereon."

This correspondence further shows that Orlando F. Thomas at the same time purchased the appellant's interest in two other accounts carried for them by the plaintiffs' firm, and assumed all liability with respect thereto, and that the appellant was discharged from liability thereon.

At the time the pool account was transferred to the plaintiffs' firm, it showed a debit balance of \$169,994.65, consisting of advances made for the purchase of the stock over and above the amounts received, together with interest thereon and commissions, and as security therefor the plaintiffs' firm received 5,450 shares of the capital stock of the Keokuk & Des Moines Railroad Company. The market value of the stock at that time was not definitely shown; but it appears that 13 days later, when the plaintiffs' firm was notified that Edward R. Thomas had purchased the interest of Orlando F. Thomas, and when the debit balance in favor of the firm was \$170,244.66, for which it held the same number of shares of the stock as security, the referee found, and the finding has not been questioned, that its market value was in excess of \$200,000. It thus appears that at the time the plaintiffs' firm received the letters notifying it that Orlando F.

Thomas' interest had been acquired by Edward R. Thomas, and that the liability of the latter was several, and only for two-thirds, the firm held securities upon which about \$30,000 in excess of the amount owing to it could have been realized, if the account had then been closed out. It will be observed that neither of the letters, notifying the plaintiffs' firm of the transfer of the interest of Orlando F. Thomas to Edward R. Thomas, contained any representation that such transfer was made with the knowledge or consent of Hamilton; and it appears by the testimony of the plaintiff Post that he did not communicate with Hamilton on the subject, or deem it necessary to communicate with him with reference to such transfer, for he apparently recognized that any member of the pool was at liberty to transfer his interest. If there was no special agreement by the members of the pool by which they were not to be jointly liable, doubtless they became partners. See *Quincey v. Young*, 5 Daly, 327, affirmed, sub nomine *Quincey v. White*, 63 N. Y. 370; *Orvis v. Curtiss*, 157 N. Y. 657, 52 N. E. 690, 68 Am. St. Rep. 810; *Franklin v. Hoadley*, 115 App. Div. 538, 101 N. Y. Supp. 374; *Id.*, 126 App. Div. 687, 111 N. Y. Supp. 300; *Id.*, 145 App. Div. 228, 130 N. Y. Supp. 47.

Evidence was received upon the trial from which it is claimed that there was a well-recognized custom by which members of a pool, without any express agreement, were only liable severally to the extent of their respective interests; but the evidence on that point is conflicting, and I do not deem it necessary for us either to determine the fact or to decide whether such a custom could change the rule of law. If a partnership existed, it would be dissolved by the transfer of the interest of one. See *Marquand v. N. Y. Mfg. Co.*, 17 Johns. 525; *Mumford v. McKay*, 8 Wend. 442, 24 Am. Dec. 34; *Sistare v. Cushing*, 4 Hun, 503; *Kennedy v. Porter et al.*, 109 N. Y. 526, 549, 550, 17 N. E. 426. On that theory, if Hamilton did not know of the transfer and acquiesce therein, he would not be further liable as a partner for future dealings on the part of any member of the partnership, excepting in so far as such dealings constituted steps in the liquidation of the business of the partnership; and counsel for the respondents do not contend that any of the transactions other than the transfer to the Silver Syndicate would not fall within that category, although they do not admit it.

But I am of opinion that the evidence shows that Hamilton was informed of such transfer, and by failing to object thereto must be deemed to have acquiesced therein. Moreover, if this were not so, inasmuch as the appellant made no misrepresentation to the plaintiffs' firm with respect to such transfer, the plaintiffs should be deemed estopped as to him from claiming that thereafter his liability was other than several, as stated in his letter, in which they acquiesced. It cannot be successfully maintained that there is no basis for such estoppel, for the account was continued when it might have been closed out by the appellant. After that time the evidence tends to show that there was no active market for the stock, and that the only sales were sales made by the plaintiffs' firm through certain brokers, at a little less than the price at which the stock was offered

in the market at the time by third parties to certain other brokers who were authorized by the plaintiffs' firm to purchase it.

It thus appears, with respect to those sales, that *in form* the plaintiffs' firm received the stock back at the same price for which they sold it, less commissions; but in fact they retained the stock and merely paid the commissions, and the sales were what are known as "wash sales," and were made for the purpose of keeping up an apparent market for the securities. Such wash sales were continued until the 16th day of June, 1903, when by direction of the appellant the plaintiffs' firm transferred the pool account to a so-called "International Silver Syndicate" account, which was owned by the appellant, or in which he was interested, and of which he was the manager. Prior to this transfer to the Silver Syndicate account, and on May 21, 1903, at the request of the plaintiffs' firm, the appellant took up 1,000 shares of the stock by having it transferred to other brokers; the plaintiffs' firm receiving therefor \$34,500. Immediately prior to the transfer to the Silver Syndicate account, the plaintiffs' firm was insisting upon further margins, or having the pool account closed, for the reason that it was unable to obtain loans on the stock sufficient to enable it to carry the account. The Silver Syndicate account at that time had a large credit balance. At the time the pool account was so transferred to the Silver Syndicate account, it had a debit balance of \$138,140.82. One week after the pool account was thus transferred to the Silver Syndicate account, and on June 23, 1903, the plaintiffs' firm transferred it back on their books to the pool account, by direction of the appellant, with a debit balance of \$102,017.52. During that week there were no transactions in the stock by the plaintiffs' firm in either the pool account or in the Silver Syndicate account. It thus appears that the effect of the transfer of the pool account to the Silver Syndicate account, and back to the pool account again, was to give to the pool account a credit of \$36,123.30.

Hamilton was not informed of this transfer, and knew nothing about it until long after; but no misrepresentation was made by the appellant to the plaintiffs' firm with respect thereto. The transfer of the pool account to the Silver Syndicate account on the books of the plaintiffs' firm *in form* extinguished the pool account; but the management of that account, or the liquidation of it, on the theory of the existence of a partnership and the dissolution thereof, was wholly left to the appellant, and it cannot fairly be inferred from the evidence that he intended by authorizing such transfer to become the purchaser of the stock himself and to assume individually the entire liability for the account. The appellant could not, without the consent of Hamilton, sell the stock to himself, and it is evident that he did not so intend. There is no element of estoppel shown by such transfer as against him in favor of plaintiffs' firm, and that such transfer inured to the benefit of the pool account is conclusively shown by the fact that, during the week intervening between the transfer and the retransfer thereof to the pool account, there was no market for the stock, and the pool account received a large credit. After the retransfer of the account to the pool account on the books of the plain-

tiffs' firm, there was no active market for the stock, and the only sales were similar wash sales, with the exception that on July 27, 1903, the appellant took up 1,000 shares, for which the plaintiffs' firm received \$15,000, and on August 6, 1903, another 1,000 shares, for which it received the same amount. On June 23, 1904, the balance owing to the plaintiffs' firm on account of this pool account was \$78,325.06, for which they held 2,450 shares of the stock. In the meantime, the plaintiffs' firm was dissolved, and the plaintiff Post became the liquidator of and attorney in fact for it. On said 23d day of June, 1904, as such liquidator and attorney in fact, the plaintiff Post executed and delivered to the appellant a release not under seal in the form of a letter, as follows:

"For one dollar and other valuable consideration, and by virtue of the powers vested in me as sole liquidator for the firm of Post & Co. and as their attorney in fact, I hereby release and absolve you from any liability on account of what was carried on the books of Post & Co., and known as the 'K. & K. Syndicate Account,' and will execute any further paper which you may require to carry this out."

The plaintiff Post testified that the "other valuable consideration," referred to in the release, consisted of an agreement by the appellant that he would furnish evidence that the amount unpaid by Hamilton for his one-third interest in the pool account, owing to the fact that he had not contributed his proportionate share, equaled or exceeded the balance then owing to Post & Co. on account of the pool account. According to the testimony of Post there was no representation on the part of the appellant with respect to the *legal* liability of Hamilton as a partner, or otherwise; and the only theory upon which he required an agreement on the part of the appellant to furnish such evidence was that there might have been transactions between the appellant and Hamilton, relating to their respective contributions, of which he was not aware.

It is contended in behalf of plaintiffs that the appellant did not furnish such evidence, and therefore there was a failure of consideration. That contention is answered by the fact that there is no evidence that appellant was requested to furnish the evidence or refused to do so. The testimony of Post with respect to the circumstances attending the execution of the release is controverted by the appellant, who testified, in substance, that Post was desirous of having him take up his interest in the pool account, and that they had two or three conversations on the subject, the substance of which was that he offered to pay for *his interest* in cash, or to take up the remaining stock for an agreed price, upon condition that he should be given a release of liability, and that Post preferred that he take the stock on account of the fact that there were no transactions in it and money could not be borrowed on it, and, after some negotiations concerning the price at which he should take the stock, \$30,000 was agreed upon, and the release was executed and delivered, and that on July 1st thereafter he paid the \$30,000 and received the stock. This payment reduced the balance of the indebtedness owing to Post & Co. on account of the pool account to \$48,325.06, for which this action was brought.

It evidently was contended by the plaintiffs upon the trial, and is contended on the appeal, that there was no consideration for the release, and that, therefore, it did not discharge the appellant. The theory upon which this contention is argued out in the brief is that the appellant, in paying the \$30,000 and taking up the remaining shares of the stock, paid nothing on account of the indebtedness to the plaintiffs' firm, and that the transaction was merely a purchase of the stock by the appellant, and the entire consideration, was for the stock. The theory upon which the referee held the appellant liable for the entire balance, as shown by his opinion, is that, by having the pool account transferred to the Silver Syndicate account, the appellant became individually liable for the entire account, and that, therefore, there was no consideration for the release of his liability on payment of part only of the balance owing, there being no dispute with reference to the amount thereof. It is quite clear, I think, that, at least as between the plaintiffs' firm and the appellant, the transfer of the pool account to the Silver Syndicate account did not increase the appellant's liability. That was a transfer in form only, and the fact that the plaintiffs' firm interposed no objection to transferring the account back to the pool account is cogent evidence that they did not understand that appellant had become liable to them for the entire pool account.

According to the testimony of Post, he intended, when he executed the release, to release the appellant from further liability. He did not claim at that time that the appellant was liable for more than his proportionate interest in the pool account, and, so far as the record shows, he never made such a claim until this action was brought. On that theory, which the uncontroverted evidence shows was asserted by the appellant at the time he took over the interest of Orlando F. Thomas and assumed liability therefor, and had been at all times acquiesced in by the plaintiffs' firm, the appellant was under no obligation to purchase, or take over, the entire remaining stock standing to the credit of the pool account, and in no view was the appellant liable to the plaintiffs' firm for the amount which he paid, excepting upon the theory of his assumption of the liability of Orlando F. Thomas. It is immaterial, to the decision of this appeal, how the question of fact is determined as to whether there was a special agreement with the brokers at the outset, by which the members of the pool were to become severally liable only, each for his proportionate share. It may be assumed that they were originally liable to the brokers as partners. There has been no misrepresentation with respect to the facts, and the most that can be claimed in behalf of the plaintiffs is that they labored throughout under a misapprehension as to the law, and that they supposed that the members of the pool were severally liable only, whereas they are now advised and contend that they were jointly liable.

If the members of the pool were severally liable only, then nothing has occurred, in my opinion, to change that into a joint liability, or to render the appellant liable for the entire account, and he was discharged by the release for he was then willing to pay his several

liability in cash, and paid it by taking the stock because Post preferred that course. If, on the other hand, they were liable as partners, then the plaintiffs are chargeable with knowledge of the law, and they are presumed to have known that the appellant was desirous of changing that liability when he bought out the interest of Orlando F. Thomas and assumed an *individual two-thirds liability*, which was a *different liability* from his liability as a partner, because he could be sued thereon, and a recovery could be had and enforced against him individually on the two-thirds liability; whereas, on the theory of a partnership, he could be sued only on his liability as a partner, and any judgment recovered would have to be satisfied in the first instance out of the partnership property, and his individual property would be liable therefor only after the payment of his individual debts. Upon this difference between an individual liability and a partnership liability, it was held in *Ludington v. Bell*, 77 N. Y. 138, 33 Am. Rep. 601, that the giving of a note by one member of a copartnership individually, after its dissolution, for part of a copartnership debt, constituted a good consideration for an agreement on the part of the creditor to release and discharge him from further liability. The assumption of a several *individual two-thirds liability* for partnership obligations afforded a good consideration for the release of the joint liability as a partner which theretofore existed. *Matherson v. Belden*, 14 App. Div. 519, 43 N. Y. Supp. 888; *Bendix v. Ayres*, 21 App. Div. 570, 48 N. Y. Supp. 211. The acceptance of this new liability and the acquiescence therein by the continuance of the account constituted a new agreement, and afforded a good consideration, as between the plaintiffs' firm and the appellant, for changing his liability into a several liability to the extent of two-thirds of the pool account. *Matherson* and *Bendix* Cases, *supra*, and *Jaffray et al. v. Davis et al.*, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710.

This theory with respect to the change of liability is not affected by the fact that at that time the stock held by the plaintiffs' firm was ample security for the indebtedness owing to them, for the manifest purpose of the communications by the appellant and by Orlando F. Thomas to the plaintiffs' firm, and by it in accepting the same, was to have it distinctly understood that if the account was to be continued the appellant's liability was to be limited to two-thirds of the amount owing at any time on account of his two-thirds interest. On the theory that the appellant was liable for only two-thirds, his liability at the time the release was executed was about \$23,500; for the total amount contributed to the pool down to that time was \$116,-123.30, and the balance owing to the plaintiffs' firm was \$78,325.06, making a total of \$194,448.36, one-third of which is \$64,816.12, and Hamilton had contributed only \$10,000 on account of his one-third interest, leaving a balance owing on account of that interest of \$54,-816.12, which, deducted from the balance owing at the time the release was executed, leaves \$23,508.94; and on payment of that amount the appellant, on that theory, would have been entitled to receive two-thirds of the stock then carried by the plaintiffs' firm. The learned counsel for the respondents, in stating the amount of the

appellant's liability at this time, on the theory of a several liability, apparently overlooked the fact that the plaintiffs were expressly notified, by the appellant's letter informing them that he had purchased the interest of Orlando F. Thomas, that his interest and liability for the future was two-thirds interest in profits and two-thirds liability for losses, after crediting him with the \$50,000 contributed as margins in excess of the margin contributed by Hamilton. Instead of paying his two-thirds liability in cash, the appellant, at the request of the plaintiffs' firm, took over the entire balance of the stock in its hands and paid \$30,000.

The plaintiffs contend, as already stated, that this was not a payment on account, but that it was the purchase of the stock the same as a third party might have purchased it; but, even on that theory, two-thirds of the \$30,000 should be credited to the appellant's liability, which would reduce it to about \$3,500, and no argument is presented in favor of holding him liable for that balance on the theory that his purchase of the stock merely constituted a payment of \$20,000 on account of his liability, leaving such balance unpaid. The evidence, however, does not show that the appellant purchased this stock as an outsider, as he would buy stock for speculation or investment; but, on the contrary, it quite clearly appears that he considered that the basis upon which he purchased it was allowing a very liberal valuation for stock, which then had no real market value, and that his only purpose in so doing was to obtain a release of any further liability on account of the pool account transactions. Moreover, according to the testimony of the appellant, which is not controverted, he left it optional with Post whether he should pay the balance on account of his two-thirds liability in cash, or take over the stock, and therefore it cannot be contended that his taking the stock was not equivalent to paying the balance of his liability on the theory of a two-thirds liability. On the assumption that there was a partnership liability on the part of the appellant at the time the release was executed, it would seem that the payment by him of the \$30,000 for the stock out of his individual funds, as a condition of obtaining a release, would afford a sufficient consideration to sustain the release, for the plaintiffs knew that there were no copartnership funds from which the payment could have been made.

If the creation of an individual liability, by giving a note for *part* of a copartnership debt, affords a good consideration for a release of liability as a partner, it follows on principle, I think, that a payment of *part* of a copartnership debt in cash from *individual funds* constitutes a good consideration for releasing the former liability as a copartner. See *Bendix v. Ayres*, *supra*. There can be no distinction between giving an *unsecured* note and paying the amount, for which the note would be given, in cash. This proposition is sustained by the authorities holding that neither payment of part of an *individual* obligation in cash, nor promising to pay the same amount in the future by an *unsecured* negotiable promissory note, constitutes a good consideration for the release of the entire debt. See *Bendix v. Ayres*, *supra*; *Shanley v. Koehler*, 80 App. Div. 566, 80 N. Y.

Supp. 679, affirmed 178 N. Y. 556, 70 N. E. 1109; Jaffray et al. v. Davis et al., supra. The purchase, or taking over, of the stock by the appellant paying therefor, or on the account, his *individual funds*, was something more than plaintiffs were entitled to on the theory of a copartnership liability at that time, and constituted a new agreement, which afforded a consideration for an accord and satisfaction. Allison v. Abendroth, 108 N. Y. 470, 15 N. E. 606.

These views differ with the determination of the referee on the facts in some respects, and require the reversal of the findings numbered 13 and 18, in so far as it is therein found that Hamilton was not aware of the transfer of the interest of Orlando F. Thomas to Edward R. Thomas, and findings numbered 19 and 20, in so far as it is therein found that the pool was dissolved by the transfer of the interest of Orlando F. Thomas to Edward R. Thomas, and finding numbered 24, in so far as it is therein found that the International Silver Syndicate assumed the indebtedness in the pool account, and that said International Silver Syndicate was accepted as debtor in place and stead of the pool, by the transfer thereof in form to it on the books of the plaintiffs' firm, and finding numbered 29, in so far as it is therein found that the release to the appellant was executed without consideration, and require a reversal of the judgment as against the appellant, and the dismissal of the complaint against him. See Bonnette v. Molloy, 138 N. Y. Supp. 67.

It follows that the judgment in favor of the plaintiffs against the appellant should be reversed, with costs, and the complaint dismissed, with costs.

INGRAHAM, P. J., concurs.

(134 App. Div. 8.)

DELEVAN et al. v. NEW YORK, N. H. & H. R. CO. et al

(Supreme Court, Appellate Division, First Department. December 13, 1912.)

CORPORATIONS (§ 320*)—TRANSFER OF STOCK—INJUNCTION—MINORITY STOCKHOLDERS—RIGHT TO SUE.

Minority stockholders of a railroad company could not maintain a suit in their individual capacity to restrain a sale of the stock held by a majority stockholder to a competing railroad company, without any provision for purchase of minority stock offered at the price paid for the majority, since the injury, if any, resulting from such sale, would be an injury to the corporation, and not directly to the minority stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1431, 1433-1439; Dec. Dig. § 320.*]

Laughlin and Miller, JJ., dissenting.

Appeal from Special Term, New York County.

Suit by Tompkins C. Delevan and others, on behalf of themselves and all others similarly situated, against the New York, New Haven & Hartford Railroad Company, the New York Central & Hudson River Railroad Company, and the Rutland Railroad Company. From

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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an order granting a preliminary injunction (137 N. Y. Supp. 207), defendants appeal. Reversed.

Argued before INGRAHAM, P. J., and LAUGHLIN, SCOTT, MILLER, and DOWLING, JJ.

Edwin D. Robbins, of New York City, for appellants.

Samuel Untermyer, of New York City (Arthur M. Wickwire, on the brief), for respondents.

INGRAHAM, P. J. This action is brought by the plaintiffs, who are stockholders of the defendant the Rutland Railroad Company, owning 1,349 shares of the common or preferred stock in that company. It is not alleged that either of the plaintiffs own any stock in either the New York, New Haven & Hartford Railroad Company or the New York Central Railroad Company, and plaintiffs do not claim in this action to enforce any right or to recover for any damages sustained by the Rutland Railroad Company, of which they are stockholders. They seek to maintain this action as owners of a small minority of the stock of the Rutland Company, and their right to maintain the action must depend upon the right that a minority stockholder has to enforce his individual right against the defendants.

The Rutland Company is a corporation organized under the laws of the states of Vermont and New York, and owns and operates a railroad from Ogdensburgh, in the state of New York, to Alburgh, in the state of Vermont, and thence to Rutland and Bellows Falls, in the state of Vermont, and of certain branches extending to the towns of Chatham and White Creek, in the state of New York. It is also the owner of the capital stock of another railroad corporation, and has certain trackage agreements with certain Canadian railroad companies, and agreements with steamship lines on the St. Lawrence river and on the Great Lakes. The Rutland Railroad also connects with a railroad known as the Boston & Main Railroad Company, operating a railroad in New England. The New York Central Railroad is a corporation organized under the laws of the state of New York, and operates an extensive system of railroads through New York state, and, by reason of its control of the stock of other railroad companies, a system of railroads extending through many of the states of the Union, and constitutes one of the main lines between the Western states and the Atlantic seaboard. The New York, New Haven & Hartford Railroad Company is a corporation organized under the laws of the state of New York and of the New England states, and controls the Boston & Maine Railroad. The New York Central Railroad Company was the owner of 47,041 shares of the preferred stock of the Rutland Company and 19,940 shares of the common stock of that company, constituting a majority of the stock issued, and by virtue of that ownership controls the election of the directors of the Rutland Company.

The complaint alleges that on or about February 11, 1911, the New York Central and the New Haven Companies, contriving and intending unlawfully to restrain the trade and commerce within and among the several states and between the said states and foreign countries carried on by them and by the Rutland Railroad Company, respectively,

and contriving and intending unlawfully to monopolize such trade and commerce, and contriving and intending unlawfully to restrain and prevent competition between the New York Central Company and the New Haven Company, and between the Rutland Company and the New Haven Company, in respect to such trade and commerce, entered into an unlawful combination and conspiracy with the Rutland Company and its directors to destroy competition between the Boston & Albany Railroad, forming a portion of the New York Central system, and the Fitchburg Railroad, forming a portion of the New Haven system, and to effect a virtual consolidation of the Rutland Company and the New Haven Company by various means and instruments, including the following:

"By transferring said forty-seven thousand and forty-one (47,041) shares of the stock of the Rutland Company held by the New York Central Company to the New Haven Company, to the end that the New Haven Company should control the Rutland Company, and should illegally vote all of said stock for the election of directors of the Rutland Company, and should exclude the minority stockholders from a just and legal voice in the election of directors of the Rutland Company, and by entering into a partnership agreement whereby the New York Central Company and the New Haven Company should equally share and divide the losses and profits arising from the operation of the Boston & Albany Railroad."

In pursuance of said unlawful combination and conspiracy, the New York Central Company and the New Haven Company wrongfully and unlawfully entered into a contract, dated February 16, 1911, wherein and whereby it was agreed: That all competition between the Boston & Albany division of the New York Central system and the Fitchburg division of the New Haven system should be suppressed, and that the New York Central Company and the New Haven Company would each endeavor to develop and increase the business of the Boston & Albany Railroad. A copy of this agreement is annexed to the complaint. That—

"In further pursuance of said unlawful combination and conspiracy, the New York Central Company has already wrongfully and unlawfully transferred to the control of the New Haven Company 23,035½ shares, constituting one-half of the controlling interest in the stock of the railroad company held by the New York Central Company, as aforesaid, at and for the price of about \$105 per share."

On July 1, 1911, the New York Central Company and the New Haven Company entered upon the performance of this contract. That in and about November, 1911, in further pursuance of the said unlawful combination and conspiracy, the New York Central Company and the New Haven Company further agreed that the remaining 23,035½ shares of the stock of the Rutland Company held by the New York Central Company should be transferred to the New Haven Company at and for the price of about \$105 per share, and on November 20, 1911, the executive committee of the board of directors of the New York Central Company adopted a resolution whereby the president of the New York Central Company was authorized to sell to the New England Navigation Company, a company controlled by the New Haven Company, 23,520½ shares of preferred stock of the Rutland Company and certain demand notes of the Rutland Company held by

the New York Central Company, amounting to \$373,000, for the aggregate amount of \$3,632,332.79, and upon such sale being made by the president the treasurer and secretary were authorized to execute such documents and make such transfers and take such steps as may be necessary to carry the resolution into effect. That on November 21, 1911, the New Haven Company adopted a resolution authorizing the purchase of the preferred stock of the Rutland Company and demand notes of the Rutland Company for the sum of \$3,632,332.79.

The complaint then alleges that in consequence of these acts a combination or conspiracy in restraint of trade or commerce among the several states and with foreign nations formerly carried on by the railroad companies independently has been formed and is in operation, and the defendants are attempting to monopolize such interstate and foreign trade and commerce "to the great and irreparable damage of the people of the states of New York, Massachusetts, and Vermont and the United States, in derogation of their rights, in violation of the laws of the states of New York, Massachusetts, and Vermont, and the act of Congress adopted July 2, 1890," commonly known as the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), "to the great and irreparable damage and injury of all the minority stockholders of the Rutland Company." It is then alleged that the New Haven Company now threatens to, and unless restrained by this court will, pursuant to said unlawful combination and conspiracy, take over from the New York Central Company and pay for at the above-mentioned price of about \$105 per share the remaining one-half of the controlling stock of the Rutland Company, and the New York Central Company threatens to and will, unless restrained by this court, transfer said stock to the New Haven Company, and the New Haven Company threatens to, and unless restrained by this court will, vote all the stock of the Rutland Company acquired by it in pursuance of said unlawful combination and conspiracy at all meetings of the Rutland Company to be hereafter held in favor of directors wholly dictated and controlled by the New Haven Company, and will deprive the minority stockholders of the Rutland Company of a just and legal voice in the election of directors of the Company, and will maintain and perpetuate an illegal control and domination of all the business and affairs of the Rutland Company.

It is then alleged that there are about 800 minority stockholders of the Rutland Company, who are citizens and residents of a large number of states, and the plaintiffs bring this suit on their own behalf and on behalf of all other stockholders of the Rutland Company similarly situated, who may come in and contribute to the expense of the suit and join in the prosecution thereof. And the judgment demanded is that the defendant the Rutland Company be perpetually enjoined from registering on the books of the Rutland Company any transfer of the stock of the Rutland Company from the New York Central Company to the New Haven Company, and from in any manner recognizing or accepting either the New York Central Company or the New Haven Company as the holder or owner of any shares

of the capital stock of the Rutland Company, from permitting either the New York Central Company or the New Haven Company from voting any of said stock, and from permitting any of the stockholders of the Rutland Company to vote any amount in excess of 10 per cent. of the outstanding capital stock thereof; enjoining the New Haven Company from acquiring or receiving from the New York Central Company any of the stock of the Rutland Company, from voting any of the stock of the Rutland Company, and from doing any act tending to place the capital stock of the Rutland Company under the control of the New Haven Company; that the New York Central Company be perpetually enjoined from in any manner transferring or delivering to the New Haven Company any of the capital stock of the Rutland Company, and from voting any of the capital stock of the Rutland Company; and also for a judgment adjudging that the stock of the Rutland Company heretofore transferred by the New York Central Company to the New Haven Company was illegally transferred, and setting aside and annulling such sale, appointing a receiver of the Rutland Company, and for such other and further relief as the equity of the case may require.

Upon this complaint the Special Term granted a temporary injunction restraining the New York Central Railroad Company, its stockholders, directors, officers, agents, and attorneys, and each of them, from in any manner transferring or delivering to the defendant the New Haven Railroad Company, or its representatives, any of the capital stock of the defendant Rutland Railroad Company now owned by the said New York Central Company, and enjoining the New Haven Railroad Company, its stockholders, directors, officers, agents, and attorneys, from acquiring or receiving from the defendant the New York Central Company any of the stock of the defendant Rutland Company, and enjoining the Rutland Company from registering on its books any transfer of its stock from the New York Central Railroad Company to the New Haven Railroad Company; and from the order granting that injunction the defendants appeal.

While there is a general allegation in the complaint as to the irreparable injury that this transfer will cause to the minority stockholders of the Rutland Company, no fact is alleged which would justify an inference of such damage. Before the agreements alleged in the complaint, and which are complained of, were made, the New York Central Company owned a majority of the stock of the Rutland Railroad Company, after such transfer is completed, the New Haven Company will own a majority of the stock of the Rutland Company, and it is not suggested upon what principle the minority stockholders of the Rutland Company will suffer by this transfer of control. It is alleged that the New Haven Company and the corporation which it controls compete with the Rutland Company, but that is strenuously denied by the defendants, they claiming that the Rutland Company is a connection or extension of the New Haven road rather than a competing road; and it certainly is not clearly established that as the roads exist at present there can be any substantial competition between them. The mere fact that passengers could by a devious and extended

route, which would not be practicable as a transportation proposition, pass over the lines of the New Haven Company or railroads controlled by it from one point to another on its system, which points are also on the system of the Rutland Railroad, does not establish that they are competing roads. I do not suppose that the New Haven Railroad could be said to be in competition with the New York Central Railroad for passenger and freight business between New York and Albany, because a passenger could go from New York to Boston and from Boston to Albany over the New Haven Railroad.

But in the view that I have of the controlling principles that must determine the questions submitted to us it is not necessary to determine this question. What is apparent is that the New York Central Railroad and the systems which it controls are much greater competitors of the Rutland Railroad than the New Haven Railroad can ever become, and certainly, if it would be illegal for the New Haven Railroad to acquire a majority of the stock of the Rutland Railroad, it would be equally illegal for the New York Central Railroad to hold a majority of that stock; and its continuous ownership of that stock, which involves the control of the Rutland Railroad, is a more serious violation of the laws of the United States than the control of the Rutland Railroad by the New Haven Company would be. Accepting the allegations of the complaint, the New York Central Company, being the owner of a majority of the stock of the Rutland Railroad and controlling its operation and management through the ownership of such stock, has been violating the federal law for years and subjecting itself to the penalties imposed by that act. It now seeks to relieve itself from this unlawful position by transferring its stock to another railroad, and the effect of the injunction granted below is to restrain the New York Central Railroad from ceasing to violate the federal law in transferring its stock to another corporation, because it is alleged that the other corporation will also violate the law if it acquires the stock. Just how this could possibly affect the rights of the minority stockholders is difficult to understand. The object of this attack upon the right of the New York Central Railroad to sell its stock is, however, quite frankly stated in the brief of the learned counsel who appeared for the respondent, as, indeed, it fairly appears from the allegations of the complaint.

It appears from the record, and is repeated in the brief, that the position of the Rutland minority stockholders' committee before the Public Service Commission, when this question as to allowing this transfer of stock was before it, was that in any event the control should not be allowed to pass, unless adequate provision was made for the protection of the minority stockholders, and that this could not be accomplished, except by requiring the purchasing company to pay for such minority stock as may be offered the same price as it had agreed to pay for the majority stock, namely, about \$105 per share. And complaint is made that the Public Service Commission, in passing upon the application of the New York Central Railroad to acquire the stock of the Ontario & Western Railroad Company, decided that such leave should not be granted, except by imposing as a condition of

authorization that the Central Company should take over such minority stock as may be offered it upon the same terms per share as it paid to the New Haven Company, and that the Public Service Commission granted the application of the Central Company to turn over the control of the Rutland Company to the New Haven Company without imposing the slightest condition or restriction for the protection of the minority.

One of the plaintiffs' contentions, as stated by the learned counsel for the respondents, is that:

"Without regard to the anti-trust law, and even if the transaction were otherwise lawful, one corporation will not be permitted to acquire the bare control of a competitor, with all the opportunities and temptations for oppression and discrimination presented by such a situation, without at least being required to offer to the minority holders the opportunity to sell their holdings on the terms on which the majority is being acquired. The ordinary dictates of common fairness require that such a condition be imposed before the minority interest can be subjected to such changed control."

And a point in the respondent's brief is devoted to an attack upon the Public Service Commission for granting this application without requiring the New Haven Railroad to purchase at the same price the stock held by the minority stockholders.

It must be quite apparent from this record that the injury that these plaintiffs complain of was caused by the refusal of the New Haven Railroad to purchase their stock at the same price as the stock was purchased from the New York Central Railroad, and that the object of the minority stockholders' objection before the Public Service Commission and this litigation is to force the New Haven Railroad to purchase their stock at the price at which they have purchased the majority stock from the New York Central Railroad. It is certainly a doubtful proposition whether a court of equity will allow its process to be used to accomplish such a purpose; but certainly a court of equity will not by its injunction prevent a corporation from transferring a control which it is alleged is in violation of the federal statutes, because the purchaser of the control will probably violate the same law that the seller of the stock is charged with having violated. If the allegation as to the effect of the control of the New York Central Company over the business of the Rutland Company is sustained, certainly the interests of the Rutland Company and its minority stockholders would be greatly conserved if its stock was transferred to another company, which would not have the same motive for making the alleged discriminations against the Rutland Company.

There is one legal question, presented at the outset of this investigation, which, however, renders further discussion of these questions unnecessary, and that is as to the right of the plaintiffs as minority stockholders to maintain this action or obtain any of the relief they ask. As before stated, the plaintiffs are owners of a minority of the stock of the Rutland Railroad. They do not ask in this case to enforce the rights of the Rutland Company, but simply their rights as owners of a minority of the stock. The facts upon which a minority stockholder can base a cause of action against a majority stockholder have been a question which has been greatly discussed, and which in

several jurisdictions has led to a considerable difference of opinion; but in this state, at least, the rights that a minority stockholder can enforce against the holders of a majority of the stock have been strictly limited. The distinction between an action brought by a minority stockholder to enforce a right of the corporation whose stock he holds and the right of a minority stockholder to enforce a right of action vesting in himself as a stockholder is clearly stated in the opinion of Mr. Justice Laughlin in the case of *Niles v. N. Y. Central & H. R. R. Co.*, 69 App. Div. 144, 74 N. Y. Supp. 617. It is there distinctly stated that a violation of the duty of the holders of a majority of the stock to manage a corporation in good faith in the interest of its stockholders imposed a liability in favor of the corporation, and this obligation can be enforced only by the corporation or by a suit instituted in its behalf; that a depreciation in the value of the stock as the result of wrongs committed against the corporation did not give to a stockholder suffering from such a depreciation a cause of action against the holders of a majority of the stock. As was said by Mr. Justice Laughlin in that case:

"The plaintiff has been damaged; but the damages sustained by him flow from the wrong committed against the corporation, and are, in contemplation of law, remote, indirect, and consequential. Where, as here, the common law prevails, such damages are not recoverable, except in the right of the corporation. * * * Even though the depreciation in the value of the stock be capable of ascertainment as a basis of damages at law, the wrongs complained of are wrongs against the corporation, and it has a cause of action for the restoration of the property or for the damages sustained. It is presumed that a diligent enforcement of these remedies will result in the restoration of the corporate property or its equivalent, and will afford adequate indemnity to the stockholders. A recovery in such case by the stockholders in their own right would not be a bar to a recovery of the same damages by the corporation. A double recovery has not been permitted in these actions up to the present time, either at law or in equity."

And this case was affirmed by the Court of Appeals in 176 N. Y. 119, 68 N. E. 142, where the court said:

"True, the plaintiff has suffered a depreciation in the value of his stock as a result of the wrong, and in this respect the injury was personal to the holders of the stock. But every stockholder has suffered from the same wrong, and if the plaintiff can maintain an action for the recovery of the damages sustained by him, every stockholder must be accorded the same right. The injury, however, resulting from the wrong, was, as we have seen, to the corporation. The depreciation in the value of the plaintiff's stock, and that of the other stockholders, was in consequence of the waste and destruction of the property and franchise of the corporation. There are wrongs which, if committed against a stockholder, entitle him to a right of action against the person committing the wrong for the damages sustained, as, for instance, where a person had been induced to purchase stock in a corporation and pay a higher price than the stock was fairly and reasonably worth, or where the owner of stock had been induced to part with it for a less sum than its true value, by reason of false and fraudulent representations of others with reference to its value. But these wrongs are distinguishable from those against the corporation. They result in injury to the stockholder upon whom the wrong is practiced, but do not injure the other stockholders or the corporation itself. The injuries, however, in this case, are not of that character. The defendants had obtained control of the affairs of the corporation through the board of directors elected by them. These directors undertook to manage the property of the corporation in good faith, according to their

best judgment and skill, in the interests of all of the stockholders. Having assumed the management, they were bound to use their best endeavors to prevent default in the payment of interest and the consequent sacrifice of the corporate property. Under the allegations of the complaint, the directors of this corporation not only failed to discharge their duties to the stockholders, but they actively participated in the depletion of the company's treasury and in a sacrifice of the company's property, thus depriving the stockholders and the creditors of that which belonged to them."

The court then cites from Judge Vann's opinion in the case of *Flynn v. Brooklyn City R. R. Co.*, 158 N. Y. 493, 53 N. E. 520:

"Where a majority of the directors, or stockholders, or both, acting in bad faith, carry into effect a scheme which, even if lawful upon its face, is intended to circumvent the minority stockholders and defraud them out of their legal rights, the courts may interfere and remedy the wrong. Action on the part of directors or stockholders, pursuant to a fraudulent scheme designed to injure the other stockholders, will sustain an action by the corporation, or, if it refuses to act, by a stockholder in its stead for the benefit of all the injured stockholders."

That was an action to recover the damages sustained by the corporation in consequence of an illegal act of the majority, after such acts had been committed and the corporation and its stockholders injured thereby; while in this case the majority stockholders are to be restrained from disposing of their stock, because such a result might happen by virtue of the control of the New Haven Railroad Company over the corporation. Certainly if, after the wrong has been committed, a minority stockholder cannot sue to recover damages caused to his stock by such wrongful and illegal acts, such minority stockholder cannot have a cause of action in equity to restrain the acquisition of a majority of the stock by an individual or corporation because it is possible that similar results would follow the acquisition of a majority of the stock.

The question as to the right of the corporation itself to maintain this action was presented to the United States Circuit Court in the case of *Hunnewell v. N. Y. Central & H. R. R. Co.*, 196 Fed. 543, and in that case Judge Noyes, in refusing an application for an injunction, said:

"The conclusion reached from the examination thus far is that the complainant in this suit is not entitled to an injunction restraining the sale of said shares. If, however, this conclusion were not reached and this suit was treated as one by the stockholder in his own interest, it would still be impossible for us to grant an injunction upon the ground of want of application to the Public Service Commission, because it now appears that such application has been made."

But these cases only follow the principle established in a line of cases of which *McHenry v. Jewett*, 90 N. Y. 58, is the leading case, in which Chief Judge Andrews said:

"It is not sufficient, to authorize the remedy by injunction, that a violation of a naked legal right of property is threatened. There must be some special ground of jurisdiction, and, where an injunction is the final relief sought, facts which entitle the plaintiff to this remedy must be averred in the complaint and established on the hearing. The complaint in this case is bare of any facts authorizing final relief by injunction. It is true that it is alleged that the defendant, by the use of the shares, has been enabled to a great ex-

tent to control the management of the combination in the interest of the New York, Lake Erie & Great Western Railway Company, with little or no regard to the best interests of the company issuing the shares. But there are no facts supporting this allegation, nor is it averred that the interests of the latter company have been prejudiced, or that the value of the shares has been impaired by the acts of the defendant. So, also, it is alleged that it is greatly against the plaintiff's interest as a shareholder to permit the defendant to vote upon the shares, and that the plaintiff will suffer great and irreparable injury, if the defendant is permitted to do so. But no facts justifying these conclusions are stated, and the mere allegation of serious or irreparable injury, apprehended or threatened, not supported by facts or circumstances tending to justify it, is clearly insufficient."

See, also, *Gamble v. Queens County Trust Co.*, 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527; *Colby v. Equitable Trust Co.*, 124 App. Div. 262, 108 N. Y. Supp. 978, affirmed 192 N. Y. 535, 84 N. E. 1111; *Flynn v. Brooklyn City R. R. Co.*, 158 N. Y. 493, 53 N. E. 520.

And that principle has been uniformly followed in this court and in the Court of Appeals. It is clear that neither in the complaint in this action nor in the evidence submitted to the Special Term was there allegation or proof that this transfer to the New Haven Company has caused or could cause any injury to the plaintiffs or other minority stockholders, except so far as such a transfer would injure the corporation and thus indirectly depreciate the value of the plaintiffs' stock. In fact, Mr. Justice LAUGHLIN'S opinion conclusively establishes that in this case the plaintiffs have sustained and can sustain no damage by reason of the transfer of the Rutland stock to the New Haven Company, so far as it has been completed, or by the contemplated transfer of the remainder of the stock owned by the New York Central Company, unless, indeed, the plaintiffs have been damaged by the refusal of the Public Service Commission to compel the New Haven Company to purchase the plaintiffs' stock for the same price that the defendant New Haven Company paid the New York Central Company, a damage which I think will be conceded cannot be the basis of an injunction to restrain the New York Central Company from selling, or the New Haven Company from buying, the stock at a price which the parties may agree to. There is no allegation that the plaintiffs' stock has decreased in value by reason of this sale of the New York Central's holdings, and an allegation as to the method by which the New York Central Company has decreased the value of the plaintiffs' stock by virtue of its management of the Rutland Company would tend to show that it was a distinct advantage to the plaintiffs, as stockholders of the Rutland Company, to have the management changed, so that such discrimination against the Rutland Company should not be continued. Applying, therefore, the principle that has been established and uniformly applied in this state for many years, it would seem clear that plaintiffs neither alleged in the complaint nor submitted proof by affidavit which would justify the court in restraining the owner of the stock of the railroad from selling it to whom it pleased and at any price the purchaser would agree to pay.

We have, however, the allegation upon which the plaintiffs seem to lay great stress, and upon which, as I understand Mr. Justice

LAUGHLIN'S opinion, he concluded that the plaintiffs are entitled to an injunction: That this transfer will involve in some way a violation of the statute of the United States known as the Sherman Act. The first section of the Sherman Act makes every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations illegal, and section 2 provides that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of a misdemeanor. And it is alleged that this sale of the New York Central Company to the New Haven Company is a contract, combination, or conspiracy in restraint of trade or commerce and is therefore illegal. The Supreme Court of the United States has lately arrived at a comprehensive construction of the meaning of these provisions in the Standard Oil Case, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, and in U. S. v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663.

It is unnecessary that we should attempt to determine whether or not these contracts are a violation of this statute, or that the sale of this stock by the New York Central Company would be a part of or the carrying out of an illegal contract; for it appears to me clear that a violation of this statute by the New York Central Company or the New York, New Haven & Hartford Railroad Company gives to the plaintiffs as stockholders of the Rutland Railroad Company no right of action to enforce this statute. We may assume, without deciding, that the Rutland Railroad Company, whose stock is being transferred in pursuance of an agreement which is illegal and void under this statute, would have a right to enjoin a transfer of control which would be necessary to carry into effect the void agreement, although it is difficult to understand how the Rutland Company could be affected injuriously or otherwise because two of its stockholders have entered into an agreement which the law of the land has declared to be illegal and which makes those taking part in it guilty of a crime. It is not alleged that the Rutland Company is a party in any way to the contract. Two of its stockholders have entered into what is claimed to be an illegal contract, and if they have violated the law the parties to the contract are those who must bear the penalty. There is nothing in the law, and nothing is suggested, to show that the Rutland Railroad Company would be subject to any penalty because of the making of this contract by two of its stockholders. Its right to exercise its franchise could not possibly be affected, the corporate existence could not be threatened, and no injury could possibly be inflicted upon it.

But, even assuming that the Rutland Railroad Company would have a cause of action, each of its stockholders certainly would not have. No act of the New York Central Company and the New Haven Company could possibly impose any liability upon the minority stockholders protesting against the action of the majority stockholders in selling its stock. These plaintiffs occupied no other relation to this transfer of stock by the New York Central Company to the New Haven

Company than did any other citizen whose interest it is to see to it that the laws are maintained. If this contract and transfer is a violation of the Sherman Act, the remedy is an action by the federal authorities to enforce the federal laws. Certainly the Supreme Court of the state of New York has no power to impose a penalty upon either of these railroad companies or their officers or directors who have united in this contract for a violation of the Sherman Act. This court could not indict or punish these defendants for any violation of its provisions; nor could it enforce any right which was violated by the Sherman Act, as no power is given by that act to the state courts to enforce it or to prevent by injunction or otherwise its violation. And certainly, applying the rule before stated, which is the settled law of this state as to the cases in which a minority stockholder will be allowed to apply to the court for relief as against a majority stockholder, there is nothing either alleged or proved in this case that would make a violation of a federal statute by the New York Central Railroad Company or the New York, New Haven & Hartford Railroad Company a ground of action for any relief in the courts of this state. An examination of all the authorities cited by the learned counsel for the plaintiffs on this question would only extend this opinion. They have all been examined, but none of them are authorities against the proposition controlling upon this court which is the settled law of this state, and by that it seems to me clear that the plaintiffs have no cause of action.

The order appealed from must therefore be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs.

SCOTT, J., concurs.

DOWLING, J. I concur in the result reached, upon the ground that the plaintiffs cannot maintain this action, nor obtain the relief which they seek, not having alleged any damages sustained by them, as distinguished from those sustained by the corporation.

LAUGHLIN, J. (dissenting). The plaintiffs own 1,349 shares of the capital stock of the Rutland Railroad Company, for brevity hereinafter referred to as the "Rutland Company," a corporation organized under the laws of New York and Vermont; and they bring this action in behalf of themselves and all other stockholders of the Rutland Company similarly situated, and they claim to represent directly 6,151 shares and indirectly 15,000 additional shares of the capital stock. The outstanding capital stock of the Rutland Company is 90,000 shares. The New York Central & Hudson River Railroad Company, which will be referred to as the "Central Company," in 1905 acquired stock control of the Rutland Company by the purchase of 47,041 shares of the capital stock; and in February, 1911, it transferred one-half of this stock to the New York, New Haven & Hartford Railroad Company, which will be referred to as the "New Haven Company," and thereupon three of the directors of the Rutland Company, theretofore elected to represent the Central Company, resigned, and three directors of the New Haven Company, one of whom was its president, were elected to succeed them. The Central Company, since it obtained

stock control of the Rutland Company, has controlled its policy and business. The plaintiffs charge, in effect, that the Central and New Haven Companies entered into a conspiracy to stifle competition and to obtain a monopoly of the transportation business in the territory in question, to the detriment of the Rutland Company, the control of which will pass to the New Haven Company, a rival, parallel, and competing line, by the transfer of the remaining shares of Rutland Company stock held by the Central Company, unless the transfer thereof shall be enjoined, and that the transfer and threatened transfer of such stock by the Central Company is a violation of the duty it owes, as the owner of the majority of the stock, to the stockholders of the Rutland Company, and in violation of the Sherman Act, so called, being an act of Congress of July 2, 1890, entitled "An act to protect trade and commerce from unlawful restraints and monopolies," section 1 of which declares that:

"Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of commerce among the several states, * * *" is illegal.

And section 2 of which provides that:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states * * * is guilty of a misdemeanor."

It is alleged that the laws of Vermont prohibit any stockholder from voting on more than 10 per cent. of the capital stock of the company, and, in the event that the transfer is not enjoined, an injunction against the New Haven Company and the Rutland Company is prayed for, limiting the voting power of the New Haven Company accordingly. It would not be proper to express an opinion on the merits with respect to the controverted facts at this time; but the decision of the appeal requires that the material facts alleged and supported by affidavits, even though controverted, be stated, for on the sufficiency thereof to present a prima facie case depends the right of the plaintiffs to have the injunction continued.

The plaintiffs allege that the Rutland Company owns and operates a railroad extending from Ogdensburg, N. Y., to Alburgh, Rutland, and Pellows Falls, Vt., with branches extending to Chatham and White Creek, N. Y.; that it owns all the capital stock of the Rutland & Noyan Railway Company, which owns and operates a short line from Alburgh to Noyan Junction, near the Canadian line, and thereby controls that company; that it has trackage agreements with the Quebec, Montreal & Southern Railway Company and the Canadian Pacific Railway Company, under which it runs and has the right to run its own trains over said lines between Noyan Junction, Iberville Junction, and Montreal; that it owns all the capital stock of the Rutland Transit Company, which is a duly authorized common carrier of passengers and freight by steamboats, and owns and operates a line of steamboats plying between Ogdensburg and Chicago and intermediate points, and thereby controls the business of that line; that at Bellows Falls it connects with a line of railroad controlled and operated by the Boston

& Maine Railroad, extending to Boston; that between White Creek and Troy, by virtue of trackage rights, it operates trains, and at Troy connects with railroad lines to New York, and with water transportation on the Hudson river; that the Central Company owns and operates a railroad line between New York and Buffalo, via Albany, Troy, and intermediate points, and owns and operates, through stock control or leases, various other railroads traversing the states of New York, Pennsylvania, Ohio, Indiana, Illinois, and Michigan, and between Buffalo, Detroit, and Chicago and intermediate points, and between Buffalo and Montreal, and the Western Transit Company, which operates steamboats on the Great Lakes as a common carrier of passengers and freight, and owns and operates the Boston & Albany Railroad Company by virtue of a lease for 999 years, made July 1, 1900, and that the Boston & Albany extends from Boston to Albany, passing through Worcester, Springfield, and Pittsfield, which are reached by lines connecting with the Rutland Company; that the New Haven Company is a corporation organized and existing under the laws of Connecticut, Massachusetts, and Rhode Island, and owns and operates various lines of railroad from New York to New London, New Haven, Bridgeport, Providence, Hartford, Pittsfield, Worcester, Springfield, and Boston, and intermediate points, and owns and controls a majority of the capital stock of the Boston Railroad Holding Company, which through majority stock ownership controls the Boston & Maine Railroad Company, which by virtue of agreements and leases and stock ownership owns and controls the Connecticut River Railroad Company, which through stock ownership owns and controls the Vermont Valley Railroad Company; that the Boston & Maine Company owns and controls and operates a large system of railroads in Massachusetts, Maine, New Hampshire, Vermont, and New York, extending to Portland and Bangor on the Atlantic coast, to White River Junction, Vt., and there connects with the Central Vermont Railroad, extending to East Swanton, where connection is made with the Grand Trunk Railway, extending to Iberville Junction, Montreal, and other points in Canada; that the Boston & Maine also owns and operates a line extending to Newport, Vt., where connection is made with the Canadian Pacific for Iberville Junction, Montreal, and other Canadian points, and also owns and operates a line extending from Bellows Falls to Windsor, where connection is made with the Central Vermont for Burlington, Vt., which is on the Rutland line, and with East Swanton, where connection is made with the Grand Trunk for Iberville Junction and Montreal and other points; that the Boston & Albany owns and controls the Fitchburg Railroad, extending from Boston to Troy and Rotterdam Junction, and owns and operates a line from Windsor, Vt., to Springfield, where connection is made with the New Haven Company's line extending to New York; that the New York, Ontario & Western Railway Company owns in its own right, or by stock control, or leases and operates, a railroad between Cornwall, on the Hudson river, and Oswego, on Lake Ontario, extending to various points in Central and Southern New York and Northern Pennsylvania, and touching Kingston, Utica, Rome, and Oneida, and operates its freight and passenger

trains over the West Shore Railroad from Cornwall to Weehawken, N. J., under a lease which continues until the year 2089; that in 1904 the New Haven Company acquired a controlling interest in the stock of said New York, Ontario & Western Railroad Company, and has ever since elected the directors thereof, and has thereby dominated and controlled the business and affairs of said company; that in January, 1905, the Central Company acquired stock control of the Rutland Company, and has ever since elected its directors, and has thereby dominated and controlled its business affairs; that the Rutland Company and the New Haven Company have owned, controlled, and operated, and own, control, and operate, two separate, parallel, and competing lines; that they are competing and parallel lines among other respects, in that there are four parallel and competing lines between Irberville Junction and Montreal and other Canadian points on the north, and Boston on the south, viz.: (1) The Boston & Maine Railroad Company and the Rutland Company from Bellows Falls and the latter's Canadian connections; (2) via Boston & Albany Railroad, controlled by the Central Company, and the Rutland Railroad from Chatham and its Canadian connections; (3) via Boston & Maine Railroad to White River Junction, thence via Central Vermont Railroad and the Grand Trunk Railway which controls it; (4) via Boston & Maine to Newport, Vt., and thence by Canadian Pacific—which four lines have for some years past been in active competition in freight and passenger traffic, including coastwise, interstate, and foreign commerce; that the Rutland Company's line from Bellows Falls to Burlington, Vt., is parallel with, and is and has been competing with, the line between said points over the Boston & Maine and Central Vermont Railroads; that the Rutland Company's two lines formed by its own road and its Canadian connections on the north, from Montreal, via White Creek Junction, Troy, and the Central Railroad, to New York, and from Montreal, via Chatham and the Harlem Railroad, to New York, are, and for some years past have been, parallel and competing lines with the New Haven line from New York to Montreal, via Windsor, Vt., and the Central Vermont and Grand Trunk Railroads; that a differential line, so called, extending from Boston via the Boston & Albany to Chatham and the Rutland Railroad to Ogdensburg and the Great Lakes via the Rutland Transit Company's steamboats, or to Norwood and thence westerly by the Central Railroad, is and for some years past has been a parallel and competing line with the differential lines from Boston via the Boston & Maine to Newport or White River Junction and the Canadian Pacific and Grand Trunk Railroads to the Great Lakes and other Western points, and is and has been a parallel and competing line with the line from Boston via the New Haven Railroad and the New York, Ontario & Western and the Great Lakes. It is also alleged that the Fitchburg Railroad, controlled by the New Haven Company, has been and is parallel and competing with the Boston & Albany between Boston and Troy and Rotterdam Junction and Albany.

The plaintiffs further allege that prior to the 16th day of February, 1911, the Central and New Haven Companies, contriving and intending unlawfully to restrain trade and commerce within and among

the several states and between the states and foreign countries heretofore carried on by them and by the Rutland Company, and to monopolize such trade and commerce, and to prevent competition between said railroads, entered into an unlawful combination and conspiracy with the Rutland Company, its directors, and others to destroy competition between the Boston & Albany Railroad, controlled by the Central Company, and the Fitchburg Railroad, controlled by the New Haven Company, "to effect a virtual consolidation of the Rutland Company and the New Haven Company," and for the purposes aforesaid and to that end contemplated having the Central Company transfer to the New Haven Company a controlling interest in the capital stock of the Rutland Company, then held by the Central Company, consisting of 47,041 shares, to enable the New Haven Company to elect and control the directors of the Rutland Company, and to share equally the profits arising from the operation of the Boston & Albany Company, and to divide the losses, if any, therefrom, and on the said last-mentioned day entered into a contract in writing for the suppression of competition between the Boston & Albany division of the Central Railroad and the Fitchburg division of the New Haven Railroad, and to share the profits and divide the losses of operation of the Boston & Albany Company as partners, the agreement to take effect July 1, 1911, and to continue for 10 years, after which period it was to be terminable by either party on one year's notice, and for the transfer of one-half of the Central Company's holdings of capital stock in the Rutland Company at \$105 per share; that the stock was transferred pursuant to said agreement, and thereupon, in furtherance of said combination and conspiracy, the New Haven Company caused its president and director and two others of its directors to be elected directors of the Rutland Company, and that ever since the Central and New Haven Companies have acted in the premises in furtherance of said conspiracy, and on the 27th day of December, 1911, the executive committee of the Central Company, in further consummation thereof, adopted a resolution authorizing the president of the company to sell one-half of its holding in the capital stock of the Rutland Company, with a note of the Rutland Company, and the rights and interests of the Western Transit Company in certain contracts between it and the Rutland Transit Company relating to six steel steamers then in service on the Great Lakes, which rights and interests the president of the New Haven Company was authorized to acquire for a price not less than \$3,632,332.79, and to divide the proceeds between the Central Company and the Western Transit Company according to their respective interests; that this resolution specified no purchaser, but immediately prior to its adoption a resolution adopted by the same board on November 20, 1911, which authorized this sale at the same price to the New England Navigation Company, was rescinded; that on the 21st day of November, 1911, the executive committee of the board of directors of the New England Navigation Company, the stock of which was all owned by the New Haven Company, adopted a resolution to purchase this stock, the note, and rights and interests in the steamers

for the consideration specified in said resolution adopted and rescinded by the executive committee of the board of directors of the Central Company; that said companies threaten and intend to consummate the transfer of the property mentioned in said resolutions, and unlawfully to suppress and destroy competition between each other and the New Haven Company and the Rutland Company; that in violation of the laws of Vermont, which require that a majority of the directors shall be residents of that state, and provide that no stockholder shall be entitled to vote more than 10 per cent. of the capital stock of the company, the Central and New Haven Companies, at the annual election of directors of the Rutland Company held in October, 1911, voted all of the stock, which had been previously held by the Central Company, and elected a board of directors, the majority of whom were not residents of Vermont; that the New Haven Company has caused the offices of general superintendent and chief engineer and other officers of the Rutland Company to be filled by its officers and nominees, and has practically taken charge of the affairs of the Rutland Company, and threatens and intends to vote all of said stock, and to deprive the minority stockholders of a just and legal vote in the election of directors, and "to maintain and perpetuate an illegal control and domination of all of the business and affairs of the Rutland Company," and threatens to "conduct all the business and affairs of the Rutland Company for the sole benefit and profit of the New Haven Company and in violation of the rights of the minority stockholders, and will continue to exercise the above-mentioned unlawful domination and control over the affairs of the Rutland Company, and will continue to suppress and throttle competition on the part of the Rutland Company both with the New Haven Company and with the New York Central Company, all to the great and irreparable damage of the Rutland Company, and particularly the minority stockholders thereof," and will do so unless restrained by the court, and that the directors of the Rutland Company threaten to, and will, unless enjoined, assist in carrying out the terms of said unlawful combination and conspiracy, and to permit the Rutland Company to be managed and controlled and its business carried on by the directors so illegally elected, "and will permit all competition between the Rutland Company and the New Haven Company to be suppressed, and will by the foregoing means render the charter of the Rutland Company subject to forfeiture, and the company subject to the pains and penalties prescribed by said 'act to protect trade and commerce from unlawful restraints and monopolies,'" and will do so unless restrained by the court; that said acts are ultra vires of the Rutland Company and are contrary to the laws of Vermont and New York and to the act of Congress known as the Sherman Act.

The prayer for relief, so far as material to the decision, is that the Rutland Company, its directors, officers, and agents, be enjoined from registering on its books any transfer of said stock pursuant to said agreement, and from permitting either company to vote thereon, and from permitting any stockholder of the Rutland Company to vote

more than 10 per cent. of the capital stock, and from recognizing said transfers of the Rutland Company's stock, and from doing any act or thing in furtherance of said unlawful combination and conspiracy, and that the Central and New Haven Companies be enjoined from further consummating said contract, and from voting said stock, and doing any act or thing in furtherance of said combination and conspiracy, and that the transfer of said stock by the Central Company to the New Haven Company, in so far as it has been consummated, be annulled, and that an injunction pendente lite be granted.

The affidavits and evidence presented by the respondents tend to sustain all of the material allegations of the complaint, and tend to show that the Rutland Company, with its rights to operate its trains over other lines as aforesaid, and the New Haven Company are actually and potentially competitors for interstate trade and commerce from New England and Atlantic coast points to the Great Lakes and ports thereon and other points, as well as for such trade and commerce between most of the New England states and Canada. The moving papers further show that the market value of the stock of the Rutland Company is only \$40 per share, and that President Mellen, of the New Haven Company, considers that for the purpose of enabling his company to control the Rutland Company a bare controlling interest in the stock is worth \$105 per share, and that he regards it as the right of one corporation, thus having stock control of another, to dispose of such stock control as may seem best for its own interests, and that he testified before the Public Service Commission that the purchase of this stock "was born of a desire to help the B. & M." (meaning the Boston and Maine, which is controlled by the New Haven Company) particularly, and the New Haven Company "somewhat, but less." It further appears that officers of the New Haven Company admitted before the Public Service Commission that the Rutland and New Haven Companies compete and are parallel to some extent. Mr. Mellen and other officers of the New Haven Company also testified that the interests of the New Haven Company in operating the Rutland Company with respect to developing the business of the Rutland Company are not in conflict, and that while it would be possible for the New Haven Company, through this stock control, to divert business from the Rutland Company to a large extent, such is not its intention.

But the respondents have a right to expect that, in determining whether the temporary injunction should be vacated, the court will take the most favorable view to them of the affidavits and testimony and admissions of the officers of the appellants. It may be observed that it is at least doubtful whether the New Haven Company would pay nearly three times the market value of this stock for the purpose of controlling the Rutland Company, unless it is to obtain some advantage thereby at the expense of the Rutland Company. The respondents also present evidence tending to show that the New Haven Company is rapidly obtaining a monopoly of the New England interstate and international trade and commerce.

The learned counsel for the appellants contends that this case falls

within the doctrine of the authorities holding that the cause of action, if any, is in the corporation, and can only be maintained by a stockholder in the right of the corporation upon alleging, as a basis therefor, that the corporation, on demand duly made, has refused to bring the action, or facts showing that such demand would be futile. The learned counsel for the respondents does not endeavor to sustain the action as one in the right of the corporation, and contends that it is brought in the individual rights of the plaintiffs as stockholders. Whether the action is brought in the right of the corporation or in the individual rights of the stockholders depends upon the allegations of the complaint, for the *form* of the action in either event would be the same. It is not alleged that a demand was made upon the corporation to bring the action; but such demand is unnecessary, if facts are alleged from which it appears that it would be futile. I am of opinion that such facts are sufficiently alleged here; for the corporation can only act through its board of directors, and the majority of the board of directors represent the New Haven and Central Companies, and it is in effect charged that they entered into a conspiracy with those companies pursuant to which the transfer of stock sought to be annulled and enjoined has been made or is threatened. As I view the case, therefore, if a good cause of action has been pleaded upon either theory, that will suffice to sustain the injunction.

This action is neither brought to recover damages sustained by the corporation nor for an accounting by any of the officers of the corporation or by others. The plaintiffs sue to *enjoin* the consummation of threatened illegal acts by which the control of the corporation will be turned over to a rival competing line, which will be permitted, through its ownership of a majority of the stock, to elect and control the board of directors, and dictate the policy and manage the affairs of the corporation of which the plaintiffs are minority stockholders; and it is charged that such acts are not for the best interests of the Rutland Company, and are designed to give the New Haven Company an advantage over it, and that such will be their effect, and this charge is fairly substantiated. The plaintiffs allege that they will be damaged in their rights as stockholders, upon the ground that the Rutland Company will be subjected to penalties for violations of the Sherman Act, and that its earnings will be depreciated by a diversion of its business to the New Haven Company and otherwise. The only acts which the *Rutland Company* threatens to do, which it is alleged are a violation of the plaintiffs' rights or of law, are the recognition of the transfer and the acceptance of the surrender of the stock, and the issuance of new stock to the New Haven Company, and the recognition of the right of the New Haven Company to vote on the stock. It is not apparent how those acts would subject the Rutland Company to penalties under the Sherman Act, even though the transfer of the stock by the Central Company to the New Haven Company be a violation thereof; but, however that may be, the plaintiffs would not be affected by the damages which it is alleged will ensue, excepting as stockholders, and the same as all other stockholders, and therefore, with respect to those matters, the cause of action would be vested

in the corporation, and could not be maintained by minority stockholders, excepting in the right of the corporation. *Niles v. N. Y. C. & H. R. R. Co.*, 69 App. Div. 144, 74 N. Y. Supp. 617, affirmed 176 N. Y. 119, 68 N. E. 142; *Flynn v. Brooklyn City R. R. Co.*, 158 N. Y. 493, 53 N. E. 520; *Howe v. N. Y., N. H. & H. R. R. Co.*, 142 App. Div. 451, 126 N. Y. Supp. 1090; Cook on Injunctions (6th Ed.) §§ 644, 645, 646, 647, 662, 734, 738, 740; High on Injunctions (4th Ed.) §§ 1203, 1207, 1216, 1223a, 1224.

In *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, 28 Sup. Ct. 572, 52 L. Ed. 865, upon which counsel for the respondents relies as authorizing an action by a stockholder in his own right for *affirmative* relief other than an injunction, the *form* in which the action was brought was not considered in the opinions delivered in the Supreme Court of the United States or in the report of the opinion of the Supreme Court of Oklahoma (*Anderson v. Shawnee Compress Co.*, 17 Okl. 231, 87 Pac. 315, 15 L. R. A. [N. S.] 846), and the action was sustained *after the consummation* of the act in violation of the Sherman Act and a lease illegally executed was annulled. In this jurisdiction, unless the fact that the execution of the lease was in violation of the express provisions of the statute distinguishes it from other cases, that action could only have been maintained by the stockholder in the right of the corporation. *Flynn v. Brooklyn City R. R. Co.*, *supra*. That decision is, however, authority for the action based solely on a violation of the Federal statute; for, if equity would afford relief on that ground alone *after the violation*, surely a court of equity can stay the act which would constitute the violation.

Section 7 of the Sherman Act is as follows:

"Any person who shall be injured in this business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States in the District in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages sustained and the costs of suit, including a reasonable attorney's fee."

This action cannot be maintained by the minority stockholders in their own right, upon the theory that this statute would give them the right to treble damages, and that the remedy at law would be inadequate owing to the impossibility of proving the actual damages. The right of action for damages, if any, would be in the corporation, and not in the individual stockholders. It cannot be maintained that the right of action for these damages is given to the stockholders. It would be impossible to determine each stockholder's proportionate interest, and it would be an unreasonable construction to hold that every stockholder could recover treble damages, based on the entire damages sustained by the corporation. It is, however, I think, the settled rule that if the threatened act sought to be enjoined be *within the power* of the corporation, so that pending the action by the stockholder it *could be legally consummated or ratified, or if the acts have been consummated, and have thereby given rise to a cause of action in favor of the corporation for equitable relief*, as, for in-

stance, the cancellation of a contract or other instrument, then the stockholder can only sue in the right of the corporation; *but, where it is not within the power of the corporation to consummate or ratify the threatened acts, then equity will, at the instance of a minority stockholder, suing in in his own right and for the benefit of all stockholders similarly situated, grant injunctive relief.* Heath et al. v. Erie Ry. et al., 8 Blatchf. 347, 392, 393, 396, 400, 401, 406, 407, Fed. Cas. No. 6,306; Zabriskie v. C., C. & C. Rd. Co., 23 How. 381-395, 16 L. Ed. 488; Railway Co. v. Allerton, 18 Wall. 233, 21 L. Ed. 902; Gamble v. Queens County Water Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527; Kent v. Quicksilver Mining Co., 78 N. Y. 159-188; Davis v. Congregation Tephila Israel, 40 App. Div. 424, 57 N. Y. Supp. 1015, and cases cited: Currier v. N. Y., W. S. & Buffalo R. R. Co., 35 Hun, 355; Fisk v. Ch., R. I. & Pacific R. Co., 36 How. Prac. 20; Belmont v. Erie Ry. Co., 52 Barb. 637; Watson v. Harlem & New York Navigation Co., 52 How. Prac. 348; Byrne v. Schuyler Elec. F. & G. Co., 65 Conn. 336, 31 Atl. 833, 28 L. R. A. 304; Commissioners of Craven v. A. & H. C. R. Co., 77 N. C. 297; Fletcher v. Alpena Circuit Judge, 136 Mich. 511, 99 N. W. 748; Tomkinson v. Southeastern Ry. Co., L. R. 35 Ch. Div. 675; Green's Brice on Ultra Vires, 643; High on Inj. (4th Ed.) §§ 1224-1226; Langan v. Francklyn (City Ct.) 20 N. Y. Supp. 404. See, also, Colby v. Equitable Trust Co., 124 App. Div. 262, 108 N. Y. Supp. 978, affirmed 192 N. Y. 535, 84 N. E. 1111, and Mills v. Central Rd. Co., 41 N. J. Eq. 1, 2 Atl. 453.

In Tomkinson v. Southeastern Railway Co., *supra*, which was an action by a stockholder in his own right to enjoin an illegal disbursement of corporate funds, the court, on granting the injunction, among other things, said:

"I have no doubt that it is the duty of the court to grant an injunction in this case. The question, as the Attorney General said, is whether the act proposed to be done is within the powers of the railway company, or outside its powers. If it is outside its powers, it is now perfectly settled that any one shareholder may come to this court and say, 'This company is going to do an act which is beyond its powers; stop it;' and the court thereupon has no discretion in the matter."

If equity will, at the suit of a stockholder or member of a corporation in his own right and without showing special damages, enjoin threatened acts of the corporation which are ultra vires or otherwise illegal, I see no reason on principle why it has not jurisdiction and should not exercise jurisdiction to enjoin an illegal transfer of a majority of the stock. If an injunction would lie in such circumstances to enjoin the issue by the corporation of a controlling interest in the stock in violation of law, I think it will also lie to enjoin the illegal transfer by a stockholder of a controlling interest in the stock. The effect upon a minority stockholder of a transfer of a controlling interest in the outstanding stock in violation of law is precisely the same as if the stock had never been issued, and the corporation was threatening to consummate a contract to issue and sell a controlling interest in the stock in violation of law, in the sense

that the law prohibited its issuance to the particular purchaser. I see no distinction in this regard between a violation of the *charter* of the corporation and the violation of any other law prohibiting the act. Where the majority of the stock has been accumulated in the hands of a single stockholder for the purposes of control, and where such stockholder is a rival competing corporation, such corporation becomes for all practical purposes the corporation which it thus dominates and controls (*Farmers' Loan & Trust Co. v. N. Y. & N. R. Co.*, 150 N. Y. 410-434, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689; *U. S. v. Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663; *Ervin v. Oregon Ry. & Nav. Co.* [C. C.] 27 Fed. 625), and should be enjoined from committing acts *ultra vires* the corporate powers of the corporation, or otherwise illegal, or in violation of the duty it owes to the minority stockholders, the same as if the corporation itself were threatening to commit the acts.

The majority stockholder in the circumstances disclosed by this case, a controlling interest having been accumulated by it for the purposes of control, occupies "substantially the same relation of trust towards the minority as the board of directors would occupy toward the stockholders it represents" (see *Farmers' Loan & Trust Co. v. N. Y. & N. R. Co.*, *supra*), and owes a duty to the minority stockholders to manage the corporation *within its charter powers and within all other laws applicable thereto, and in good faith and for the best interests of the corporation*, and it is within the jurisdiction of a court of equity to enjoin and redress violations of this duty; but the honest exercise of the discretion and judgment vested in the majority stockholders cannot be reviewed by the court. *Gamble v. Q. Co. W. Co.*, *supra*; *Farmers' Loan & Trust Co. v. N. Y. & N. R. Co.*, *supra*; *Flynn v. City Rd. Co.*, *supra*; *Wright v. Oroville M. Co.*, 40 Cal. 20; *Ervin v. Oregon Ry. & Nav. Co.*, *supra*; *Meyer v. Staten Island Ry. Co.*, 7 N. Y. St. Rep. 245.

It is not necessary to consider the federal authorities under which counsel for the appellants contends that a suit in equity to *enforce* the provisions of the Sherman Act by injunction can only be maintained by the Attorney General pursuant to the provisions of the act; for in the case at bar well-recognized grounds of equity jurisdiction appear, and the minority stockholders have the same right, in my opinion, to apply to a court of equity to enjoin acts on the part of the majority stockholder and of others, including the corporation of which they are stockholders, in violation of a federal statute, as if the acts were in excess of the powers conferred upon the corporation by its charter, or in excess of the authority of stockholders as limited by the charter or other laws of the state; for when the Congress of the United States legislated on this subject, which was clearly within its jurisdiction, it declared rules of law and of public policy which superseded all laws and rules of public policy of every state and territory inconsistent therewith, and the statute became as binding in this and every other state as if it had been enacted by the state Legislature, and it is as much the duty of the state courts to protect stockholders of a corporation against a violation thereof

as if the violation were of the charter powers of the corporation or of other statutory law of the state. See *Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327.

The authorities lastly herein cited are, I think, precedents for this action; but, if they are not, I think that a precedent therefor should be made, for it will tend to safeguard the interests of the minority stockholders by preventing those in control through ownership of the majority of the stock from violating the duty which they owe to the minority to conduct the affairs of the corporation and preserve it as a separate entity for the fulfillment of the purposes of its creation, instead of turning it over to a rival in violation of law and virtually terminating its independent existence. There is no danger in such a precedent. The only judgment demanded is an injunction to prevent the consummation of the transfer of the stock control in violation of the duty of the majority owner to the minority owners, and in violation of the federal statute. The defendants will neither be subjected to a double recovery nor to a multiplicity of actions. No recovery is sought excepting a decree of the court restraining the violation of this trust duty and of the statute and canceling the transfer of stock which has been made; and this as a representative action in behalf of all stockholders who are not selling their stock at the excessive valuation offered by the New Haven Company for sufficient only to give it control of the Rutland Company. Of course, no action could be brought by the majority holder who is selling, and it is a party defendant, and the final decree will determine all questions with respect to liability by virtue of the contract, or contemplated contract, as between it and the vendee, who is also before the court. No other minority stockholder can maintain a separate action in his own right for the relief demanded by plaintiffs, and if such an action should be brought, under well-settled rules of equity practice, it would be consolidated with this or stayed. I regard it as exceedingly doubtful whether the Rutland Company could maintain an action for like relief; but, however that may be, it has been made a party defendant, and the other defendants will not be prejudiced, for the Rutland Company will be bound by the decree, and could not, if it would, maintain another action for like relief.

Section 150 of the Railroad Law (chapter 49, Consol. Laws; chapter 481, Laws 1910) forbids the merging or consolidation of parallel and competing lines of railroad, other than street surface railroads, and contracts, including leases, for the use of one road by the other, "unless the Public Service Commission shall consent thereto"; and section 54 of the Public Service Commission Law (chapter 48, Consol. Laws; chapter 480, Laws 1910) forbids the purchase or acquisition by *any* railroad corporation, domestic or foreign, of "any part of the capital stock of any domestic railroad corporation," including street surface railroads and other common carriers, "organized or existing under or by the laws of this state, unless authorized so to do" by the Public Service Commission. The consent and authorization by the Public Service Commission pursuant to these provisions of law was obtained. The learned counsel for the appellants contends, therefore,

that the transfer, having been authorized by the laws of our state, cannot contravene any public policy which it is the duty of or within the jurisdiction of this court to enforce.

That argument seems plausible, but it is fallacious. It leaves out of consideration the fact that the Congress of the United States has exercised its constitutional authority to declare by statutory enactment a public policy on the same subject for the whole country, which, by virtue of the express provisions of the federal Constitution, became the "supreme law of the land," and is as much the public policy of this state as any statute enacted at Albany. The federal statute superseded all state statutes inconsistent therewith, and rendered nugatory any subsequent state legislation in conflict therewith. *Second Employers' Liability Cases*, supra. It is based on the further erroneous theory that the Public Service Commission of the state of New York, in approving this transfer of stock, *authoritatively* determined that the transfer would not be prejudicial to the public interests, or in restraint of trade, or constitute a violation of the Sherman Act, and that such determination, if not controlling, should be accepted by this court. The *opinions* of the Public Service Commissioners, acting within their jurisdiction, are entitled to great weight, and doubtless their *determinations* on facts, acting likewise within their jurisdiction, if not annulled on certiorari, are controlling; but the Commission was exercising functions under the state law, and it could make no adjudication which would protect any of the parties against a prosecution or action for a violation of the Sherman Act, or which would constitute a bar to an action for damages or a suit in equity based on a violation thereof, or on a breach of the duty owing by the majority stockholders to the minority stockholders. If the transfer would constitute a violation of the Sherman Act or of such duty the Public Service Commission should not have approved it; but that body was not given jurisdiction to *authoritatively* decide those questions. It was authorized merely to determine *authoritatively* whether or not the transfer would be consistent with *public* interest, and, if so, to consent in behalf of the people of this state. That consent or approval was at most merely permissive, and notwithstanding it a court of equity may inquire into the motive of the Central Company in selling and the purpose and object of the New Haven Company in thus acquiring control of the Rutland Company, and the effect thereof, even though no statute were violated thereby; and if the transfer involves a breach of duty on the part of the vendor, it being in the circumstances of a quasi trustee for the minority stockholder, I think that it is entirely competent for a court of equity to enjoin it. See *Farmers' Loan & Trust Co. v. N. Y. & N. R.*, supra, 150 N. Y. 434, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689; *Young v. R. & K. G. L. Co. et al.*, 129 N. Y. 57, 29 N. E. 83; *Colby v. Equitable Trust Co.*, supra.

Moreover, I am of opinion that it is by no means clear that the Legislature contemplated that the Public Service Commission would attempt to approve of the purchase of a *mere controlling interest* in the stock of one corporation by a rival competing line, thus leaving

the minority stockholders at the mercy of a management directly opposed to them in interests. Such a situation might, if it were not a violation of the Sherman Act, warrant consolidation, but not the transfer of mere stock control. The approval of the Commission appears to have been largely influenced by its view that the control of the Rutland Company by the New Haven Company would be less detrimental to the minority stockholders of the Rutland Company than if such control remained in the Central Company, which the Commission held was a parallel and competing line, where it has been for many years, and would be more beneficial to the public; and the Commission assigned this as a reason for not requiring the New Haven Company to offer to purchase the minority stock on the same terms as it had agreed to purchase the majority stock, which the Commission, on denying an application of the New Haven Company for leave to sell its stock in the New York, Ontario & Western Company to the Central Company, ruled would be a proper condition to impose on granting such an application, for the reason that the minority stockholders could not be protected in such case by the courts or otherwise. Some of the stockholders of the Rutland Company have an action pending against the Central Company to prevent its control over the Rutland Company through ownership of the majority of the capital stock. The right of the plaintiffs to enjoin this transfer cannot be affected by the failure thus far of certain stockholders of the Rutland Company, as plaintiffs in the other action against the Central Company, to succeed.

The Court of Appeals in *Young v. Rondout & Kingston Gaslight Co.*, 129 N. Y. 57-60, 29 N. E. 83, 84, on considering whether an injunction, *which was essential to a recovery by the plaintiffs*, should be vacated, said:

"To dissolve an injunction, with the inevitable result of defeating plaintiff's remedy without a trial, we must be entirely satisfied that the case is one in which by settled adjudication the plaintiff, upon the facts stated, is not entitled to final relief. We cannot say that of this plaintiff's complaint in advance of a trial. * * * These are grave and serious questions. On this motion we do not decide them."

It may be said that on the review of the order the Court of Appeals was confined to legal questions, and that this court may review the exercise of discretion by the court at Special Term; but still, if the plaintiffs present a *prima facie* case for injunctive relief, where, as here, it is probable that their right to final judgment will depend upon whether the status quo is maintained, I am of opinion that the injunction order should be sustained. See *Mannington v. Hocking Valley R. R. Co.* (C. C.) 183 Fed. 133, 146, 147, 149, 159; *Bigelow v. Calumet & Heckla Mining Co.* (C. C.) 155 Fed. 869.

On the hearing on the application to vacate the injunction order, which was originally granted *ex parte*, the plaintiffs offered to have the cause submitted for decision on the merits on affidavits presented on the motion, as depositions, or to try the issues immediately, and they subsequently formally renewed this offer in writing. That was some evidence that the action has not been brought in bad faith and

for the purpose of delaying the transfer of the stock. I am of opinion that the plaintiffs have in the circumstances sufficient basis for their contention that the transfer of this stock constitutes a violation of the Sherman Act and a fraud upon the corporation and its minority stockholders to warrant the temporary injunction order until a decision of the action on the merits, which, if the defendants had been willing to proceed to trial, doubtless could have been had long ago. In view of the right which a railroad corporation now has for the exchange of freight and passenger traffic with connecting lines under the Interstate Commerce Act (section 12 of chapter 309 of Session 2 of 61st Congress [Act June 18, 1910, 36 Stat. 551] amending section 15 of "An act to regulate commerce," approved February 4, 1887 [Act Feb. 4, 1887, c. 104, 24 Stat. 384 (U. S. Comp. St. Supp. 1911, p. 1301)]), the efforts of the New Haven Company to obtain a controlling interest in the Rutland Company indicate that it is not actuated by a desire to further the interests of the Rutland Company, and the contrary is clearly shown by the exorbitant price paid for the stock and the admissions of President Mellen of the New Haven Company. It is presumptively, I think, against the interests of one corporation to have it controlled by a competitor. *Louisville & Nashville v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849.

The appellants further contend that in the main the Rutland and New Haven Companies are connecting companies, and form a through line, and are parallel and competing only to a very small extent, and that therefore there is and will be no violation of the Sherman Act, which was construed by the Supreme Court of the United States in *U. S. v. American Tobacco Co.*, *supra*, as embracing only "acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade, or which either because of their inherent nature or effect or because of the evident purpose of the acts" injuriously restrain trade. Those questions should be left for decision when the facts are fully developed by common-law proof showing definitely the extent to which the lines are competing and parallel, and the extent to which trade and commerce will be restrained and a monopoly created, and clearly laying bare the purpose of the majority stockholder of the Rutland Company in thus turning over the control and management of that company to the New Haven Company and of the latter company in acquiring it. The plaintiffs allege, and present evidence tending to show, that the New Haven Company and lines which it controls are competing and parallel lines with the Rutland line to an extent sufficient under the decisions of the federal courts construing the Sherman Act to establish presumptively that the proposed transfer constitutes a contract or combination in restraint of interstate and foreign trade and commerce, and is designed to monopolize such trade and commerce, and that it is therefore illegal and void. See *Louisville & Nashville v. Kentucky*, *supra*; *Northern Securities Co. v. U. S.*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679; *Standard Oil Co. v. U. S.*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834; *U. S. v. American Tobacco Co.*, *supra*; *Harri-man v. Northern Securities Co.*, 197 U. S. 244, 25 Sup. Ct. 493, 49 L.

Ed. 739; *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838; *Langdon v. Branch* (C. C.) 37 Fed. 449, 2 L. R. A. 120. See, also, *State ex rel. Attorney General v. Hocking Valley*, 12 Ch. Circuit (N. S. L.) 49; *Hafer v. Cinn., H. & D. R. Co.*, 29 Ch. L. J. 68; *Gulf, C. & S. F. R. Co. v. State*, 72 Tex. 404, 10 S. W. 81, 1 L. R. A. 849, 13 Am. St. Rep. 815; *People v. Boston, H. & T. R. Co.*, 12 Abb. N. C. 230. And, therefore, without intending to express an opinion on the merits, as they may be developed on the trial, I think that the plaintiffs are entitled to have the injunction continued.

I therefore dissent from the reversal of the order.

MILLER, J. I am of the opinion that a minority stockholder of a corporation may maintain an action to enjoin the transfer of the control of the corporation to a competing corporation in violation of law, and that the plaintiffs have made a sufficient case on that head to justify the Special Term in preserving the status quo until the determination of the action.

I therefore vote to affirm the order.

MARINE & CONTRACTORS' SUPPLY CO v. PALTROWITZ.

(Supreme Court, Appellate Term, First Department. January 9, 1913.)

PLEADING (§ 345*)—ANSWER—DENIALS—SUFFICIENCY.

In an action on an account stated and for breach of contract, an answer admitting plaintiff's incorporation, and denying each and every other allegation in the complaint, was sufficient to require the plaintiff to prove his cause of action; and hence judgment for plaintiff on the pleadings was improperly granted.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by the Marine & Contractors' Supply Company against Harry Paltrowitz. From a judgment for plaintiff, after a trial by the court without a jury, defendant appeals. Reversed, and new trial ordered.

Argued December term, 1912, before SEABURY, GUY, and GERARD, JJ.

Isidore Siegeltuch, of New York City, for appellant.

Slade, Slade & Slade, of New York City (Maxwell Slade and David Slade, both of New Haven, Conn., of counsel), for respondent.

GERARD, J. The complaint alleges two causes of action: First, that plaintiff and defendant were joint owners of a building, that defendant as joint owner collected certain rents from the tenants, that plaintiff was entitled to one-half the rents, that an account was stated between plaintiff and defendant, and that it was found that the defendant was indebted to plaintiff in a stated sum. The second cause of action sets forth the joint ownership and alleges that the defendant

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

collected certain other rents, to one-half of which plaintiff was entitled, and that defendant promised to pay such one half.

The first defense of the answer, after an allowance of an amendment by the court, admitted the incorporation of plaintiff and denied "each and every other allegation in the complaint contained." Of course, this put the plaintiff to its proof to make out its cause of action, and it was therefore error for the learned court below to grant judgment for plaintiff on the pleadings.

Judgment and order reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

(79 Misc. Rep. 42.)

FAIRCHILD et al. v. FLOMERFELT.

(Supreme Court, Appellate Term, First Department. January 9, 1913.)

BROKERS (§ 24*)—TRANSACTIONS ON MARGIN—CALL FOR SETTLEMENT—RIGHT TO SELL.

A stockbroker's action against a customer, to recover the balance due on margin transactions after having sold the customer out, could not be maintained, where the customer was given no notice of the time of sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 19; Dec. Dig. § 24.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Charles N. Fairchild and others, composing the firm of Charles N. Fairchild & Co., against Mary R. Flomerfelt. From a judgment for defendant, plaintiffs appeal. Affirmed.

Argued December term, 1912, before SEABURY, GUY, and GERARD, JJ.

Fromme Bros., of New York City (Theodore F. Kuper, of New York City, of counsel), for appellants.

David E. Goldfarb, of New York City, for respondent.

GERARD, J. The action was brought to recover a balance of \$345, alleged to be due plaintiffs from defendant as a result of certain transactions, consisting of the purchase and sale by plaintiffs, for and on account of defendant, of cotton. At the trial there was a conflict of testimony between the plaintiffs and defendant as to various orders given by her, and as to whether or not the plaintiffs had agreed to allow her to operate for six weeks, apparently without margin. But the judgment of the court below should be sustained upon the following grounds:

Irrespective of what the exact contract between the parties was, the plaintiffs base their claim upon having sold out the defendant because of her failure to furnish additional margin, and before selling her out they sent her a letter demanding from her a settlement of their special account by payment of it, and stating:

"In the event of your failure so to do before 10 o'clock on Monday morning next, we shall close out your account on the New York Cotton Exchange and hold you responsible for your debit balance."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It has been held in the case of *Content v. Banner*, 184 N. Y. 121, 76 N. E. 913, 6 Ann. Cas. 106, that, the relationship of a cotton or stock-broker to a client being that of pledgee and pledgor, the broker must, before selling the stock or cotton, notify his client, the pledgor, giving notice of the time and place of sale, and that the mere failure of the client to furnish margin after notice is insufficient to authorize the broker to sell out the stock or cotton. In the *Content Case* the notice read as follows:

"Inasmuch as the stock has not yet been sold, we wish to give you a further opportunity to take it up or supply us with sufficient margin to carry it, if you so desire. If, however, you do not make suitable arrangements in this respect before Monday next, we shall sell the stock for your account and hold you responsible for the loss."

In the case at bar no notice of the time of sale, which is one of the essentials of the notice, was given. There are also cases in this state which hold that a sale on the Exchange is not authorized, because the client, or pledgor, has not an opportunity of entering such place in order to bid and watch the conduct of the sale. *Dos Passos on Stockbrokers* (2d Ed.) p. 358.

The omission to state the time of sale alone furnishes sufficient reason why the plaintiffs should not recover in this action, and the judgment is therefore affirmed, with costs. All concur.

SCHROEDER v. JARMULOWSKY.

(Supreme Court, Appellate Term, First Department. January 9, 1913.)

INSURANCE (§ 182*)—PREMIUMS—PERSONS LIABLE—EVIDENCE.

Plaintiff cannot recover of defendant because of complying with a letter, signed "M. J.," the name of defendant, inclosing an insurance policy, and asking plaintiff to make a certain increase in its amount, and return it to a certain address; the uncontradicted evidence being that defendant's uncle, with whom he lived at such address, was of the same name, that the goods covered by the policy belonged to the uncle, and that he called at defendant's office and asked defendant's bookkeeper to send the letter, there being no proof that the bookkeeper had authority from defendant to ask the increase in the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 392, 393; Dec. Dig. § 182.*]

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Henry Schroeder against Meyer Jarmulowsky. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued December term, 1912, before SEABURY, GUY, and GERARD, JJ.

Grossfield Bros., of New York City, for appellant.

Joseph Komito, of New York City, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GERARD, J. Plaintiff, an insurance broker, received a letter signed "Meyer Jarmulowsky," and underneath, in parenthesis, the initials "J. R." which letter inclosed a policy of insurance and read as follows:

"Kindly return this policy to 8 Charles street, room 10, and increase same \$200, and oblige."

Thereafter the plaintiff renewed the policy, and sent the same to Meyer Jarmulowsky to the Charles street address.

It appears, from the uncontradicted evidence produced by defendant, that there are two Meyer Jarmulowskys, that the other one is the uncle of the defendant, and that defendant lives with this uncle at the Charles street address, and that the goods at the Charles street address covered by the policy are the property of the uncle; and in explanation of the letter it was claimed by defendant that the uncle had stopped in defendant's office and asked defendant's bookkeeper to send the letter in question.

As there is no proof that defendant's bookkeeper had authority to ask plaintiff to take out this insurance, and as there is no denial of the facts alleged as to the two Jarmulowskys, I am constrained to the opinion that the judgment must be reversed, and a new trial had, but without costs. All concur.

BUXTON v. LIETZ.

(Supreme Court, Appellate Term, First Department. January 9, 1913.)

ATTORNEY AND CLIENT (§ 136*)—PRIVILEGES—MERCANTILE AGENCY.

A contract for legal services by a mercantile agency constituting a firm composed of partners not members of the bar, or by an individual not a member of the bar as assignee of the business of the agency, with authority to continue business in the name of the agency, is illegal, neither the assignor nor plaintiff being authorized to practice law, without reference to Laws 1909, c. 483, as amended by Laws 1911, c. 317, prohibiting corporations and associations from practicing law.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 297, 298; Dec. Dig. § 136.*]

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by Ben A. Buxton, doing business under the firm name and style of the Meacham-Buxton Mercantile Agency, against Charles L. Lietz. From a judgment (136 N. Y. Supp. 829) dismissing the complaint, plaintiff appeals. Affirmed.

Argued December term, 1912, before SEABURY, GUY, and GERARD, JJ.

Jacob Miller, of New York City (Henry A. Brann, Jr., of New York City, of counsel), for appellant.

George William Hart, of New York City, for respondent.

SEABURY, J. The plaintiff sues upon a contract made between his assignor and the defendant. The contract calls for the perform-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ance of services on the part of the plaintiff's assignor, which can only be lawfully performed by an attorney and counselor at law duly licensed to practice law in this state. At the time the contract sued upon was made with the "Meacham-Burton Mercantile Agency," the plaintiff's assignor, the so-called "agency" was a partnership not composed of members of the bar of this state. On February 8, 1912, the partnership was dissolved, and its business assigned to the plaintiff, who continues to do business under the name of the former partnership. It is also conceded that the plaintiff has not been duly licensed to practice law. The learned court below dismissed the complaint, on the ground that the contract sued upon was illegal.

We think that this disposition of the case was proper. The appellant contends that, at the time the contract was made, on March 10, 1911, it was not illegal, because chapter 483 of the Laws of 1909 merely prohibited a corporation from practicing law, and that the amendment to that law made by chapter 317 of the Laws of 1911, so as to make the prohibitions therein contained apply to voluntary associations, did not go into effect until September 1, 1911, which was after the contract in suit was made. We think that the argument urged by the appellant is immaterial to the question at issue. Quite apart from the statutory provisions referred to, the plaintiff and his assignor, not being duly licensed to practice law, had no right to contract so to do, and any contract made for this purpose was illegal. The principle upon which this ruling rests is so fully discussed in *Matter of Application of Co-operative Law Co.*, 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. (N. S.) 551, 139 Am. St. Rep. 839, 19 Ann. Cas. 879, that further discussion seems to us unnecessary.

Judgment affirmed, with costs. All concur.

(79 Misc. Rep. 24.)

GERSON et al. v. BLANCK et al.

(Supreme Court, Appellate Term, First Department. January 9, 1913.)

1. LANDLORD AND TENANT (§ 200*)—UNTENANTABLE PREMISES—FIRE—PAYMENT OF RENT—DUTY TO RESUME—"PUT IN GOOD REPAIR."

Defendants' lease provided that if the premises should be so injured by fire as to be untenantable the rent should be paid proportionately up to the time of the damage, and should from thenceforth cease until the premises should be put in good repair. The premises were rendered untenantable by fire on March 25, 1911, and on June 1st following plaintiffs offered to allow defendants to reoccupy the same. A new stairway, required by law to make the premises such that defendants could have lawfully continued their business thereon, was not completed until September, 1911. *Held*, that the words "put in good repair" meant "tenantable condition," and that defendants were therefore not liable for rent for the months of June and July.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 794-797; Dec. Dig. § 200.*]

2. LANDLORD AND TENANT (§ 211*)—INJURY TO BUILDING—REPAIR—DELAY.

Leased premises were rendered untenantable by a fire in March. They remained under the control of the public authorities for three weeks after the fire, during which all persons were forbidden to disturb existing con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ditions, and defendants refused to permit the removal of the débris for a similar period until they had adjusted their insurance loss, when repairs were proceeded with and were finished in September. *Held*, that the landlords were not guilty of unreasonable delay in making the necessary repairs to restore the premises to tenantable condition.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 840–845; Dec. Dig. § 211.*]

3. **LANDLORD AND TENANT (§ 211*)—REPAIRS—LABOR LAW.**

Where rented premises were made untenable by fire, the lessee was not entitled to complain that in making repairs the doors were so hung as to open outwardly, instead of inwardly, as required by the Labor Law (Consol. Laws 1909, c. 31) of the state, where there was no evidence that more space was taken in effecting the change than was necessary.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 240–245; Dec. Dig. § 211.*]

4. **APPEAL AND ERROR (§ 153*)—RIGHT TO ALLEGE ERROR—WAIVER.**

By consenting to the submission of certain false issues to the jury, plaintiffs did not waive their right of appeal on the ground that the jury's finding should be set aside on any of the grounds stated in Code Civ. Proc. § 999.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 953–956; Dec. Dig. § 153.*]

5. **JUDGMENT (§ 596*)—RES JUDICATA—ISSUES.**

Judgment in favor of tenants in an action by a landlord to recover rent for specified months, during which the premises were undergoing repairs made necessary by fire, was not *res judicata* against the landlord's right to recover rent for subsequent months.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1111; Dec. Dig. § 596.*]

Appeal from City Court of New York, Trial Term.

Action by Robert Gerson and others against Max Blanck and another. From a judgment for defendants, and from an order denying plaintiffs' motion for a new trial, plaintiffs appeal. Modified and affirmed.

Argued December term, 1912, before SEABURY, GUY, and GERARD, JJ.

Norwood & Marden, of New York City (Carlisle Norwood, of New York City, of counsel), for appellants.

Max D. Steuer, of New York City (Henry W. Unger, of New York City, of counsel), for respondents.

GUY, J. The plaintiffs appeal from a judgment in favor of the defendants in an action brought to recover rent for the months of June and July, 1911, of loft premises on the corner of Washington Place and Greene street, in this city, which were rendered untenable by fire on March 25, 1911.

[1] On June 1, 1911, the plaintiffs offered to allow the defendants to reoccupy the demised premises. The evidence shows that a new stairway, which was required by law in order to make the premises such that the defendants could have lawfully continued their business on the premises, was not completed until September, 1911. Until that date the premises did not become tenantable, and the defend-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ants were not obliged to reoccupy them. The lease between the parties provided as follows:

"If the premises hereby leased shall be injured by fire or otherwise, but not rendered untenable, the same shall be repaired with all proper speed at the expense of the lessor; but, if the damage shall be so extensive *as to render the premises untenable*, the rent shall be proportionately paid up to the time of such damage, and shall from thenceforth cease until such time as same shall be put in good repair."

In *Friedlander v. Citron*, 140 App. Div. 489-491, 125 N. Y. Supp. 510, 512, Mr. Justice Miller writing the opinion, the court say:

"In such case the statute would apply if the lease had not expressly provided that the 'rent * * * shall from thenceforth cease until such time as the same shall be put in good repair,' which, of course, means that the rent should cease only until that time. Having provided by contract for the contingency that happened, the contract must govern."

Under this rule, there was but a single issue to be determined in the case, and that was whether the premises had been put in good repair in June or July, 1911. This is the issue which should have been submitted to the jury, if, indeed, it was proper to submit any issue to the jury in this case. Instead of submitting this simple issue to the jury, the court below, with the consent of both counsel, submitted the following questions:

First. Was there an unreasonable delay and failure to restore these lofts to their original condition?

Second. Was there an intentional deprivation of usable space in changing the doors to open outwardly as required by the Labor Law [Consol. Laws 1909, c. 31] of the state?

[2] As I read the evidence, it presented neither of these issues. Even if the premises were not ready for reoccupancy until September, 1911, it could not be held, in view of the fact that the premises had remained under the control of the public authorities for at least three weeks after the fire, during which time all persons were forbidden to disturb existing conditions, and in view of the fact that there is evidence that defendants refused to permit the *débris* to be removed for a similar period, until they had adjusted their insurance loss, that plaintiffs were guilty of unreasonable delay in making necessary repairs to restore the place to its former condition, so far as the same was permissible under the law.

[3, 4] There is no basis whatever in the evidence for the submission of the second question to the jury. The change of the doors so as to make them open outwardly, instead of inwardly, was required by the Labor Law of the state, and there is not a scintilla of evidence from which the jury would be justified in finding that more space was taken in effecting such change than was necessary in order to comply with the law. The lease must be presumed to have been made by both lessor and lessee, with a view to the due exercise of the police power of the state during the term of the lease, so far as the public safety might require. Both parties tried the case upon the artificial basis indicated in the propositions submitted to the jury, and counsel

for the plaintiffs consented that these issues be submitted, thereby conceding that there was sufficient evidence on these issues to call for their submission to the jury. But by consenting to the submission of these issues to the jury plaintiffs did not waive their right of appeal on the ground that the finding of the jury should be set aside on any of the grounds stated in section 999 of the Code. See *Picard v. Lang*, 3 App. Div. 51-54, 38 N. Y. Supp. 229.

I am of the opinion that the finding of the jury that there was unreasonable delay on the part of the plaintiffs in making the repairs, and an intentional deprivation of usable space in changing the doors to open outwardly, was entirely against the weight of evidence. It appears conclusively by the evidence that plaintiffs' contractor proceeded diligently with the work of reconstruction, so far as he was permitted to do so by the public authorities and by the defendants, and that the alleged deprivation of space was not intentional on the part of the plaintiffs, but was due to the requirements of the law in that regard. The proof establishes, however, that the premises were not "in good repair" in the months of June and July, which we understand to mean tenantable condition, such condition as would permit of their use by the defendants, without violation of law, for the purposes contemplated by the lease, and plaintiffs are not, therefore, entitled to recover rent for those months. So far, therefore, as the judgment has the effect of dismissing the complaint on the merits as to plaintiffs' claim for rent for those months, it must be affirmed, with costs.

[5] We have expressed our views thus at length because of the suggestion contained in the charge of the court below that the judgment rendered would determine as to the future liability of the defendants under the lease. We do not so understand the case. The present judgment, whatever may have been the theory upon which the case was tried by counsel, settles only the question as to whether or not these plaintiffs are entitled to rent for the months of June and July. In order, however, that no misunderstanding may arise in the future as to the meaning of this judgment, we think that the judgment appealed from should be modified, so as to state that the complaint is dismissed upon the merits as to the rent alleged to be due for the months of June and July, but without prejudice to the right of the plaintiffs to sue for rent which may subsequently become due after the premises have been "put in good repair."

Judgment modified, so as to read as follows: Ordered, adjudged, and decreed that the defendants, Max Blanck and Isaac Harris, co-partners under the firm name of Triangle Waist Company, recover and have judgment against the plaintiffs, Robert Gerson, Louis E. Jacobson, and Samuel Jacobson, in the sum of \$106.82, dismissing the complaint on the merits as to the rent alleged to be due for the months of June and July, 1911, but without prejudice to the right of the plaintiffs to sue for rent which may subsequently become due after the premises have been put in good repair, and that an execution issue therefor, and, as so modified, the judgment is affirmed, with costs. All concur.

(79 Misc. Rep. 52.)

SHERMAN v. PULLMAN CO.

(Supreme Court, Appellate Term, First Department. January 9, 1913.)

1. CARRIERS (§ 417*)—BAGGAGE—ACTIONS FOR LOSS—SUFFICIENCY OF EVIDENCE.

Evidence in a Pullman car passenger's action for loss of baggage held to sustain a judgment for plaintiff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1590-1600; Dec. Dig. § 417.*]

2. CARRIERS (§ 417*)—BAGGAGE—NEGLIGENCE.

The failure of the porter of a Pullman car to return to a passenger articles delivered to him on retiring was prima facie evidence of negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1590-1600; Dec. Dig. § 417.*]

3. CARRIERS (§ 413*)—BAGGAGE—NEGLIGENCE.

If a porter neglected to watch a bag, which he received from a passenger on retiring, and permitted its contents to be stolen, or himself stole it, the sleeping car company would be liable therefor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1583-1588; Dec. Dig. § 413.*]

4. CARRIERS (§ 387*)—"BAGGAGE"—DEFINITION.

The meaning of the term "baggage" depends upon the peculiar circumstances of each case; but the contract to transport imposes the duty of transporting a reasonable amount of hand baggage, such as is commonly taken by travelers for their personal use, the quantity and value of which depends upon the passenger's station in life and the purpose of his journey.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1505-1518; Dec. Dig. § 387.*]

For other definitions, see Words and Phrases, vol. 1, pp. 663-670; vol. 8, p. 7586.]

5. CARRIERS (§ 391*)—PASSENGERS—BAGGAGE.

A diamond necklace, carried by a female passenger in a hand bag, is baggage, even though not used on the journey.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1520-1528; Dec. Dig. § 391.*]

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Helen D. Sherman against the Pullman Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued December term, 1912, before SEABURY, GUY, and GERARD, JJ.

Worcester, Williams & Saxe, of New York City (Rogers H. Bacon, of New York City, of counsel), for appellant.

Julius D. Tobias, of New York City (Harry A. Bloomberg, of New York City, of counsel), for respondent.

SEABURY, J. The plaintiff sues to recover the value of a diamond necklace, alleged to have been lost or stolen through the negligence of the defendant. On August 30, 1910, plaintiff was a passenger with

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

her husband on one of the defendant's cars, which left Lake Placid bound for the city of New York. The plaintiff had with her a small leather bag, in which were certain toilet articles and a small wooden jewelry box, which contained a diamond necklace.

[1] Plaintiff testified that, when she prepared to retire for the night, she endeavored to put her hand bag under the berth; but, as her husband's dress suit case had already been put under the berth, she was unable to do so. While she was so engaged, the porter in charge of the car said to her, "I will take care of this for you, lady," and she delivered the bag to him. The next morning she found the bag in front of her berth, and, upon opening it, discovered that the wooden jewelry box had been broken open, and that the necklace had been taken away. She immediately reported the loss to her husband and to the conductor of the car. Upon the trial, the porter denied that the bag had been given into his possession. The court below rendered judgment for the plaintiff for \$250. The judgment cannot properly be said to be against the weight of the evidence, and upon this appeal we must assume that the facts were as stated by the plaintiff. Upon this state of facts, the defendant was properly held liable.

[2,3] The bag was actually delivered to the porter, whose duty it was to aid passengers in handling their baggage, and to watch and care for it while the passenger was asleep. The failure of the defendant to return to the plaintiff the articles which she had delivered to it was *prima facie* evidence of negligence. The defendant having received the bag and its contents from the plaintiff, its duty was to return them, or to satisfactorily explain their loss. It did neither of these things. If the porter neglected to watch the bag, and thus allowed some one to steal its contents, the defendant was liable. If the porter stole the necklace, the defendant was also liable. That the defendant is liable for the loss of the baggage of its passengers, under the circumstances disclosed by the evidence in this case, is now too firmly established to admit of question. *Hasbrouck v. N. Y. C. & H. R. R. Co.*, 202 N. Y. 363, 95 N. E. 808, 35 L. R. A. (N. S.) 537, Ann. Cas. 1912D, 1150; *Knieriem v. N. Y. C. & H. R. R. Co.*, 146 App. Div. 662, 131 N. Y. Supp. 496; *Carpenter v. Railroad Co.*, 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644; *Williams v. Webb*, 27 Misc. Rep. 508, 58 N. Y. Supp. 300; *Irving v. Pullman Co.*, 84 N. Y. Supp. 248; *Arthur v. Pullman Co.*, 44 Misc. Rep. 229, 88 N. Y. Supp. 981; *Croll v. Pullman Co.*, 61 Misc. Rep. 265, 113 N. Y. Supp. 542.

[4] The appellant contends that the diamond necklace was not a part of the plaintiff's baggage appropriate to the journey, and that, therefore, the defendant is not liable for its loss. This contention raises the familiar question as to what may be included within the term "baggage." None of the definitions of this term given by judges and text-writers really define it in any satisfactory way. The term is probably incapable of exact definition, as its meaning must in every case depend upon so many personal and peculiar circumstances. Perhaps as satisfactory a statement as can be found is that given by Judge

Vann in *Hasbrouck v. N. Y. C. & H. R. R. Co.*, supra, where it is said:

"The contract to transport the plaintiff carried with it the duty of transporting a reasonable amount of hand baggage, such as is commonly taken by travelers for their personal use; the quantity and value depending upon station in life, object of the journey, and other considerations."

In *Macrow v. Great Western Ry. Co.*, Law Rep. 6 Q. B. 612, 622, Chief Justice Cockburn said:

"Whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities, or to the ultimate purpose, of the journey, must be considered as personal luggage."

The range of articles which are included within the term must necessarily be as diversified as individual tastes and habits. A few of the cases on the subject will indicate the latitude of the term. Thus, baggage has been held to include:

The tools of a harness maker. *Davis v. Cayuga & S. R. Co.*, 10 How. Prac. 330.

Or carpenter. *Porter v. Hildebrand*, 14 Pa. 129.

The surgical instruments of an army surgeon. *Hannibal R. R. v. Swift*, 12 Wall. 262, 20 L. Ed. 423.

A camera. *Atwood v. Mohler*, 108 Ill. App. 416.

A snuff box, writing paper, and ink. *Grant v. Newton*, 1 E. D. Smith, 95.

A watch. *McCormick v. Hudson R. R. Co.*, 4 E. D. Smith, 181; *Jones v. Voorhees*, 10 Ohio, 145; *American Contract Co. v. Cross*, 71 Ky. (8 Bush.) 472, 8 Am. Rep. 471.

A pocket pistol and a case of dueling pistols. *Woods v. Devin*, 13 Ill. 746, 56 Am. Dec. 483.

A telescope. *Cadwallader v. Railway Co.*, 9 Low. Can. 169.

An opera glass. *T. W. & W. Ry. Co. v. Hammond*, 33 Ind. 379, 5 Am. Rep. 221.

A gun. *Int. & G. N. Ry. Co. v. Folliard*, 66 Tex. 603, 1 S. W. 624, 59 Am. Rep. 632.

One revolver. *Chicago, etc., R. R. Co. v. Collins*, 56 Ill. 212.

A rifle, revolver, gold chain, two rings, and a silver pencil case. *Bruty v. Railway Co.*, 32 Upp. Can. Q. B. 66.

And in *Parmelee v. Fischer*, 22 Ill. 212, 74 Am. Dec. 138, the plaintiff was permitted to recover for a variety of articles as baggage which range from a German silver teapot and a looking-glass to a new double-barreled gun.

Personal jewelry, such as a lady may carry for her personal use, has often been held by the courts to come within the term baggage. In *Brooke v. Pickwick*, 4 Bingham, 475, a gentleman traveling by coach with his daughter had in his trunk jewelry used by the latter, which was lost. It was held to be baggage; Best, C. J., saying:

"The plaintiff's trunk contained no more than a person in his condition might be expected to carry with him."

In *McGill v. Rowand*, 3 Pa. 451, 45 Am. Dec. 654, a plaintiff was allowed to recover for the loss of his wife's valuable diamond breastpin, a gold breastpin, and a miniature set in gold, with chain.

In *Doyle v. Kiser*, 6 Ind. 242, the court said:

"The articles of property treated as baggage, according to the decisions of different courts, may be, clothing, traveling expense money, a few books for the amusement of reading, a watch, a lady's jewelry for dressing, etc."

In *McCormick v. Hudson R. R. Co.*, 1 E. D. Smith 181, a gold watch and such other articles of jewelry as a passenger ordinarily wears about his person were held to be baggage.

In *Hubbard v. Railway*, 112 Mo. App. 459, 87 S. W. 52, articles consisting of opera glasses, jewelry, watches, diamonds, earrings, and several rings and breastpins, were held to be baggage; the court saying:

"It will be seen at a glance that they were things appropriate to the apparel of a woman, as all of them were pieces of jewelry such as are commonly worn on the person for use or ornament. * * * We might almost pronounce the articles to be baggage as a matter of law; for plainly they were personal apparel."

In *Hasbrouck v. N. Y. C. & H. R. R. Co.*, *supra*, a lady, who was a passenger on defendant's train, was permitted to recover for three finger rings and two \$10 bills, which were lost or stolen from her; Vann, J., saying:

"The rings were adapted to her social position, and she was in the habit of wearing them at parties and receptions."

In *Knieriem v. N. Y. C. & H. R. R. Co.*, *supra*, a plaintiff was permitted to recover for four rings, a watch, and a silver bag used by his wife, on the ground that these articles were baggage.

In *Railroad Co. v. Fraloff*, 100 U. S. 24, 25 L. Ed. 531, the plaintiff, a foreign lady of rank and wealth, was permitted to recover for the loss of 275 yards of rare and valuable lace, which was lost from her trunks. It was shown that she was accustomed to wear the lace upon different dresses when on visits, or frequenting theaters, or attending dinners and balls and receptions, and the court held that the lace was baggage, and affirmed a verdict for the plaintiff for \$10,000.

In those cases where jewelry carried by a passenger has been held not to be baggage, the jewelry was being carried as merchandise for sale, or as presents for friends, or belonged to some person other than the passenger. *Richards v. Westcott*, 15 N. Y. Super. Ct. 589; *Id.*, 20 N. Y. Super. Ct. 6; *Nevins v. Bay State Steamboat Co.*, 17 N. Y. Super. Ct. 225. While a recovery was denied for lost jewelry in *Steers v. N. Y. & Philadelphia Steamship Co.*, 57 N. Y. 1, 15 Am. Rep. 453, the decision was placed upon the ground that the bill of lading or receipt for the trunk containing the jewelry expressly provided that such articles should be carried by passengers only at their own risk.

[5] The fact that the diamond necklace which was lost was not used by the plaintiff *on the journey* does not preclude it from being

considered as baggage. *Dexter v. Syracuse, etc.*, 42 N. Y. 326, 1 Am. Rep. 527.

It follows that the judgment appealed from should be affirmed, with costs. All concur.

(79 Misc. Rep. 5.)

GEIGER V. RAPAPORT.

(Supreme Court, Appellate Term, First Department. January 9, 1913.)

1. MASTER AND SERVANT (§ 40*)—DISCHARGE OF SERVANT—ACTIONS—EVIDENCE.

In an action by an employé for wrongful discharge, evidence *held* to support a finding that the employer was not justified in discharging the employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 47-49; Dec. Dig. § 40.*]

2. APPEAL AND ERROR (§ 204*)—EVIDENCE—OBJECTIONS—NECESSITY.

A party may not complain of evidence received without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 149, 1258-1272, 1274-1278, 1280, 1569; Dec. Dig. § 204.*]

3. APPEAL AND ERROR (§ 1033*)—FAVORABLE INSTRUCTIONS—CAUTIONARY INSTRUCTIONS.

The refusal to charge that no inference could be drawn by the jury against a party because of his failure to call a witness present in court during the trial was not erroneous, where the court gave instructions more favorable to the party than he was entitled to.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

4. MASTER AND SERVANT (§ 39*)—DISCHARGE OF SERVANT—ACTIONS—ISSUES.

Where, in an action by an employé for his wrongful discharge, the only issue under the pleadings was whether the employer discharged the employé, the employer could not prove a justification of the discharge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 12, 45, 46; Dec. Dig. § 39.*]

5. MASTER AND SERVANT (§ 40*)—WRONGFUL DISCHARGE—JUSTIFICATION—BURDEN OF PROOF.

An employer, who, when sued by an employé for a wrongful discharge, pleads justification, has the burden of establishing the defense.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 47-49; Dec. Dig. § 40.*]

Appeal from City Court of New York, Trial Term.

Action by Samuel Geiger against Jacob Rapaport. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 137 N. Y. Supp. 753.

Argued December term, 1912, before SEABURY, GUY, and GERARD, JJ.

Henry Fluegelman, of New York City (M. S. Bevins, of New York City, of counsel), for appellant.

Max D. Steuer, of New York City (Julian Arthur Leve, of New York City, of counsel), for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SEABURY, J. Plaintiff sues to recover damages for the breach of a written contract of employment, and the answer admits the contract and denies the other allegations of the complaint.

[1] Knowledge of the conditions existing in the defendant's shop shortly before the time of the discharge is essential to an understanding of the case. The plaintiff was employed as an operator and tailor. The defendant was a manufacturer of cloaks and suits. From July 7 to September 2, 1910, there was a general strike in the cloak-making trade in this city. During the strike, the plaintiff, although frequently threatened with personal violence, continued to work under his contract, and during that time he slept in the defendant's factory, and his meals were brought to the factory to him. On September 2, 1910, the unions and the manufacturers settled the strike by entering into a formal agreement, which is called a "protocol." This protocol made provision for securing sanitary conditions in the shops, fixed a minimum weekly scale of wages, and contained other provisions affecting the conditions under which work in this trade was to be done. Among other things, it provided that:

"In the future, there shall be no time contracts with individual shop employes, except foremen, designers and patent graders."

It also provided that:

"Each member of the manufacturers is to maintain a union shop; a 'union shop' being understood to refer to a shop where union standards as to working conditions, hours of labor, and rates of wages as herein stipulated prevail, and where, when hiring help, union men are preferred—it being recognized that, since there are differences in degrees of skill among those employed in the trade, employers shall have freedom of selection as between one union man and another, and shall not be confined to any list, nor bound to follow any prescribed order, whatever. It is further understood that all existing agreements and obligations of the employers, including those to present employes, shall be respected. The manufacturers, however, declare their belief in the union, and that all who desire its benefits shall share in its burdens."

After the strike was settled, the defendant persuaded the plaintiff to join a union, which the plaintiff was permitted to do upon paying a fine to the union of \$25, which the defendant advanced, upon condition that he should reimburse himself by deducting \$5 a week from the wages of the plaintiff. On October 1, 1910, a dispute occurred in the defendant's shop, because the employes were asked to work on a garment in reference to which the price to be paid had not been agreed upon. According to the plaintiff, there was an angry dispute between the workmen and the defendant, and the workmen started to leave the shop. The plaintiff went to the defendant, and asked him what he should do, and the defendant told him he had better go with the others, and that he would not lose anything by so doing. The defendant admits that the disturbance testified to by the plaintiff occurred, but denies that he told the plaintiff he could leave with the other workmen. The contention of the defendant is that he told the plaintiff that, if he left, he would not take him back again. This disturbance occurred on Saturday morning, and on the Monday following, when the plaintiff re-

turned, the defendant refused to allow him to work. The plaintiff was corroborated by several witnesses, and the defendant called several of his own employes to corroborate his version of the occurrence.

After a careful review of the whole record, we have come to the conclusion that the verdict of the jury should not be disturbed. There are several significant circumstances disclosed in the record, which tend very strongly to corroborate the plaintiff. Before the settlement of the strike, it was clearly to the defendant's interest to employ the plaintiff under a written contract, and during the whole of the turbulent period of the strike it is conceded that the plaintiff performed his duty under his contract. The point of view and interest of the defendant necessarily changed after the signing of the protocol. From that time on, the interest of the defendant would be promoted by employing only union men, and from that date the efforts of the defendant to get rid of the plaintiff are plainly disclosed by the record. On September 27, 1910, two men went to the plaintiff and asked him to sign a paper, addressed to the defendant, which was as follows:

"I find it disagreeable to work under the contract as a week worker, while all the other workers are piece workers. I think I will make out as much as a piece worker, and the people who work in your shop will feel more friendly towards me. I would like to join the union and give up the contract which I have with you. Will you please agree that the contract which I have made with you be terminated as soon as I join the union, and that I work as a piece worker?"

The plaintiff testified that the two men who presented this paper to him to sign did so in the defendant's shop and in the defendant's presence, with the admonition that, if he did not comply:

"They will take you down a dead man. You will have to sign the paper."

To this request the plaintiff replied:

"You will have to take me down a dead man. I am not going to break my contract."

It was proven upon the trial, without objection, that the other employes of the defendant who were working under a written contract had an experience similar to that of the plaintiff, and that they were all asked to sign the letter quoted above. The fact that the plaintiff was asked to sign this letter, and was threatened with violence if he did not do so, and that the requests and threats were made to him in the defendant's shop and in the presence of the defendant, plainly indicate the defendant's attitude, and make it clear that the defendant desired the plaintiff to abandon the contract. The refusal of the plaintiff on September 27th to abandon his contract indicates that he would not willingly have repudiated it on October 1st, as the defendant testified.

Having continued to work for the defendant throughout the whole period of the strike, we find it difficult to believe that he voluntarily left the defendant's employ because of the comparatively slight disagreement which took place between the defendant and his other union employes on October 1st. The fact appears to us to be, as we have

no doubt it did to the jury, that, as the defendant had failed in his efforts to induce the plaintiff to abandon his contract, he seized the first opportunity which presented itself of getting rid of him. It is noticeable, also, that he did not do this until the plaintiff had worked with him, after the settlement of the strike, long enough to enable him to reimburse himself out of the plaintiff's wages for the amount of the fine which the union imposed upon the plaintiff. We are satisfied, from a review of all the evidence, that the verdict of the jury was proper.

[2] It is urged that the judgment should be reversed because a witness was permitted to testify that the letter quoted above was seen by him at the office of the union, and that he (the witness) was compelled to sign it. This evidence was received without any objection being made to it. By failing to object to its introduction, the defendant consented to its admission. In view of the evidence given by the plaintiff in relation to the same subject, its admission could not be deemed prejudicial even if it had been objected to and an exception duly taken.

[3] It is also urged that the judgment should be reversed, because the court below refused the request of counsel for the defendant to charge that no inference could be drawn by the jury against the defendant because of his failure to call a witness who was present in the court during the trial. While we are of the opinion that the charge requested might well have been made, the failure of the court to give any charge at all on the subject was not an error prejudicial to the rights of the defendant. The charge of the court, when considered as a whole, was more favorable to the defendant than he was entitled to.

[4, 5] Under the pleadings, the only issue in the case was whether the defendant discharged the plaintiff. The answer did not plead that the defendant was justified in discharging the plaintiff. Upon the trial, the fact that the defendant discharged the plaintiff was not disputed, and the only question contested was whether or not the defendant was justified in discharging him. The court below not only submitted the case to the jury upon this theory, thus giving the defendant a benefit which, under his pleadings, he was not entitled to (*Linton v. U. F. Co.*, 124 N. Y. 533, 536, 27 N. E. 406), but went further, and charged the jury that the burden of proof was upon the plaintiff, and, if they found the evidence of the parties "equally trustworthy," they must find a verdict for the defendant. Under the pleadings, the defendant had no right to attempt to prove justification, and, even if he had pleaded such a defense, the burden of establishing that defense was upon him. *Linton v. U. F. Co.*, supra. The charge of the court required the plaintiff, not only to prove his own case, which was not disputed upon the trial, but to sustain the burden of proof in negating the defense upon which the defendant was permitted to offer proof, although no such defense had been pleaded. Severe as this burden was, we are satisfied that the plaintiff fully sustained it.

Judgment affirmed, with costs. All concur.

(79 Misc. Rep. 271.)

DOMINICK v. STERN.

(Supreme Court, Special Term, Erie County. January 8, 1912.)

1. INSURANCE (§ 590*)—RIGHT OF PROCEEDS—RIGHTS OF CREDITORS.

Domestic Relations Law (Consol. Laws 1909, c. 14) § 52, authorizes a wife to insure her husband's life, and provides that, if she survives the period or term of insurance, she shall be entitled to the insurance money as her separate property, free from claims of creditors, except that, where the annual premium paid from the husband's property exceeds \$500, that portion of the insurance money purchased by the excess of the premium above \$500 is primarily liable for the husband's debts. Insurance Law (Consol. Laws 1909, c. 28) § 212, concerning life insurance corporations upon the co-operative or assessment plan, and section 238, relative to fraternal beneficiary societies, orders, or associations, provide that the benefits paid or to be paid shall be exempt from seizure on legal or equitable process for debts of the member. *Held* that, in determining whether the amount of annual premium exceeds \$500, within the meaning of Domestic Relations Law, § 52, assessments paid to fraternal benefit societies, or benefit or assessment associations, should not be considered, especially as the provision of the Domestic Relations Law was first enacted in 1840 (Laws 1840, c. 80), while the exemptions of the Insurance Law were not enacted until 1883 (Laws 1883, c. 175), and would have been unnecessary, except to exempt such insurance from the provisions of the earlier statute.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1479, 1482, 1485; Dec. Dig. § 590.*]

2. STATUTES (§ 224*)—CONSTRUCTION—ASCERTAINING INTENT.

In determining the proper construction of apparently conflicting statutes, the purpose and intent in their passage governs, which is to be gathered, not only from the language of the acts themselves, but from their relation to each other in the order of time of their enactment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 300, 302, 306; Dec. Dig. § 224.*]

3. STATUTES (§ 231*)—CONSTRUCTION—EFFECT OF GENERAL REVISION OF STATUTES.

A construction of apparently conflicting statutes, based on the order of their passage, was not affected by the re-enactment of such statutes in the Consolidated Laws, in view of the statutory provision that, in determining the effect of the provisions of that consolidation, they shall not be considered as having been enacted or re-enacted at the time of the passage of the Consolidated Laws, but as having been enacted as of the various times when they first became laws by earlier statutes.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 312; Dec. Dig. § 231.*]

Action by Eugene L. Dominick, as administrator with the will annexed of Jacob Stern, deceased, against Ida B. Stern. On motion for a judgment on the pleadings dismissing the complaint after a demurrer thereto for insufficiency. Demurrer sustained, and complaint dismissed.

Frank C. Brendel, of Buffalo, for plaintiff.

Alfred L. Becker, of Buffalo, for defendant.

WHEELER, J. This action is brought by the plaintiff, in his representative capacity, for the purpose of recovering from the defendant

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

surplus of insurance purchased by the testator upon his life in excess of annual premiums of \$500, pursuant to section 52 of the Domestic Relations Law (Consol. Laws 1909, c. 14) of the state of New York. The complaint alleges the testator died insolvent, and had been insolvent for many years prior to his death. The plaintiff brings this action in behalf of, and for the benefit of, the creditors of the deceased.

[1] Section 52 of the Domestic Relations Law of the state, under which this action is brought, provides as follows:

"A married woman may, in her own name, or in the name of a third person, with his consent, as her trustee, cause the life of her husband to be insured for a definite period, or for the term of his natural life. Where a married woman survives such period or term she is entitled to receive the insurance money, payable by the terms of the policy, as her separate property, and free from any claim of a creditor or representative of her husband, except, that where the premium actually paid annually out of the husband's property exceeds five hundred dollars, that portion of the insurance money which is purchased by excess of premium above five hundred dollars, is primarily liable for the husband's debts. The policy may provide that the insurance, if the married woman dies before it becomes due and without disposing of it, shall be paid to her husband or to his, her or their children, or to or for the use of one or more of those persons; and it may designate one or more trustees for a child or children to receive and manage such money until such child or children attain full age. The married woman may dispose of such policy by will or written acknowledged assignment to take effect on her death, if she dies thereafter leaving no descendants surviving. After the will or the assignment takes effect, the legatee or assignee takes such policy absolutely. A policy of insurance on the life of any person for the benefit of a married woman is also assignable and may be surrendered to the company issuing the same, by her, or her legal representative, with the written consent of the assured."

It appears by the allegations of the complaint that the defendant was the wife of the testator, and caused his life to be insured for her benefit as widow and beneficiary in the following insurance companies, fraternal benefit societies or associations, and assessment associations, for the following amounts, which were paid, and received by her after her husband's death, to wit:

Germania Life Insurance Company of New York.....	\$3,000
Fidelity Mutual Life Insurance Company, Philadelphia.....	3,000
Mutual Benefit Life Insurance Company of New Jersey.....	2,000
Masonic Life Association.....	5,000
Supreme Council of the Royal Arcanum.....	3,000
Knights Templars and Masonic Mutual Aid Association of Cincinnati, Ohio	5,000
Supreme Court of the Independent Order of Foresters, Toronto, Canada	3,000
Emergent Gratufty Fund of Ismailia Temple, Ancient Arabic Order, Noble Mystic Shrine, Oasis of Buffalo, N. Y.....	500

The first three of the above-named companies are incorporated "old-line" insurance companies (so-called), and the annual premiums paid for such insurance to them amounted in the aggregate to \$260.90. The remaining companies or associations are fraternal benefit societies, or benefit or assessment associations. The assessments paid to such associations amounted at the time of the testator's death to the sum of \$468.17. The total amount of premiums and assessments thus paid was the sum of \$729.07.

These premiums and assessments, the complaint alleges, were paid by the testator out of his own funds and with his own money; and the plaintiff contends that the insurance moneys received by the defendant are impressed with a trust in favor of the creditors of the testator for that portion purchased by the excess of premiums paid over \$500. The defendant, on the other hand, maintains that the insurance moneys or benefits paid the defendant by the fraternal benefit societies and benefit or assessment associations are by statute exempt from the claims of creditors of the deceased, and therefore no recovery can be had in this action.

Section 212 of the Insurance Law (Consol. Laws 1909, c. 28), governing "life or casualty insurance corporations upon the co-operative or assessment plan," provides:

"The money or other benefit, charity, relief or aid, paid or to be paid, provided or rendered by any such corporation, association or society shall not be liable to be seized, taken or appropriated by any legal or equitable process, to pay any debt or liability of a member, or any debt or liability of the widow of a deceased member of such corporation designated as the beneficiary thereof, which was incurred before such money was paid to her or such benefit, charity, relief or aid was provided or rendered."

Section 238 of the Insurance Law, governing "fraternal beneficiary societies, orders or associations," provides:

"Membership in any such society, order or association shall give to the member the right at any time, upon the consent of such society, order or association, in the manner and form prescribed by its by-laws, to make a change in its payee or payees, beneficiary or beneficiaries, without acquiring the consent of such payees or beneficiaries. All money or other benefit, charity, relief or aid, to be paid, provided or rendered, or which has heretofore been paid, or which shall hereafter be paid, provided or rendered, by any such society, order or association, whether voluntary or incorporated under this article or any other law, shall be exempt from execution, and shall not be liable to be seized, taken or appropriated by any legal or equitable process, to pay any debt or liability of a member, beneficiary, or beneficiaries of a member. All notices of assessment made upon its lodges, councils, branches or members, or any of them by any such society, order or association, shall truly state the cause and purpose of the assessment, and what portion or amount thereof, if any, is to be used for the payment of other than beneficiary claims. An affidavit made by any officer of such society, order or association that such notice was mailed, stating the date of mailing, shall be presumptive evidence thereof."

The question is therefore presented whether the exemptions provided for in the section last quoted control, or whether the provisions of section 52 of the Domestic Relations Law applies as well to moneys realized from co-operative and benefit insurance as it does to "old-line" insurance; for, if section 52 of the Domestic Relations Law does not govern co-operative and benefit insurance, then, inasmuch as the premiums paid for "old-line" insurance did not exceed the \$500 limit, there can be no recovery in this action. So far as we have been able to ascertain, or the researches of counsel disclose, there is no adjudicated case reported which passes upon the question presented.

[2] In the investigation of this question, we naturally inquire as to the purpose and intent of the Legislature in the passage of the acts.

This is gathered, not only from the language of the acts themselves, but from their relation to each other in the order of the time of their enactment into law.

Investigation discloses that as far back as 1840 the Legislature passed an act containing substantially the same provisions as those embodied in the present fifty-second section of the Domestic Relations Law. Chapter 80, Laws 1840. The statute of 1840 has been amended from time to time until it appears in its present form in the Domestic Relations Law of the Consolidated Laws of the state.

The exemption clauses upon which the defendant relies have their source in subsequent legislation. It was not until 1883 that the Legislature of the state undertook to regulate co-operative and assessment life insurance associations. In that year, it passed "An act to provide for the incorporation of co-operative or assessment life and casualty insurance associations and societies." Chapter 175, Laws 1883. Section 19 of that act provided that:

"The money or other benefit, charity, relief or aid to be paid, provided or rendered by any corporation, association or society authorized to do business under this act shall be exempt from execution, and shall not be liable to be seized, taken or appropriated by any legal or equitable process, to pay any debt or liability of a member."

From this beginning, by amendments and other enactments, the statutes governing exemptions of this class of insurance have finally taken the form contained in the present sections 212 and 238 of the Insurance Law of the state.

It seems clear to our mind that when the Legislature passed the first and original statute of 1883, exempting co-operative and assessment life insurance from liability for the debts of a member, its purpose was to save and relieve such insurance from the operation of the statute of 1840, or any of the subsequent amendments thereto, and to secure absolutely to the beneficiaries of such insurance the enjoyment of the benefit of such insurance, free from the claims of the creditors of the members whose life was insured. The framers of the statute undoubtedly had in mind the probability or possibility that in the absence of some such express exemption the prior statute limiting the amount of insurance exempt from the claims of creditors of the insured might operate on co-operative and benefit insurance, and to guard against such a contingency or possibility provided for the exemptions embodied in the law relating to such life insurance.

If it were not to meet just this situation and guard against it, the exemption clauses as originally enacted in the law of 1883 would have been idle; for under the common law, and independent of the statute, such insurance could not have been reached by the creditors of the member whose life was insured. *Bown v. C. M. B. A.*, 33 Hun, 263; *Beeckel v. I. C. O. U. F.*, 58 Hun, 7, 11 N. Y. Supp. 321, affirmed 124 N. Y. 661, 27 N. E. 413; *Boasberg v. Cronan* (Super. Buff.) 9 N. Y. Supp. 664; *Bloomington v. Lisberger*, 24 Hun, 355; *Pingree v. Jones*, 80 Ill. 177; *Leonard v. Clinton*, 26 Hun, 288; *Pinneo v. Goodspeed*, 120 Ill. 524, 12 N. E. 196; 25 Cyc. 896, and cases cited.

The inference is therefore irresistible that the Legislature intended by these exemptions to place co-operative and assessment insurance in

a class by itself, and to relieve such insurance from the operation of the statute making insurance moneys realized by a wife subject to the debts of the husband where the insurance premiums paid exceed a certain amount. Moreover, to hold otherwise would do violence to the plain and explicit language of the statutes in question.

[3] The fact that these various statutes under discussion have been re-enacted into the Consolidated Laws of the state does not change in any way the construction to be placed upon them. The rules prescribed for the construction of the Consolidated Statutes of the state expressly provides that:

"For the purpose of determining the effect of any of the provisions or sections thereof or any other provision or section thereof, or of any special law theretofore enacted, the several provisions and sections of such laws, and Code amendments and said act amendatory thereof shall not be considered as having been enacted or re-enacted by the Legislature at the time of the passage of the Consolidated Laws or such Code amendments or said act amendatory thereof, *but as having been enacted as of the various times when such provisions and sections first became laws by any earlier statutes,*" etc.

Whether the statutes wholly exempting co-operative and assessment insurance from the claims of creditors of a deceased member are wise or not is not for the court to discuss. Like much benevolent legislation designed for the protection of those dependent on the head of a family, it is possible of abuse. Nevertheless, we must take and administer the law as we find it, and there exist many reasons why these statutes of exemption are, on the whole, wise, and evidently prompted and influenced the Legislature in their passage. In this class of cases, the benefits to be paid are usually only an incident to membership in the fraternal order or association paying them. The benefit paid by any one association is usually limited in amount, whereas the amount of "old-line" insurance which may be written by any one company, or in any one policy, is unlimited. Associations of this character provide a cheap form of insurance as compared with other insurance companies. The assessments to be paid in most assessment companies vary from year to year, instead of being fixed and determined in advance at the time of writing, as in the case of straight "old-line" insurance. The number of assessments may vary from year to year, dependent on the number of deaths of members. In most, if not all, of the co-operative or assessment companies, the beneficiary acquires no vested right in the benefit to be paid prior to the death of the member, but the beneficiary may be changed from time to time prior to the member's death. Doubtless these considerations, in the zeal to save families of members from want, led the state legislators to write the law as we find it on our statute books. And who shall say that on the whole it has not worked well? But, whether wise or not, we deem it the law.

We have therefore reached the conclusion that the defendant's demurrer must be sustained, and judgment directed, dismissing the plaintiff's complaint, with costs.

So ordered.

In re KRISTELLER.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

ATTORNEY AND CLIENT (§ 40*)—ADMISSION—PRIOR CONVICTION OF A FELONY—DISBARMENT.

Where an attorney, on applying for admission to practice, intentionally concealed the fact that he had previously been convicted of a felony, he will be disbarred.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 58; Dec. Dig. § 40.*]

Proceedings by the Bar Association of the City of New York to disbar Frederick W. Kristeller, an attorney. Application granted.

See, also, 136 N. Y. Supp. 1139.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and MILLER, JJ.

Minar Chrystie, of New York City, for petitioner.

Henry F. Cochrane, of Brooklyn, for respondent.

INGRAHAM, P. J. The respondent was admitted to practice upon the certificate of the State Board of Law Examiners by the Appellate Division of this Department in June, 1908. He produced the affidavits of two attorneys that he was of good moral character and answered the usual questions as to his record, in which there was no statement of any criminal charge against him, yet prior to his admission the respondent had had quite a unique criminal career.

It seems he commenced his study of the law in the office of an attorney whose name he could not remember and the date of which is not given. He had been employed, however, for two or three years with a concern known as Smith Bros., and subsequently with a person by the name of Arthur T. Lumley. He had also some connection with a man named Schmitt, and during that employment he was charged by Schmitt with embezzlement. He signed a writing which confessed that he had embezzled some funds from Schmitt, but after signing that instrument the proceedings against him seem to have been dropped. He then entered the employ of the government, and while there was indicted in the United States District Court in Brooklyn on the charge of embezzlement. Under that indictment he was examined as a witness and was acquitted. He was subsequently indicted for perjury committed on the trial of the indictment against him, and upon that indictment he was convicted and sentenced to the Elmira Reformatory in 1903. He served there for 2 years and 8 months, the period for which he was sentenced, and was then discharged. After his discharge he removed to this department from Brooklyn, where he had before lived, and where he had these various criminal charges made against him and was well known, and was here admitted to practice. He admits that he intentionally suppressed, on his application for admission to practice, all information as to his criminal activities, including his conviction and imprisonment for the crime of perjury.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This proceeding was referred to the official referee, who has found these facts, and in fact they were all admitted by the respondent, when examined as a witness before the referee; but the respondent claimed before the referee that since his admission to the bar he had maintained a good character, and produced some evidence to that effect. If the respondent had been admitted to practice before he had been convicted, his conviction would of itself have disbarred him; and if the court had had knowledge of the fact that he had been convicted of a felony before his admission, it certainly would not have admitted him.

The fact of such conviction was intentionally concealed from the court when the respondent made his application for admission to practice, and the fact of his prior conviction of a felony, which was concealed from the court upon his admission, requires his disbarment; and it is so ordered. All concur.

HYMAN v. HYMAN.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. EVIDENCE (§ 590*)—LEGAL ETHICS—WITNESS.

Although contrary to the ethics of the profession for an attorney voluntarily to place himself in a position where it is necessary for him to become a witness in order to establish his client's cause of action, such an act does not render such evidence inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2439; Dec. Dig. § 590.*]

2. DIVORCE (§ 129*)—ADULTERY—SUFFICIENCY OF EVIDENCE.

That plaintiff, on the advice of her attorney, went with the attorney and other persons to a room in which defendant was supposed to be living in a state of adultery with another woman, and there discovered evidence affirming the plaintiff's suspicions, it was improper for the trial court to disregard such evidence, on the ground that the mode of obtaining the evidence enveloped the whole case in an atmosphere of suspicion.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 411-441, 454; Dec. Dig. § 129.*]

Appeal from Special Term, New York County.

Action by Lena Hyman against Louis Hyman. Judgment for defendant, and the plaintiff appeals. Reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, MILLER, and DOWLING, JJ.

Leon Levy, of New York City, for appellant.

Jacob Silverstein, of New York City, for respondent.

PER CURIAM. Action for a divorce. Defendant did not appear in the action or at the trial. At the close of plaintiff's case the complaint was dismissed, and she appeals. After the appeal was taken the defendant appeared.

The complaint was dismissed, as appears from the opinion of the learned justice sitting at Special Term, because the plaintiff's counsel who tried the case advised the plaintiff how to procure evidence and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
139 N.Y.S.—5

then personally assisted in securing the evidence; that such conduct on the part of counsel "is condemned by professional ethics, and should, in like measure, be condemned by public policy"; that while such action does not as matter of law disqualify the counsel from testifying as a witness to the adultery, "yet as matter of fact it shocks the sense of propriety and envelops the whole case in an atmosphere of suspicion."

[1] It is not, so far as we are aware, contrary to professional ethics for an attorney or counsel, if there be legal evidence in existence, to advise his client how to obtain it; and this, even though the action be one to procure a divorce. It is contrary to the ethics of the profession for an attorney or counsel voluntarily to place himself in a position where it is necessary for him to become a witness in order to establish his client's cause of action or defense; but his act ought not to deprive the client of that to which he would otherwise be entitled.

[2] In the present case there is not the slightest doubt, as appears from the record, that the plaintiff was entitled to a judgment of divorce. The defendant was living openly and notoriously with another woman whom he called his wife. The plaintiff had reason to believe that fact. Her counsel advised, if her suspicions were correct, she could, by following his advice, obtain the evidence of it. His advice was followed, and the plaintiff, in company with several other persons, including her counsel, resorted to subterfuge and obtained admission to defendant's room, and what was there seen proved that the wife's suspicions were correct and that the defendant was living and cohabiting with another woman. This was established by several witnesses, including plaintiff's counsel. There is nothing to suggest that their testimony is not true, and the same, being wholly uncontradicted, should have been accepted, and the judgment of divorce granted.

The finding that the defendant had not committed adultery at the time, place, and with the person stated is against evidence, as is also the finding that such adultery was not committed without the connivance, procurement, or consent of the plaintiff, or that the plaintiff had not voluntarily cohabited with the defendant since the discovery of such act of adultery.

The judgment appealed from, therefore, is reversed, and a judgment directed for plaintiff, with costs.

CREELMAN v. STAR CO.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

LIBEL AND SLANDER (§ 6*)—PURPOSE OF AN INNUENDO.

An article charging Charles F. Murphy and Mayor Gaynor with wrongfully retiring a deputy fire chief on full pay, under a plan to have him appointed state fire marshal, ending with, "The first step was the preparation of a long letter to the mayor by James Creelman," the plaintiff, "president of the Municipal Civil Service Commission," telling of such deputy fire chief's unfitness for further service and recommending his retirement at full pay, did not reflect upon plaintiff's act or motive in writing the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

letter, and was not libelous as to him, and cannot be made so by innuendo; the purpose of an innuendo being, where a publication is capable of two meanings, one innocent and the other libelous, that the libelous meaning was the one intended, and not to enlarge the publication.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 3-16; Dec. Dig. § 6.*]

Appeal from Special Term, New York County.

Action by James Creelman against the Star Company. From an order overruling a demurrer to the complaint, defendant appeals. Reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, MILLER, and DOWLING, JJ.

Clarence J. Shearn, of New York City, for appellant.

William Harman Black, of New York City, for respondent.

McLAUGHLIN, J. The defendant published in its newspaper the following article:

"Ahearn for Fire Marshal of State.

"Further indications of the alliance between Charles F. Murphy, boss of Tammany, and Mayor Gaynor, were disclosed yesterday in the semiofficial announcement that Murphy had obtained the promise of Governor Dix to appoint Thomas J. Ahearn to the position of State Fire Marshal at \$7,000 a year. This position has just been created by the Legislature.

"Meanwhile, Mayor Gaynor had Ahearn, who has served for many years as deputy fire chief, retired at the full salary of his office, \$4,200 a year. Under the law Fire Commissioner Johnson had authority to retire Ahearn at \$2,100 a year.

"When Murphy decided to name Ahearn as State Fire Marshal, he set to work to have him retired at full pay. The Mayor readily agreed to his plan. The first step was the preparation of a long letter to the Mayor by James Creelman, President of the Municipal Civil Service Commission.

"Creelman's Recommendation.

"In this letter Mr. Creelman pointed out that Ahearn entered the Fire Department in 1873, and in attempting to save a child early in his career had suffered injuries which affected his hearing. Creelman declared he was no longer fit to act as deputy chief and asked that he be retired at full pay. Gaynor indorsed the recommendation, and Commissioner Johnson retired Ahearn on Thursday."

Plaintiff, claiming that the publication, so far as he was concerned, was libelous, brought this action to recover the damages alleged to have been sustained. The complaint, after setting forth the article, and that it was published of and concerning the plaintiff, alleged as an innuendo that it charged Mayor Gaynor and Charles F. Murphy with having wrongfully and as a matter of favoritism agreed upon a plan to have Ahearn retired upon full pay from the position of deputy fire chief and have him appointed to the position of State Fire Marshal at a salary of \$7,000 a year; that the plaintiff, as president of the Municipal Civil Service Commission, "entered with them into the said improper purpose, and in pursuance thereof, and in order to carry out the same, wrote the letter mentioned in the said publication." The defendant demurred to the complaint, upon the ground that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

facts stated did not constitute a cause of action. The demurrer was overruled, and it appeals.

I am unable to see how the article, as published, can be said to reflect in any way upon the plaintiff's act or motives in writing the letter referred to. Where a publication is capable of two meanings, one innocent and the other libelous, then the complaint must show by innuendo that the libelous meaning was the one intended by the publisher. This is the purpose of an innuendo, and not to enlarge the publication. If an article is not susceptible of a libelous construction, it cannot be made so by innuendo. *Morrison v. Smith*, 177 N. Y. 366, 69 N. E. 725; *Fleischmann v. Bennett*, 87 N. Y. 231; *Klaw v. N. Y. Press Co., Ltd.*, 137 App. Div. 686, 122 N. Y. Supp. 437; *Maerlender v. Porter*, 114 App. Div. 180, 99 N. Y. Supp. 533.

No one, it seems to me, reading the article, would be led to believe that the plaintiff had joined in an alliance with the mayor and Murphy to bring about the retirement of Ahearn. The article does not so state. There is nothing in it from which it can even be inferred that the plaintiff had any knowledge, at the time he wrote the letter referred to, of the plan or purpose of the mayor and Murphy, or that he, by writing the letter, was aiding them in any way. Nor is there anything in the article, as published, from which it can even be inferred that any of the statements contained in the letter written by the plaintiff were false, or that it was not written with the best of motives.

The plaintiff, as president of the Municipal Civil Service Commission, had no power to retire Ahearn nor could he do a single act which would bring about that result. Section 790 of the Greater New York Charter vested that power with the Fire Commissioner. The mere statement that the plaintiff had written the letter, without in any way impugning his motives, could not, as it seems to me, possibly be interpreted as defaming him, either in his official or unofficial capacity. For aught that appears from the article itself, the letter may have been written with the best of motives, and every fact therein stated been true.

The judgment appealed from, therefore, is reversed, with costs, and the demurrer sustained, with costs, with leave to plaintiff to serve an amended complaint, on payment of the costs in this court and in the court below. All concur.

WALSH v. BARRETT.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. PLEADING (§ 129*)—ANSWER—ADMISSIONS.

A paragraph of the complaint, alleging that on a certain date defendant was the president of an express company, not denied by the answer, is thereby admitted.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270-275; Dec. Dig. § 129.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PLEADING (§ 121*)—ANSWER—DENIAL OF KNOWLEDGE OR INFORMATION.

Under Code Civ. Proc. § 500, requiring the answer to contain a general or special denial of each controverted material allegation of the complaint, or a denial of any knowledge or information thereof sufficient to form a belief, the president of an express company, sued for injuries to plaintiff by one of its trucks, may deny any knowledge or information sufficient to form a belief as to whether the truck which struck plaintiff was owned by the company, was being driven in a given direction on a street named, and was under the management of the company and its servants, and he cannot be ordered to make a more specific denial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 245-248; Dec. Dig. § 121.*]

Appeal from Special Term, New York County.

Action by William Walsh against William M. Barrett, as president of the Adams Express Company. From an order requiring defendant to make its answer more definite and certain, defendant appeals. Reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Everett, Clarke & Benedict, of New York City (C. W. Wickersham, of New York City, of counsel), for appellant.

Joseph J. Baker, of New York City, for respondent.

CLARKE, J. Plaintiff brings this action to recover damages for being negligently run down by one of defendant's trucks. The amended complaint in paragraph 6 alleges:

"That on said 16th day of December, 1911, the said Adams Express Company, of which the said William M. Barrett was and is the president, was the owner of the certain automobile truck which, at the time the plaintiff sustained the injuries hereinafter alleged, was being driven in a northerly direction along said Fifth avenue, and under the control, management, and direction of said Adams Express Company, its servants, agents, and employes, and which said automobile truck struck plaintiff."

The amended answer verified by William M. Barrett, alleges:

"Second. Denies that he had any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in articles 5 and 6 of the amended complaint."

[1] The order appealed from requires the defendant to—

"separately deny or admit the following allegations of paragraph 6 of the amended complaint in this action: (1) That on December 16, 1911, William M. Barrett was the president of the Adams Express Company."

The second paragraph of the amended complaint alleges that fact, and, not being denied in the answer, is therefore admitted. It is idle to ask the defendant to deny or admit it again. Further, in the sixth paragraph of the complaint it is merely a descriptive clause.

[2] The order further requires the defendant to admit or deny:

"(2) That on December 16, 1911, the Adams Express Company was the owner of the certain automobile truck which struck the plaintiff. (3) That

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the said truck, at the time it struck the plaintiff, was being driven in a northerly direction along Fifth avenue. (4) That at the time it was under the control and management of the Adams Express Company, its servants, agents, and employes."

It further provided that the second clause of the answer should be stricken out.

The effect of this order is to deny to the defendant the right to interpose an answer in the precise form allowed by section 500 of the Code of Civil Procedure. Such provision is appropriate to the case at bar, because it is unreasonable to require the president of such a company as the defendant, with a large number of servants operating and controlling many vehicles, to swear specifically one way or the other as to such details of the plaintiff's cause of action.

Kirschbaum v. Eschmann, 205 N. Y. 127, 98 N. E. 328, cited by respondent, does not apply. In that case there were corporate acts having to do with the passage of resolutions, the issuing of notes, the execution of underwritings, and the making of written agreements which were presumptively within the knowledge of the corporation and its officers, because executed and acted upon by them. Here, on the contrary, is a negligence case, and the defendant is called upon to answer or deny whether a truck was going in a particular direction, on a particular street, at a particular time. It seems to me that no such pleading can be required. The rule which has been applied when a man denies that he has any knowledge or information sufficient to form a belief as to his own residence (*Olsen v. Singer Mfg. Co.*, 143 App. Div. 142, 127 N. Y. Supp. 697), or as to papers on file in public offices (*Rochkind v. Perlman*, 123 App. Div. 808, 108 N. Y. Supp. 224, 1151), has no application.

The order appealed from should be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs to the appellant. All concur.

GLENN v. UNION-BUFFALO MILLS CO. et al.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

PLEADING (§ 120*)—ANSWER—DENIALS AND ADMISSIONS.

The complaint in a suit in equity did not contain a plain and concise statement of the facts constituting the alleged cause of action, as required by Code Civ. Proc. § 481, but was voluminous, and pleaded evidence and conclusions, and the answers to the several paragraphs admitted and alleged certain facts, and, "except as so expressly admitted," denied the allegations. *Held*, on motion to require defendants to amend, so as to specifically deny each material allegation and be so definite that their precise meaning and application would be apparent, that defendants in answering need not admit the allegations in the precise language alleged, but could state the facts admitted to be true and deny those not admitted, and that, as they could not safely or truthfully specifically admit or deny each allegation, they were not required to serve such amended answers.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 244, 253, 254, 257, 258; Dec. Dig. § 120.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Special Term, New York County.

Action by William S. Glenn against the Union-Buffalo Mills Company and others. From orders requiring defendants to serve amended answers, they appeal. Reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

George W. Schurman, of New York City, for appellants.

Robert R. Reed, of New York City, for respondent.

McLAUGHLIN, J. Appeal by the Union-Buffalo Mills Company and its officers and directors, and a separate appeal by the defendants composing the firm of Fleitmann & Co., from orders requiring them to amend their separate answers so that the same shall "contain a general or specific denial of each material allegation of paragraphs" 3 to 33, inclusive, "of the complaint controverted by the defendants, or of any knowledge or information thereof sufficient to form a belief, and, further, that such denials and each of them shall be definite and certain, so that the precise meaning and application thereof is apparent." The orders also directed the defendants to serve copies of their amended answers within 20 days, and in default thereof paragraphs 2 to 10, inclusive, of the answers, are ordered to be stricken out.

The action was commenced on the 20th of August, 1912, to prevent the Buffalo Mills Company from increasing its capital stock by the issue of what is termed a prior preferred stock, to authorize which a meeting of the stockholders had been called. Plaintiff also sought to enjoin Fleitmann & Co. from voting in favor of the proposed issue upon certain common stock held by it, and to compel a cancellation of that stock, and for an accounting. The answers of the Buffalo Mills Company and Fleitmann & Co. are substantially the same. In the second paragraph the defendant "admits and alleges" (then follow the statement of certain facts), and concludes:

"Except as so expressly admitted, said defendants deny the allegations, and each of them, in paragraph 3 of the said amended complaint contained."

This paragraph well illustrates the other paragraphs of the answer. What the plaintiff wants, and to which he claims he is entitled, is a specific admission or denial of the facts set forth in the complaint.

The action is in equity, and the complaint quite voluminous. It is difficult to see what bearing some of the facts set forth in the complaint have upon the issue sought to be tried. After a consideration of both the complaint and answers, I do not see how the defendants could truthfully, or with safety, specifically admit or deny each allegation in the complaint. The complaint is not free from criticism. It does not contain, as required by section 481 of the Code of Civil Procedure, a plain and concise statement of the facts constituting the alleged cause of action; on the contrary, some of the matter pleaded is evidence, or a legal conclusion of the pleader. The result is a long complaint, and this, of itself, necessitates a longer answer than would otherwise be required. Defendants were not required, in answering,

to admit the allegations of the complaint in the precise language there used. They could state the facts they admitted to be true, and deny those not admitted.

This practice is recognized in several well-considered authorities. Thus in *Grant v. Pratt & Lambert Co.*, 52 App. Div. 540, 65 N. Y. Supp. 486, the statement is made that the rule governing the effect of admissions contained in a pleading requires that the matter shall be taken as a whole, and the admission is limited by any statement therein which qualifies or explains. In *Griffin v. Long Island R. R. Co.*, 101 N. Y. 348, 4 N. E. 740, the denial was "of each and every allegation of the complaint not before admitted or controverted." In *Lake Ontario National Bank v. Judson*, 122 N. Y. 278, 25 N. E. 367, it was said:

"The denial by the defendant in his answer, except as therein admitted, of each and every allegation of the complaint, put in issue any material allegation of the complaint not distinctly admitted by the answer."

See, also, *Burley v. German-American Bank*, 111 U. S. 216, 4 Sup. Ct. 341, 28 L. Ed. 406; *Clark v. Dillon*, 97 N. Y. 370.

Neither the complaint nor answer can be said to be a model pleading; but one seems to be as good as the other. Whether this be so or not, I am unable to see any difficulty in determining what the defendants admit and what they deny.

The orders appealed from, therefore, should be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs. All concur.

PAKAS v. HURLEY.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

SET-OFF AND COUNTERCLAIM (§ 22*)—AMOUNT COLLECTED IN RUNNING HOTEL.

Where the manager of a hotel continued in the possession and management of same after being discharged, and also wrongfully collected rent for stores in the same building, he had no right to recoup himself for losses in running the hotel out of the rents collected for the stores, even though, in the owner's action for the money collected, he was entitled to offset the expenses of running the hotel against the receipts from the hotel.

[Ed. Note.—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. §§ 26-37; Dec. Dig. § 22.*]

Laughlin, J., dissenting.

Appeal from Trial Term, New York County.

Action by Solomon L. Pakas against Frank C. Hurley. From the judgment, and from denial of a new trial, plaintiff appeals. Modified and affirmed.

See, also, 137 N. Y. Supp. 1132.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and MILLER, JJ.

J. Arthur Corbin, of New York City, for appellant.

Albert I. Sire, of New York City, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MILLER, J. This case was twice considered by this court on a former appeal. 146 App. Div. 746, 131 N. Y. Supp. 454; 149 App. Div. 909, 133 N. Y. Supp. 499. The learned trial court, on the trial now being reviewed, literally followed the language of the opinions then rendered, and as a result fell into an error, which it is our duty to correct in the interest of justice. The error is traceable to the careless writing of the writer of this opinion, and it may be well to state the essential facts as now developed.

The plaintiff was the owner of premises known as the Hotel Orleans. The defendant, after having been discharged as manager on the 30th of June, 1908, wrongfully continued in possession during the month of July, running the hotel, paying the expenses, and collecting money from guests of the hotel and from other tenants in the building. This suit was brought to recover the sums alleged to have thus wrongfully been received. It appears without dispute that the defendant collected the sum of \$513.80 from guests of the hotel on June accounts, the sum of \$472.50 from store rentals for the month of July, and the sum of about \$2,660 from guests of the hotel for room rentals, restaurant charges, and the like for July. The defendant's evidence tends to show that the disbursements in running the hotel during the month of July were over \$3,200.

We reversed a judgment in favor of the plaintiff on the former appeal for the exclusion of evidence to show the expenses incurred by the defendant in running the hotel. The precise and only point decided was that it was error to exclude such evidence. In the statement of facts in the opinion reported in 146 App. Div. 746, 131 N. Y. Supp. 454, the writer stated that the defendant collected "from guests for room rentals for the month of July the sum of \$2,112.07," though in fact that sum included said sum of \$472.50 received from store rentals, and no distinction was made, with respect to the right of set-off, between room rentals and store rentals. We think it plain that there is a distinction between the two classes of receipts, and that the expenses incurred to make the collections in one class possible could not be offset against collections in the other class.

The defendant could not take possession of the plaintiff's hotel, run it at a loss, and use the money, wrongfully collected from other tenants of the building, to make good the loss. Those tenants were the plaintiff's not his. He did not have to run the hotel to make the collections from them possible, and those collections are as distinct from the receipts of the hotel as though those tenants had occupied a separate building. The defendant was sued as a wrongdoer for money received by him. He was not sued for the value of the use and occupation. Wherefore he was entitled to offset the expenses reasonably and necessarily incurred in running the hotel against the receipts from the hotel. But if those expenses exceeded those receipts, the loss fell upon him, and he was not entitled to recoup himself by receipts from other sources belonging to the plaintiff.

There is some evidence that the defendant furnished light and water to the other tenants of the building. But, assuming that he was entitled to offset the expense of doing that against the collections

from said tenants, he made no attempt to prove what that expense was, or to separate it in any way from the hotel expense account.

The jury found a verdict for the sum of \$13, and it is easily demonstrated how that result was reached. The defendant was not entitled to offset any of his disbursements against the collections on June accounts, which amounted to \$513.80, but were referred to during the trial as amounting to \$513. The plaintiff conceded that he owed the defendant \$500 salary as manager, which he credited in his complaint. The disbursements for July were more than the total receipts, including the store rentals, and so the jury found a verdict for \$13 thus allowing the disbursements to offset the July receipts and deducting the salary of \$500 from the receipts for June of \$513. But the plaintiff was entitled, upon the undisputed evidence, to recover the store rentals of \$472.50 in addition to the receipts on June accounts, and the defendant was not entitled to offset against either of those sums any amount, except the sum of \$500 voluntarily allowed by the plaintiff.

Wherefore the judgment should be modified, by increasing the recovery to the sum of \$485.50, with interest from August 1, 1908, and, as thus modified, affirmed, with costs to the appellant.

INGRAHAM, P. J., and CLARKE and SCOTT, JJ., concur

LAUGHLIN, J. (dissenting). As stated in my dissenting opinion on the former appeal herein (149 App. Div. 909, 133 N. Y. Supp. 499), I regard this as an action for the conversion of moneys, which it was the duty of the defendant to turn over and account for to the plaintiff, without any deduction; and, on the exception to the refusal of the court to adopt that theory, I vote for a reversal, and for a new trial.

SECURITY TITLE & TRUST CO. OF YORK, PA., v. STEWART.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. JUDGMENT (§ 250*)—THEORY OF COMPLAINT—CHANGE OF THEORY.

Where the theory of the complaint was that the defendant's agreement was for the purchase of stock, and not to subscribe to capital stock, no recovery could be had on the theory that the agreement constituted a subscription agreement.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 436; Dec. Dig. § 250.*]

2. CORPORATIONS (§ 121*)—PURCHASE OF STOCK—ACTION FOR PRICE—TENDER OF DELIVERY.

Where defendant entered into a contract for the purchase of corporate stock, the capital of which had not been paid in, no action for the price can be maintained after all the installments are due, unless the seller tenders a delivery and shows an ability to perform; it otherwise not appearing that defendant would obtain the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Special Term, New York County.

Action by the Security Title & Trust Company of York, Pa., against James C. Stewart. From an order denying his motion for judgment on the pleadings, defendant appeals. Reversed, and motion granted.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and MILLER, JJ.

Gilbert E. Roe, of New York City, for appellant.

Louis Marshall, of New York City, for respondent.

LAUGHLIN, J. The only point presented by the appeal is whether the complaint states facts sufficient to constitute a cause of action, for that is the sole ground upon which the motion for judgment upon the pleadings was made.

[1] The action is brought on an assigned claim of the Prudential Finance Company to recover the sum of \$12,500, the consideration which it is alleged the defendant agreed to pay plaintiff's assignor on a subscription for 10,000 shares of the capital stock of the La Luz Mining & Tunnel Company. It was conceded at Special Term, and is conceded on the appeal, that the theory of the complaint is that the defendant's agreement with plaintiff's assignor was for the purchase of stock, and that it was not an agreement to subscribe for capital stock in the La Luz Mining & Tunnel Company, although it is in the form of a subscription agreement; and manifestly no recovery could be had upon the theory that the agreement constituted a subscription agreement with the La Luz Company, and, in the circumstances, that question does not require further consideration.

[2] By the terms of the agreement, a copy of which is annexed to the complaint, the subscribers agreed with one another and directly with the plaintiff's assignor. It was to become of force when subscriptions in the same form for 100,000 shares of the capital stock should be obtained by subscribers whose responsibility should be approved by the plaintiff's assignor, and notice thereof should be given to the subscribers. It is alleged that the requisite subscriptions were obtained, as provided in the agreement, on or about the 1st day of June, 1905, and that each subscriber was thereupon duly notified thereof. The agreement required each subscriber to pay 10 per cent. of the amount of his subscription when thus notified, and the remainder in installments as called by the board of directors of plaintiff's assignor; but it limited the board in calling for subscriptions to not more than 10 per cent. of each subscription in any one month, counting from the time of payment of the first installment. With respect to the delivery of the stock, the agreement provided as follows:

"The stock hereby subscribed for shall be delivered upon payment of the last installment; but if the full amount subscribed shall not be called prior to July 1, 1906, then, on that date, each subscriber who is not in default shall be entitled to receive stock to the amounts actually paid on his subscription hereunder."

The agreement contained provisions not involved on the appeal, by which the plaintiff's assignor was authorized to borrow money thereon, and the subscribers were thereupon to become severally liable

for their respective proportionate shares of the loan. There is no recital in the agreement as to whether the plaintiff's assignor then held the stock, or with respect to when or how it was to acquire it; and there is no allegation in the complaint that plaintiff's assignor, or the plaintiff, ever had or was in a position to acquire the stock, or that delivery of the stock was tendered to the defendant, or that the plaintiff is in a position to make delivery upon payment of the subscription. For aught that appears by the agreement, or the complaint, if the defendant were required to pay his subscription, he might be unable to obtain the stock. According to the allegations of the complaint, at the time the action was commenced, all of the installments on the defendant's subscription had matured, and he was in default with respect to each of them; and the plaintiff seeks to recover the entire amount of the defendant's subscription.

The learned counsel for the respondent contends that the plaintiff was under no obligation to tender delivery of the stock, for the reason that the subscription was payable in installments, and the defendant was not entitled in any event to receive the stock until after he had paid nine installments, and at most at the time of paying the tenth installment. There is no force in this contention, for all of the installments having become due, and the defendant being in default at the time the action was commenced, the case is precisely the same as if the whole amount was payable at one time. *Beecher v. Conradt*, 13 N. Y. 108, 64 Am. Dec. 535; *Booth v. Milliken*, 127 App. Div. 522, 111 N. Y. Supp. 791, affirmed 194 N. Y. 553, 87 N. E. 1115.

It is not contended in behalf of the respondent that this was an executed contract of sale, and that plaintiff's assignor held the stock as collateral security for the payment of the defendant's subscription agreement; but *James v. Hamilton*, 2 Hun, 630, which was affirmed on appeal (63 N. Y. 616), is cited in support of the argument that the defendant was not entitled to demand a delivery of the stock until after payment of the ninth installment. It was held in that case that where there is an *executed* contract for the sale of personal property, and the property is held as security for the payment of a note given for the purchase price, there need be no tender before bringing an action on the note; but that was upon the theory that the property was held as collateral and that title thereto had passed to the purchaser. Of course, it is unnecessary to tender the return of collateral held as security for a note before bringing an action thereon; but that is not this case.

This was an executory contract for the sale of the stock, and the title did not pass to the defendant at the time he signed the subscription agreement, and if he ever obtains title to stock by virtue of the agreement it will not be until he pays the purchase price. Therefore the ordinary well-settled rule, that an action on an executory contract to recover the purchase price of property cannot be maintained unless the plaintiff has tendered a delivery and is able to perform, applies. *Kohlmetz v. Calkins*, 16 App. Div. 518, 44 N. Y. Supp. 1031; *Considerant v. Brisbane*, 14 How. Prac. 487; *Levy v. Burgess*, 64 N. Y. 390; *Ewing v. Wightman*, 167 N. Y. 107, 60 N. E. 322; *Booth v. Milliken* and *Beecher v. Conradt*, *supra*.

It follows that the order should be reversed, with \$10 costs and disbursements, and the motion granted, with \$10 costs, but with leave to plaintiff to amend, on payment of costs of the appeal and of the motion. All concur.

STOUT v. WHITE.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. PLEADING (§ 40*)—COMPLAINT—TIME FOR FILING—LEAVE TO SERVE.

Where action was commenced July 12th, by summons without a complaint, and by consent time to serve a complaint was extended until September 20th, and on October 23d defendant filed a motion to dismiss for want of a complaint, plaintiff's motion for leave to serve a complaint thereafter, unaccompanied by a copy of his proposed complaint, an affidavit of merits, or any excuse for default, should have been denied.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 91-95; Dec. Dig. § 40.*]

2. DISMISSAL AND NONSUIT (§ 58*)—GROUNDS—WANT OF PROSECUTION.

Where action was commenced July 12th by summons without a complaint, defendant, who appeared and consented that a complaint might be served before September 20th, was entitled to a dismissal for failure to file such complaint, where plaintiff's motion for leave to serve a complaint was presented without copy of the proposed complaint, affidavit of merits, or excuse for his default.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 134-139; Dec. Dig. § 58.*]

Appeal from Special Term, New York County.

Action by James N. Stout against Archibald S. White. From an order denying a motion to dismiss the action for want of prosecution, and from an order granting a motion to open the default and for leave to serve a complaint, defendant appeals. Orders reversed, motion to open default denied, and motion to dismiss granted.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Charles E. Thorn, of New York City, for appellant.

Wm. H. Osborne, of New York City, for respondent.

PER CURIAM. The defendant appeals from two orders—one denying his motion to dismiss for want of prosecution, and the other opening plaintiff's default in failing to serve a complaint.

[1, 2] The action was commenced on July 12, 1912, by the service of a summons without a complaint. Defendant duly appeared on July 31st. By consent plaintiff's time to serve a complaint was extended until September 20th. It was not served, and on October 23, 1912, defendant moved to dismiss for lack of prosecution. Plaintiff thereupon moved, on an order to show cause, to open his default and for leave to serve the complaint. Both motions came on to be heard at the same time, with the result that plaintiff's motion was granted and defendant's motion denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The plaintiff served no copy of a proposed complaint, no affidavit showing merits, and gave no excuse for his default. His motion should have been denied, and that of defendant granted.

The order opening plaintiff's default and permitting him to serve a complaint is therefore reversed, and the motion denied, with \$10 costs, and the order denying defendant's motion to dismiss is reversed, and the motion granted, with \$10 costs, with \$10 costs and disbursements to defendant in this court.

WACKER v. WACKER.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. DOMICILE (§ 10*)—HUSBAND AND WIFE—PERSONAL RIGHTS AND DUTIES.

A husband's domicile is prima facie that of the wife.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 39; Dec. Dig. § 10.*]

2. HUSBAND AND WIFE (§ 3*)—PERSONAL RIGHTS AND DUTIES—DOMICILE.

Where a married woman is wrongfully abandoned by, or for good and sufficient reasons leaves, her husband, she may acquire a separate domicile for the purpose of enforcing her rights.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 5-8; Dec. Dig. § 3.*]

3. DOMICILE (§ 8*)—JURISDICTION—DOMICILE OR RESIDENCE OF PARTIES.

A domicile, once acquired, is presumed to continue until a new one is acquired.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 36, 37; Dec. Dig. § 8.*]

4. DIVORCE (§ 62*)—JURISDICTION—"DOMICILE" OR RESIDENCE OF PARTIES.

A wife, abandoned by her husband in a foreign country, and who at the commencement of an action for separation had never been in this state, was not entitled to maintain such action under Code Civ. Proc. § 1763, subd. 1, authorizing such an action where both parties are residents of the state when the action is commenced, since under the definition of "domicile" as the place where one has his true, fixed, permanent, and principal establishment, to which, whenever he is absent, he has the intention of returning, her domicile did not follow that of her husband, and, even if she had a constructive domicile in this state, that was insufficient, in view of the former provision of the Revised Statutes that the action might be maintained between a husband and wife, inhabitants of the state, and the fact that the only change in the Code is the insertion of the word "both," which requires an actual, as distinguished from a constructive, residence.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 208-216, 220; Dec. Dig. § 62.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2168-2179; vol. 8, pp. 7641, 7642.]

Appeal from Special Term, New York County.

Action by Fredericka Wacker against John F. Wacker. From an order denying a motion to vacate an order awarding a temporary alimony and counsel fee, and appointing a receiver in sequestration proceedings, defendant appeals. Reversed, and motion granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Benjamin Sharps, of New York City, for appellant.

William H. Hamilton, of New York City, for respondent.

McLAUGHLIN, J. The parties intermarried in Germany in 1886, where they continued to reside until some time in 1891, when, according to the allegations of the complaint, the defendant, wrongfully and without just cause or provocation, abandoned the plaintiff, and has since refused to support or live with her. Shortly after the abandonment, the defendant came to the state of New York, where he has since resided. The action was commenced by the service of a summons on the defendant on the 31st of May, 1912, and the plaintiff was not then within the state of New York, nor had she ever been in the United States. Subsequently she left Germany, and reached New York about the 20th of June, 1912; the defendant in the meantime having temporarily left New York for Germany, where he was when she arrived. He did not appear in the action, but his default was subsequently opened, and he was permitted to come in and defend. During his default the plaintiff obtained, *ex parte*, an order awarding her \$10 a week alimony and \$500 counsel fee, and also an order appointing a receiver of defendant's property in sequestration proceedings. After defendant had appeared in the action, he moved, upon notice, to vacate the order awarding alimony and counsel fee and appointing the receiver. The motion was denied, and he appeals, urging that both orders are erroneous, since the court did not have jurisdiction of the subject-matter of the action.

The question, therefore, which is presented by the appeal, is whether, under our statute (section 1763 of the Code of Civil Procedure), this action can be maintained, when, at the time it was commenced, plaintiff was not, and never had been, a resident of the state. The statute provides that an action of this character may be maintained (1) where both parties are residents of the state when the action is commenced; (2) where the parties were married within the state, and the plaintiff is a resident thereof when the action is commenced; and (3) where the parties, having been married without the state, have become residents of the state, and have continued to be residents thereof at least one year, and the plaintiff is such a resident when the action is commenced.

[1, 2] Plaintiff contends that she comes within subdivision 1, and was in fact a resident of the state when the action was commenced, because her husband was then domiciled and resided here; in other words, that she had a right, at her election, to consider her husband's domicile and residence her own. The rule seems to be well settled that the domicile of the husband is *prima facie* that of the wife. *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129. This rule, however, has its exception, which is that where a married woman is wrongfully abandoned, or for good and sufficient reason leaves her husband, she may acquire a separate domicile for the purpose of enforcing her rights. *Cheever v. Wilson*, 76 U. S. 108, 19 L. Ed. 604; *Harris v. Harris*, 83

App. Div. 123, 82 N. Y. Supp. 568; *Ensign v. Ensign*, 54 Misc. Rep. 289, 105 N. Y. Supp. 917; affirmed 120 App. Div. 882, 105 N. Y. Supp. 1114. I have been unable to find any authority in this state to the effect that the domicile acquired by the husband after he has wrongfully abandoned his wife is *prima facie* her domicile. There are authorities in some of the other states to this effect; but they seem to proceed upon the theory that she could not, if she so desired, acquire a separate domicile. *Nichols v. Nichols* (C. C.) 92 Fed. 1; *Greene v. Greene*, 11 Pick. (Mass.) 415; *Kashaw v. Kashaw*, 3 Cal. 313; *Masten v. Masten*, 15 N. H. 159; *Mellen v. Mellen*, 10 Abb. N. C. 329, and note.

[3, 4] Here plaintiff's domicile of origin and matrimonial domicile were in Germany. Was her domicile, upwards of 20 years after being abandoned, *prima facie*, the domicile of the husband; she in the meantime not having done a single act indicating an intention on her part to so construe it? Domicile of origin is presumed to continue until a new one is acquired (*Dupuy v. Wurtz*, 53 N. Y. 556), and the burden of proving a change rests upon the party alleging it. *Matter of Newcomb*, 192 N. Y. 238, 84 N. E. 950. Domicile has been defined as the place where one "has his true, fixed, permanent home and principal establishment, to which, whenever he is absent, he has an intention of returning." *Story on Conflict of Laws* (8th Ed.) p. 41. Under this definition, it is not difficult to see the plaintiff, at the time the action was commenced, did not have a domicile in the state of New York in fact, because she had never been here, and so far as appears had no intention of coming. If she were domiciled here, then it was solely by reason of the fiction that her domicile followed that of her husband, which, under the facts here presented, I do not think it did. But, even assuming that she had a constructive domicile in the state of New York, I do not believe this gave her the right, without coming into the state, to maintain this action. The plaintiff, if she can maintain the action at all, must come within the first subdivision of the section of the Code hereinbefore referred to, which provides that such an action may be maintained:

"1. Where both parties are residents of the state when the action is commenced."

Prior to 1880 the Revised Statutes provided (2 Revised Statutes, 146, pt. 2, c. 8, tit. 1, § 50) that an action for separation might be maintained:

"1. Between any husband and wife, inhabitants of this state."

It seems to me clear that under the Revised Statutes the plaintiff could not maintain the action, because she was not an actual inhabitant of the state, nor could she claim to be a constructive one by reason of the domicile of her husband. There is nothing in the enactment of 1880 (chapters 178 and 245, Laws of 1880) to indicate an intent on the part of the Legislature to enlarge the scope or change the purpose of the statute; on the contrary, the only change of substance in the words used would seem to indicate that an actual residence here was necessary to the maintenance of the action. The words are,

"where *both* parties are residents." The word "*both*" is significant. This would not have been used, unless it were intended that *both* parties should reside in the state. If the plaintiff's contention be correct, then she can maintain the action without ever coming here at all; her testimony being taken by commission.

In *De Meli v. De Meli*, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. Rep. 652, the court, speaking of what was required, under the section of the Code referred to, in order to enable a party to maintain an action in this state, said:

"The question here has relation to the legal residence of the parties. And within the meaning of the statute providing for actions of this character, the place of which the parties are residents is that of their permanent abode, which may be distinguished from their place of temporary residence. * * * In legal phraseology, residence is synonymous with inhabitancy or domicile. And it is in this sense that the term 'residence' is used in the provisions of the Code before referred to, and persons having that relation to this state are its citizens and residents, and for the purposes of the relief, like that in view of this action, they are subject to the jurisdiction of its courts."

In *Hewes v. Hewes*, 16 N. Y. Supp. 119,¹ Ingraham, J., said:

"It is clear, however, that the residence spoken of in the section of the Code cited is an actual residence of each of the parties, and not the theoretic residence of the wife, which is presumed to follow that of the husband. The language used is the plural. It is the parties that must be residents of the state, to entitle either of them to maintain the action. * * *"

See, also, *Ramsden v. Ramsden*, 28 Hun, 285; *Toosey v. Toosey* (Com. Pl.) 3 N. Y. Supp. 951.

It is the actual residence of *both* parties which gives the court jurisdiction. If this be true, then the plaintiff cannot maintain this action. Had she been, at the time the action was commenced, a resident of the state, she could do so, because *both* of the parties would, in that case, have been residents.

The order appealed from is reversed, and the motion granted. All concur.

BARCLAY v. BARRIE.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

Appeal from Special Term, New York County.

Action by Reginald G. Barclay against Alexander Barrie. From the judgment, plaintiff appeals. Affirmed.

See, also, 144 App. Div. 934, 129 N. Y. Supp. 1113.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and MILLER, JJ.

Charles F. Brown, of New York City, for appellant.

Edward Bruce Hill, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion of this court on former appeal. 142 App. Div. 670, 127 N. Y. Supp. 403.

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 61 Hun, 625.

INGRAHAM, P. J. (dissenting). This action was before this court on a former appeal from a judgment in favor of the defendant, which was reversed and a new trial ordered. 142 App. Div. 670, 127 N. Y. Supp. 403. The nature of the action and the questions presented are stated in the opinion on the former appeal, and do not need to be restated here.

The copartnership agreement under which the parties to this action had continued business was executed on the 1st of January, 1904, and provided for the copartnership, which continued under various extensions to January 1, 1910; that on or about the 7th of February, 1908, a further agreement was executed, which continued the said copartnership to the 1st day of January, 1913; that the copartnership agreement provided for a capital not exceeding \$150,000, subsequently increased to \$400,000, which would draw interest at 6 per cent. per annum, and which capital should not be withdrawn, except by mutual consent; that all gains, profits, and increase that shall come, grow, or arise from or by means of said business should be divided equally between the parties to the agreement; that at all times during the continuance of said copartnership each partner should give reasonable time, attention, and attendance to, and use reasonable endeavors in, the business of said copartnership, and should, with reasonable skill and power, exert himself for the joint interest, profit, and advantage of the copartnership. The defendant further covenanted that he would not, after the expiration of the agreement, or any removal thereof, manufacture or sell any of the articles specified in the copartnership agreement; that the annual rental for the use of firm name, good will, trade-marks, copyrights, and labels, and the compensation of the plaintiff and to the estate of W. C. Barclay, deceased, for the use thereof, and for the rights conferred by the agreement, should be a sum equal to 55 per cent. of the annual net profits and gains of the entire business to be carried on, which was to be paid to the plaintiff and to the said estate by the copartnership in installments at the end of each month. It was further provided that, in the event of the interest of either partner in said business terminating by limitation, agreement, death, or otherwise, his rental and such interest in capital, etc., should be paid to him or to his legal representatives within five years, with legal interest semiannually, to be computed from the date of such termination. It was also agreed that upon the termination, for any reason, of this copartnership, no allowance should be made to either partner or his representatives for the good will or firm name of said business, or for any trade-mark, copyrights, labels, or rights, or rights to use the same, nor should such good will, firm name, trade-marks, copyrights, labels, or rights be treated or estimated, in any manner, as an asset of the copartnership; but such good will, firm name, trade-marks, copyrights, and labels and rights should revert to the estate of William C. Barclay, deceased, and to the said Reginald G. Barclay, the plaintiff in this action; and the liquidation of said business upon the termination of the copartnership in any way should be in the hands and under the control of the surviving and remaining partners, but the legal representative of a deceased partner was to have a voice in such liquidation.

The court found that from the beginning of the present partnership

down to about March, 1907, the plaintiff attended to the affairs of the partnership business with regularity; that from March, 1907, to May 10, 1908, the plaintiff attended to the affairs of the partnership only irregularly, under and by virtue of the agreement of January 4, 1907, and February 7, 1908, whereby he agreed to pay to the defendant an additional 5 per cent. of the profits of the partnership until he should notify the defendant of his desire to assume a more active part in the management of the business; that the defendant attended regularly to the affairs of the partnership business from the beginning of the partnership down to May 10, 1908; that on or about May 10, 1908, the defendant suffered from the rupture of a blood vessel in the brain, and as a result thereof had a paralysis of the right side of his body and a difficulty of speech, and thereby became incapacitated from devoting any time, attention, or attendance to the business of the copartnership, or using reasonable endeavors in the business of the copartnership, or exerting himself for the joint interest, profit, and advantage of the copartnership with reasonable skill or power, and from in any way selling, dealing, or merchandising with the joint stock and increase of said business; that the defendant has not recovered from the effect of said stroke of paralysis, and the said incapacity resulting therefrom, but that his condition will so improve that, prior to the time limited for the existence of the copartnership (January 1, 1913), he will make a practical recovery of his health; that the condition of the defendant will continue to improve, ending in a practical recovery, within the time limited for the existence of the copartnership; that the defendant's mentality has never been involved, and he has not shown any sign of mental deterioration; that on or about March 1, 1909, the plaintiff sent to the defendant a letter calling his attention to the fact that since the 10th day of May, 1908, the defendant had wholly failed to perform any of his duties as provided for by the articles of copartnership; that during all that time the defendant had been continuously absent from the office of the firm, but had left the management wholly to the plaintiff; that under article 7 of the articles of copartnership the plaintiff gave the defendant notice that omissions above specified were breaches of said article 7, and that the plaintiff would consider the said firm terminated after the expiration of 30 days; that on April 1, 1909, the plaintiff changed the partnership bank accounts, so that no check could be drawn on the signature of the defendant, and since May 10, 1908, the defendant had not attended to the business of the partnership, but the business had been managed by the plaintiff; that on or about November 21, 1911, the plaintiff received a letter from the defendant stating the defendant's desire to return to business, and requesting that the bank accounts be changed so as to enable him to draw on them; that the amount of capital contributed in cash by the defendant to the partnership was approximately \$130,000 and the amount contributed in cash by the plaintiff was approximately \$110,000, and each partner had been receiving interest on the cash capital contributed by him to the partnership, and in addition to that there had been paid to the defendant the sum of \$750.

The court found as a conclusion of law that the plaintiff was not entitled to a dissolution of the copartnership, that the defendant had

not committed any breach of the articles of copartnership which would justify a court of equity in dissolving the copartnership, and directed judgment dismissing the complaint.

On the trial it appeared that the defendant had not appeared at the place of business of the copartnership since May 10, 1908, and had never attempted in any way to perform any of his duties as a copartner; that before the last trial of the action the defendant voluntarily absented himself from the state, so that he could not be served with a subpoena, or could not be forced to attend the trial of the action, and the evidence of his physicians seems to me to conclusively establish that in consequence of his physical condition he was incapacitated from attending to the business of the copartnership, or performing the duties that he assumed under the copartnership agreement. The action was tried on the 22d and 25th days of March, 1912. The inability of the defendant to comply with the copartnership articles and to give any time and attention to its business lasted from May, 1908, substantially four years, and the copartnership had less than a year to run. It has been established that the physical disability which existed from March, 1908, had continued until the trial, about four years, and there is no reason to suppose that the defendant could substantially perform the copartnership business on his part during the remaining months of the existence of the copartnership.

When this case was before this court on the former appeal, the judgment for the defendant was reversed, and a new trial ordered. We held that the copartnership agreement did not contemplate a dissolution of the firm ipso facto by the service of a notice by one partner upon the other, even in the case of a long-continued absence, but that "a long-continued and willful neglect of the business might furnish a sufficient ground for the dissolution of a firm; * * * that a partnership will not be dissolved in consequence of the physical incapacity of a partner, which is temporary in its nature, although prolonged, but will be dissolved for total and permanent incapacity." That opinion was concurred in by a majority of the court; but Mr. Justice Laughlin wrote an opinion, wherein I concurred, which states what I consider the true rule, that where it appears that one partner has been stricken with a disease which practically makes it impossible for him to perform the duties assumed by him by his copartnership agreement, such disability is not of a temporary nature, but is permanent in its character, and that the remaining partner is entitled to apply to a court of equity for a dissolution of the copartnership.

Whether we call such a disability permanent or temporary, if it appears by substantial evidence at the time of the trial that the disability was such as to prevent the disabled partner from rendering any substantial service to the firm during the period for which the copartnership was to exist, a court of equity was thereby justified in dissolving the copartnership and liquidating the business, as provided for in the copartnership articles. In May, 1908, there was a copartnership which was to continue for a little less than five years. At that time the defendant was stricken with paralysis, which disabled him from performing the duties of a copartner in the conduct of a business such

as the one carried on by the parties to this action. When such disability had continued for over a year, without any attempt by the disabled partner to seriously perform any of the duties assumed by him under the copartnership articles, the remaining partner had a right to apply to a court of equity for a dissolution of the copartnership; and if, on the trial of the action, it appeared with reasonable certainty that the physical condition of the disabled partner was such that he would not be able to resume his duties as copartner within a reasonable time, and that this disabled condition had existed four years, the copartnership having less than a year to run, and that the disabled partner was not in a condition to attend the trial, the mere opinion of physicians that he was substantially improving, and might, on the last day of the period for which the copartnership was to exist, be able to attend to business, did not justify the court in refusing to dissolve the copartnership.

We have the allegation in the complaint that this disability was permanent, and would continue during the whole term of the existence of the copartnership. We have that fact proved when the case finally came on for trial. The actual condition of the defendant during these four years is certainly the very best evidence as to the permanent condition of his disability; and upon the undisputed facts, as found by the court, I think that this plaintiff was entitled to a judgment dissolving the copartnership as of the date of the commencement of the action.

For these reasons, I think the judgment should be reversed, and judgment directed for the plaintiff upon the findings of the Special Term, as before indicated.

LAUGHLIN, J.. concurs.

(79 Misc. Rep. 59.)

GAGLIONE v. GIAMBRONE.

(Supreme Court, Equity Term, Erie County. January, 1913.)

VENDOR AND PURCHASER (§ 334*)—VOID CONTRACT—REPUDIATION BY VENDEE—VENDOR'S OFFER TO PERFORM.

A vendee could not recover a down payment on a contract for the sale of real property owned by the vendor and his wife as tenants by the entirety, because the contract was not signed by the wife, where the vendor offered to perform, and tendered a deed executed by both himself and his wife, whereupon, in case of the vendee's refusal to perform, the down payment would be forfeited.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. § 334.*]

Action by Giuseppe Gaglione against Antonio Giambrone to recover part of the purchase price paid on an alleged void contract for the sale of realty. Judgment for defendant.

F. S. Jackson and William Armstrong, both of New York City, for plaintiff.

Lanza & Miceli, of Buffalo, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BROWN, J. Defendant and his wife are the owners as tenants by the entirety of certain real estate in the city of Buffalo. On December 28, 1911, the defendant and the plaintiff entered into a contract in writing under seal whereby the defendant agreed to sell and convey such real estate to the plaintiff on January 15, 1912, by delivering to plaintiff a warranty deed free and clear of all incumbrances; the plaintiff on December 28, 1911, paying to defendant the sum of \$500 and agreeing to pay the balance of the purchase price on delivery of the deed. On or about January 10, 1912, the plaintiff repudiated the contract and demanded of defendant that the \$500 be repaid to him. Such money not having been paid, the plaintiff on January 13, 1912, commenced this action for the recovery of such down payment, alleging in his complaint that, the contract not having been executed by the defendant's wife, the same was void; that, the real estate being owned by the defendant and his wife as tenants by the entirety, the wife not signing the contract, there was no contract in writing signed by the grantors, as required by the statute of frauds. On January 15, 1912, the defendant, in pursuance of the provisions of the contract, duly tendered to plaintiff the deed provided by the contract, duly executed by the defendant and his wife, and demanded specific performance of the contract by payment of the balance of the purchase price. The plaintiff refusing to accept such deed and declining to pay the unpaid purchase money, the defendant interposed an answer, denying the invalidity of the contract, alleged his readiness to perform, and demanded judgment on his counterclaim for specific performance.

The proofs upon the trial sustain the allegations of the defendant. There is no proof of any default on the part of defendant. He has done precisely what he agreed to do. Even assuming that the contract, not being executed by the defendant and his wife, could not be enforced by the wife, it is not seen how the plaintiff would be entitled to recover his earnest money upon the facts in this case. It has long been the settled law of this jurisdiction that a vendee cannot recover a payment made to apply on the purchase price of real estate under a parol contract which is void within the statute of frauds, unless the vendor has repudiated the contract or is unable or unwilling to perform. *Collier v. Coats*, 17 Barb. 471; *Fleischman v. Plock*, 19 Misc. Rep. 649, 44 N. Y. Supp. 413; *Quinto v. Alexander*, 123 App. Div. 1, 107 N. Y. Supp. 422; *Hann v. Brettler*, 50 Misc. Rep. 647, 98 N. Y. Supp. 607; *Cooley v. Lobdell*, 153 N. Y. 596, 47 N. E. 783. As was said in *Graham v. Healy* (Sup.) 138 N. Y. Supp. 611 (December, 1912), there was no tender of performance by plaintiff or demand that defendant perform. Moreover, the vendor was, at the time fixed for performance, ready and willing to perform, and so remained up to the day of the trial.

The proof is that the defendant and his wife both orally agreed with the plaintiff to sell the real estate. They both have performed that oral agreement, and the defendant has performed the written contract. The plaintiff is not entitled to recover the moneys paid by him. As it was expressed in *Quinto v. Alexander*, *supra*, by his failure to keep his agreement he has forfeited his cash payment. Upon payment

by the plaintiff to the defendant of the balance of the purchase price, together with interest from January 15, 1912, within a reasonable time, he will be entitled to the conveyance heretofore offered him. Such payment must be made within 20 days after service of copy of interlocutory judgment herein. Upon application, upon proof that plaintiff has not made such payment and accepted such deed, final judgment will be directed canceling the contract of December 28, 1911.

Defendant is entitled to costs.

KELLER et al. v. KELLER.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. PARTNERSHIP (§ 336*)—ACCOUNTING AFTER DEATH OF PARTNER—BURDEN OF PROOF.

In an action for an accounting, the burden was upon the surviving partner to prove that the firm was chargeable with an expense account not entered upon the firm's books until after the death of the deceased partner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 797; Dec. Dig. § 336.*]

2. PARTNERSHIP (§ 333*)—CHANGE OF APPLICATION.

Where, in an action against a surviving partner for an accounting, he elected to credit certain payments to the principal account, as he had a right to do, he could not thereafter change that election and credit same to an interest account.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 792-796; Dec. Dig. § 333.*]

Appeal from Special Term, New York County.

Action by Clothilde R. Keller and another, as executors of Adolph Keller, deceased, against Hugo Keller. From the judgment, all parties appeal. Modified and affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

W. G. Phlippeau, of New York City (Alfred B. Cruikshank, of New York City, of counsel), for plaintiffs.

Hamilton, Gregory & Freeman, of New York City (William H. Hamilton, of New York City, of counsel), for defendant.

PER CURIAM. We have carefully considered the voluminous record in this case, and are in the main satisfied with the disposition made by the learned justice at Special Term, and for the reasons given in his careful and painstaking opinion, which meets our approval. We think, however, that the judgment should be modified in two respects:

[1] First. An item of \$10,306.83, which was entered on the books on May 18, 1904, the date of Adolph Keller's death, as an expense account. The evidence in respect to this item is confused; the defendant himself making three different explanations of it and of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

items of which it was composed. In the main the claim is that, prior to the year 1902, \$17,612.07 was charged as expense to the Keller Jewelry Manufacturing Company, which should have been charged to L. H. Keller & Co.; that, at the end of the year 1902, Mr. Adolph Keller told the bookkeeper to take off part of that, because it was too much to charge to the Keller Jewelry Manufacturing Company, and in fact it ought not to have been charged anyway; that it was too much to charge back at any one time, but that on December 31, 1902, there was charged back to L. H. Keller & Co. \$4,125.04, "and after that he was supposed to take some part off every year." As matter of fact, however, no charges were thereafter made in the years 1903 and 1904 until after Adolph Keller's death, when this lump sum was entered in the books.

The explanation is so unsatisfactory, and, bearing in mind that the books should have been closed as of the day of Adolph Keller's death, and that the burden was upon the defendant, we think that the account should have been surcharged with this amount. Therefore findings 18 and 19 are amended, so that the total amount of the capital should be \$97,633.84, making the amount of the capital of the deceased partner of Adolph Keller, one-half thereof, \$48,816.92, instead of \$43,633.50, as found. The sixth conclusion of law should be similarly modified.

[2] Second. There should be allowed the interest on the difference between said sum of \$48,816.92 and the sum of \$38,554.85, the amount stated in the first account rendered by defendant; that is, on \$10,262.07, from May 18, 1904, to the date of the judgment, at 4 per cent. The reason why interest on the difference found by the court was not allowed in the judgment was that the defendant claimed that he had overpaid the amount of principal required to be paid in partial payments by the agreement, and that such overpayment should be credited to the interest account. The answer is that the defendant, having elected to credit said payments to principal account, and having the right so to do, could not thereafter change that election and credit it to the interest account. When an election has once been made and acted upon, it is too late thereafter to change the application of the payment.

The judgment appealed from should be modified as indicated, and, as modified, affirmed, with costs to the plaintiffs.

BIRD v. PRESS PUB. CO.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. LIBEL AND SLANDER (§ 7*)—TAMPERING WITH WITNESSES—LIBELOUS PER SE.
A false charge that an attorney had advised his client to give a witness money to get her out of the way was libelous per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 17-78; Dec. Dig. § 7.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. LIBEL AND SLANDER (§ 121*)—LIBEL—EXCESSIVE DAMAGES.

A verdict for \$3,000 was not excessive, where plaintiff, an attorney, was falsely charged with advising his client to give a witness money to leave the country.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 353, 354; Dec. Dig. § 121.*]

3. LIBEL AND SLANDER (§ 104*)—REQUEST FOR RETRACTION—LETTER.

The refusal of a publisher to retract a publication, libelous per se, is competent evidence as to the feeling and intention of the publisher; but a letter to a publisher, stating that a publication was false, and containing many self-serving declarations, and stating that he was going to sue, was not a request for a retraction, and its admission was reversible error—the fact that the publisher did not thereafter publish a retraction being no evidence whatever of a premeditated wrong.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 284-291; Dec. Dig. § 104.*]

4. LIBEL AND SLANDER (§ 107*)—EVIDENCE—FEELINGS OF PLAINTIFF.

In a libel action, plaintiff may testify as to the effect of a publication upon his feelings.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 299-303, 305, 351; Dec. Dig. § 107.*]

Clarke and Dowling, JJ., dissenting.

Appeal from Trial Term, New York County.

Action by Hobart S. Bird against the Press Publishing Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Howard Taylor, of New York City, for appellant.

Gilbert E. Roe, of New York City, for respondent.

McLAUGHLIN, J. The defendant, on the 15th of September, 1910, published in its newspaper the following article:

"Cassira Pennachio, the wife of Attilio Pennachio, a well-to-do banker, at No. 529 Morris avenue, whose examination on a charge of attempting to kill her husband with a pistol on September 7th, has been postponed from time to time, was not in the Morrisania court when the case was called by Magistrate House to-day. Her lawyer told the court that he had heard that the woman had been given money and sent back to Italy. The husband said that his lawyer, Hobart Bird, of No. 320 Grand street, had told him to take this course. Bird admitted that such was a fact. The court asked the lawyer to stop outside of the rail, and said that he would bring the case to the attention of the Bar Association. The papers will be sent to the district attorney."

The plaintiff, claiming that the article, so far as it referred to him, was libelous, brought this action to recover the damages alleged to have been sustained. He had a verdict of \$3,000, and from the judgment entered thereon, and an order denying a motion for a new trial, defendant appeals.

[1] There was no attempt on the part of the defendant to prove the truth or justify that part of the article which stated:

"The husband said that his lawyer, Hobart Bird, of No. 320 Grand street, had told him to take this course. Bird admitted that such was a fact."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The plaintiff is an attorney of this court, and the article charged him with the commission of a crime. It was, therefore, libelous per se.

[2] It is a serious charge to make against an attorney that he has advised a client to pay money to a witness in order that he may be gotten out of the jurisdiction of the court. If he were guilty of the offense charged, then he is unworthy to practice his profession, and ought to be disbarred. The falsity of the article being established, and, there being no evidence offered to justify the publication, defendant, of course, was liable in damages, and the verdict rendered certainly cannot be said, upon this record, to be excessive. We would, therefore, have no hesitancy in affirming the judgment and order appealed from, except for an error committed at the trial in the reception of evidence.

[3] The court received, over defendant's objection and exception, a letter written by the plaintiff to the defendant subsequent to the publication. In the letter he called attention to the fact that the statement in the article before quoted, referring to him, was false, and then set forth at some length self-serving declarations as to the injury which had been done him, and concluded:

"I have, of course, only one remedy, faulty and inadequate as it is—money damages. The right to this I shall assert."

If there had been a request in the letter for a retraction, so much of it, at least, would have been admissible. When a publisher is called upon to retract a publication libelous per se, it is his duty to retract the charge as fully and broadly as it has been made, and his refusal to do so—

"is competent evidence as to the feeling and intention of the publisher with which the libel was published." *Stokes v. Morning Journal Ass'n*, 72 App. Div. 184, 76 N. Y. Supp. 429.

This seems to be the general rule. *Palmer v. N. Y. News Pub. Co.*, 31 App. Div. 210, 52 N. Y. Supp. 539; 25 Cyc. 500. Here there was no request in the letter for a retraction. *Bradley v. Cramer*, 66 Wis. 297, 28 N. W. 372. What was said would seem to indicate that the plaintiff did not want a retraction, but did want "money damages." After their relations were thus stated by the plaintiff, the fact that the defendant did not thereafter publish a retraction was no evidence whatever of a premeditated wrong in the publication.

[4] It is also urged that the court erred in permitting the plaintiff to testify what effect the publication had upon his feelings. It is at least doubtful whether defendant is in a position to raise this question. When the plaintiff was asked to describe his feelings, defendant's counsel stated he had no objection to his doing so; but, assuming that question was raised by a subsequent motion to strike out, the testimony was clearly admissible. Similar questions were passed upon in *Van Ingen v. Star Co.*, 1 App. Div. 429, 37 N. Y. Supp. 114, and *Palmer v. N. Y. News Publishing Co.*, supra. In the former case Mr. Justice Ingraham, who delivered the opinion of the court, in referring to the question, said:

"It is well settled that, in determining the amount of damage where a publication is libelous per se, the jury has the right to consider the mental suffering which may have been occasioned to the plaintiff by the publication."

The case was subsequently taken to the Court of Appeals, where the determination of this court was affirmed (157 N. Y. 695, 51 N. E. 1094) on his opinion. In the latter case, Mr. Justice Rumsey, who delivered the opinion of the court, said:

"A publication of a libel which reflects upon the character of a reputable man must necessarily cause him more or less mental suffering and humiliation, and these things are elements of general damages which the jury may take into consideration."

See, also, 25 Cyc. 533, and authorities cited in note.

No error was committed in this respect, nor do we find any errors, other than the one pointed out, which call for consideration.

The judgment and order appealed from are therefore reversed, with costs to appellant to abide event.

INGRAHAM, P. J., and SCOTT, J., concur.

CLARKE, J. I dissent. It seems to me that the letter was admissible in evidence for the purpose of showing that the attention of the defendant had been called to the falsity of the publication and should be treated as in effect a request for retraction. Irrespective of a request for retraction, I think it the duty of one who has published a libelous statement, which he subsequently discovers to be false, to right the wrong, so far as he can, without request, and that it is material upon the question of express malice, and hence to the amount of damages, to show that prior to the commencement of the action he knew that the charge made was unfounded. As said by Nelson, C. J., in *Hotchkiss v. Oliphant*, 2 Hill, 510:

"If the defendant had become satisfied that the charge which he had unwittingly copied was unfounded, common honesty and a decent respect for the rights of the injured party call for an unqualified withdrawal. * * * A libelous publication may be inadvertently admitted into the columns of a newspaper, and the editor chargeable only with mistake or indifference to the truth; but if, when advised of his error, he hesitates to correct it, the case rises to one of premeditated wrong, of settled and determined malignity towards the party injured, which should be dealt with accordingly. There is no longer room for any indulgence toward the act, and the party becomes a fit object for exemplary punishment."

The judgment and order appealed from should be affirmed, with costs.

DOWLING, J., concurs.

**MAYOR, ETC., OF CITY OF NEW YORK v. MECHANICS' & TRADERS'
BANK OF CITY OF NEW YORK.**

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

INDEMNITY (§ 11*)—LIABILITY OF INDEMNITOR.

An assignee of a city contractor for work on a designated avenue obtained from the city the amount due under the contract, agreeing to indemnify the city against claims which it might be compelled to pay by reason of the recovery of any claim. A third person, claiming a lien on the money due under the contract, showed without dispute that he worked for the contractor and carried earth from another street, where the contractor was excavating, for use for grading the avenue. *Held*, that the third person was entitled to recover for work in grading the avenue, and the city, paying a judgment obtained by him, could recover from the assignee on his indemnity.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 21-25; Dec. Dig. § 11.*]

Appeal from Trial Term, New York County.

Action by the Mayor, Aldermen, and Commonalty of the City of New York against the Mechanics' & Traders' Bank of the City of New York. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Reversed, and judgment directed for plaintiff.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and MILLER, JJ.

Terence Farley, of New York City, for appellant.

Rufus O. Catlin, of Brooklyn, for respondent.

MILLER, J. The facts, leading up to this controversy, were stated by Mr. Justice McLaughlin on a prior appeal in this action. 130 App. Div. 748, 115 N. Y. Supp. 769. On that appeal this court reversed a judgment in favor of the plaintiff for the exclusion of evidence offered to show that the payment of the Winant judgment was made in bad faith. We said, upon the authority of *City of New York v. Baird*, 176 N. Y. 269, 68 N. E. 364, that the defense interposed involved two questions: (1) Whether the payment to Winant was made in good faith; and (2) whether it operated to the injury of the bank. On this trial the said excluded evidence was received, and, even assuming that it tended to show bad faith on the part of the city, it failed to show injury to the defendant. On the contrary, the undisputed evidence shows that the defendant was not injured.

Of course, the important question on the second branch of the case was whether the Winant judgment could have been reversed on appeal. If it could not, the indemnitor was not injured by its payment. The attorney who represented the indemnitor, this defendant, testified that the question which he desired to raise on the appeal from the Winant judgment was whether the work was done by Winant on the Lexington avenue paving, for which the defendant's assignor, Garvin, had the contract in question, or upon some other contract of Garvin. The stenographer's minutes of the trial, resulting in the Winant judg-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment, are in evidence. The testimony discloses without contradiction that the work done by Winant consisted of carrying earth by boats from Fifty-Fourth street, East River, to 106th street, Harlem River, to be used for grading Lexington avenue. The fact that the earth was obtained from places where Garvin was doing other work requiring excavation to be made is of no consequence. Upon the undisputed evidence, Winant was entitled to recover under the decision of the Court of Appeals. *M. & T. N. Bank, v. Winant*, 123 N. Y. 265, 25 N. E. 262. Manifestly, then, the indemnitor was not injured by the payment of the judgment, and the plaintiff's motion for a direction of a verdict should have been granted. It is to be noted that the city succeeded on the new trial of the Baird Case. 117 App. Div. 659, 102 N. Y. Supp. 915; 176 N. Y. 269, 68 N. E. 364.

The finding that defendant sustained damages is reversed, and judgment and order are reversed, with costs, and a judgment directed in favor of the plaintiff, with costs, on its motion for a directed verdict, made at the close of the evidence. All concur.

MORRIS v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, Third Department. December 30, 1912.)

1. PERPETUITIES (§ 6*)—TESTAMENTARY TRUSTS—SUSPENSION OF POWER OF ALIENATION.

Where a testator devised and bequeathed all his property to a trustee, to pay over the net income to his seven children during their lives, and upon the death of any of such children to pay the capital of the share of which such child received the income as directed by his or her last will and testament, and in default to the lineal descendants of such children, or, if none, then to the surviving children, the trust is invalid, because the property might not vest in absolute ownership for the term of more than two lives in being at the creation of the estate; it not being sufficient that the property might, by any possibility, be vested within that period.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 47, 49–53, 56; Dec. Dig. § 6.*]

2. EMINENT DOMAIN (§ 158*)—PAYMENT OF COMPENSATION INTO COURT.

Where a particular provision of a testator's will, devising property in trust to his seven children, was invalid, and the property was conveyed, not only by the trustee, but by the children, the grantee took good title, which could not be questioned, and upon condemnation by the city of New York, it was improper for the city, in view of Water Supply Act (Laws 1905, c. 724) § 17, providing that it should, within three calendar months after the confirmation of the report of the commissioners of appraisal, make payment to the respective owners, to pay the money into court for possible adverse claimants; the commissioners of appraisal having found that the land belonged to the grantee.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 426, 428–432; Dec. Dig. § 158.*]

Appeal from Trial Term, Otsego County.

Action by Katherine C. Morris against the City of New York. From a judgment for plaintiff, defendant appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Argued before SMITH, P. J., and KELLOGG, HOUGHTON, BETTS, and LYON, JJ.

Archibald R. Watson, of New York City, for appellant.
Merritt Bridges, of Morris, for respondent.

LYON, J. This action was brought to recover the amount of an award made by the commissioners of appraisal for about 182 acres of land situated in the county of Westchester, acquired by the city of New York in connection with the Kensico Reservoir, pursuant to the provisions of chapter 724 of the Laws of 1905, and amendatory and supplemental acts, relating to providing an additional supply of pure and wholesome water for the use of the city of New York.

[1] The important question at issue is whether the plaintiff, at the time of the vesting of title thereof in the city of New York, January 26, 1909, had title in fee simple to a tract of 79 acres, constituting a part of the 182 acres; the title to the remaining 103 acres concededly being in plaintiff. The title of plaintiff to the 79-acre tract is dependent upon the validity of the title obtained by Louis Prigge, her grantor, under conveyance made to him by the Frankford Real Estate, Trust & Safe Deposit Company of Philadelphia, Pa., and by the widow and heirs at law of Edward H. Middleton of that city. Concededly Edward H. Middleton was seised in fee simple of the 79-acre parcel. He died in 1905, leaving a will, which was duly probated in the state of Pennsylvania the same year, and of which an exemplified copy was recorded in the surrogate's office of Westchester county, N. Y., in July, 1906. The testator, after making certain specific gifts, devised and bequeathed all the residue and remainder of his property to said Trust & Safe Deposit Company, its successors and assigns, in trust to keep invested his personal estate, "and to pay over and distribute the net income received from both real and personal estate amongst my seven children for and during the terms of their respective lives in the following proportions," which he states shall be one-seventh thereof to each of his seven children, but "subject to the deduction hereinafter stated" as to three of the children, as to whom he directs that his trustee shall deduct from the capital of the share, of which the income is given, the sum of \$2,500 as to two of his children and \$5,000 as to the third, "the income of which is to be equally added to and divided amongst the shares of my six other children," exclusive of one or two who are named. The will then provides:

"And I further trust from and immediately after the respective deaths of any of my children in trust to pay and distribute the capital of the share of which the child so dying received the income in his or her lifetime in such manner as said child shall appoint and direct by his or her last will and testament, and in default thereof to pay over and distribute said share to the lineal descendants of such deceased child per stirpes; and in case any and so often as any of my children shall die without leaving lineal descendants surviving such decedent, then in trust to hold the said share of the child so dying for the surviving brothers and sisters (the issue of any deceased brothers and sisters to take per stirpes) upon the same trust as the original shares herein devised and bequeathed to my trustees for the benefit of said

surviving brothers and sisters, and with the same force and effect as if the said accrued shares had been one of the original shares so devised and bequeathed."

The will empowered the trustee and its successors and assigns to sell and convey any and all of the testator's real estate. In July, 1906, said trustee by full covenant deed conveyed to Louis Prigge said 79-acre parcel, and in September, 1906, the said seven children of Edward H. Middleton, who constituted his only heirs at law, also conveyed said parcel to said Prigge by deed, in which they ratified and confirmed said conveyance by said trustee, and in which the wives of the heirs at law who were married and the widow of Edward H. Middleton joined.

The fifth clause of the will was clearly invalid, as unlawfully suspending the power of alienation for the term of more than two lives in being at the creation of the estate. In determining as to the validity of this clause of the will, the court could not consider the possibility of the estates attempted to be created terminating within the prescribed period. As was said in *Matter of Wilcox*, 194 N. Y. 288, 295, 87 N. E. 497, 499:

"In determining the validity of limitations of estates, under the above statutes [the provisions of the Revised Statutes in reference to absolute ownership and restraint of alienation], it is not sufficient that the estates attempted to be created may, by the happening of subsequent events, be terminated within the prescribed period, if such events might so happen that such estates might extend beyond such period. In other words, to render such future estates valid, they must be so limited that in every possible contingency, they will absolutely terminate at such period, or such estates will be held void."

The fifth clause of the will being invalid, the title to the 79-acre parcel vested upon the death of Edward H. Middleton in his heirs at law, and the said deed given by them to Prigge in September, 1906, vested a good title in him.

[2] However, the defendant in its reply brief states that the real issue involved upon this appeal is not whether the trust sought to be created by the Middleton will is valid or invalid, but whether the notice of the conveyance by the Trust & Safe Deposit Company, in violation of section 156 of the Banking Law as it existed in 1905, did not make it imperative for the defendant for its own protection to pay the money into court. Section 18 of chapter 724, Laws of 1905, provided that the city of New York might pay an award into court "where there are adverse or conflicting claims to the moneys awarded as compensation," and the order confirming the report of the commissioners of appraisal granted in March, 1910, provided:

"And where there are adverse or conflicting claims to the amounts awarded * * * the said comptroller shall pay the sum so mentioned in said report payable to said owner * * * into the Rockland County Trust Company, to the credit of such parcel and subject to the further order of this court."

Upon the hearing before the commissioners no claim of ownership of the land or of right to the award was made by any person other than plaintiff, nor was any adverse claim made upon the trial of this

action in June, 1912, nor, so far as the record discloses, at any time prior thereto. The commissioners reported that the plaintiff herein was the owner of the land and entitled to be paid the sum of \$41,000, and the report was confirmed as above stated after hearing both parties hereto, and the order of confirmation has not been modified or reversed. The sole reason stated by the defendant in the letter of August 26, 1911, for paying the award into court was the complications which had arisen in regard to the exception contained in the abstract of title. It would seem to matter very little whether the said Trust Company, as executor and trustee, could legally execute a conveyance of lands situated within this state so long as the clause of the will under which the Trust Company and any successor must derive its power was invalid. The title of Prigge, and hence of plaintiff, as his grantee, would seem to have been perfect. The trustee having received the purchase price and executed the conveyance, neither it nor its cestuis que trust could have any claim upon the award; and the heirs at law, in consideration of such payment by Prigge, having conveyed said parcel and ratified and confirmed the said conveyance by said Trust Company, could make no claim to the award. In view of these facts, no person, either as a devisee under the will of Edward H. Middleton or as an heir at law, could have had any right or interest in the award. Hence the defendant was not justified in paying the award into court, thereby subjecting the plaintiff to the expense and delay attending the prosecution of legal proceedings necessary to obtain the moneys, and to considerable loss of interest thereon.

The Water Supply Act contemplated prompt payment of the award. Section 17 of that act provided that the city of New York should, within three calendar months after the confirmation of the commissioners of appraisal, make payment to the respective owners of the amount of the award, with interest from the time of filing certified copies of the oath of office, at which date, February 26, 1906, the title had vested in the city of New York. That section also provided that, in case of default or neglect in payment within the three months, the claimant, after application first made by him to the comptroller of the city of New York for the payment thereof, might sue for and recover the same with interest and costs, and that it should be sufficient to declare generally for so much money due to the plaintiff, and that the report of the commission, with proof of the right and title of the plaintiff to the sum demanded, should be conclusive evidence in such suit. It was conceded upon the trial that demand for payment of the award to the plaintiff was made upon defendant June 22, August 17, and August 30, 1911. The defendant has raised no question as to the plaintiff's title to any portion of the 182 acres taken, excepting as to this 79-acre parcel.

I think that the judgment in favor of plaintiff, for the amount of the award and interest, should be affirmed. All concur.

SULLIVAN v. CORN EXCH. BANK et al.

(Supreme Court, Appellate Division, Second Department. December 30, 1912.)

1. MORTGAGES (§ 25*)—PRIORITY—EFFECT AS BETWEEN PARTIES.

Where a debtor promised to execute his bond for the amount of the debt, secured by mortgage on realty, and executed and delivered a mortgage reciting that the debt was secured by his bond of the same date, and also reciting a consideration and covenanting to pay the debt, but no bond was ever in fact executed, the mortgage, even if given to secure payment of an antecedent debt, was valid as between the parties and against all others who then had no equitable interest in the property, or who did not acquire rights as subsequent purchasers for value.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 29–42; Dec. Dig. § 25.*]

2. MORTGAGES (§ 25*)—VALIDITY—CONSIDERATION.

Where a mortgage on realty recited an indebtedness secured by a bond, and that the mortgage was to secure payment on the bond and was in consideration of \$1, the fact that no bond was actually given at the time the mortgage was executed and delivered did not impair it, since there was other sufficient consideration.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 29–42; Dec. Dig. § 25.*]

3. MORTGAGES (§ 25*)—VALIDITY—EXISTENCE OF DEBT SECURED.

The validity of a mortgage does not depend upon the form of the indebtedness, whether by note, bond, or otherwise, but upon the existence of the debt which it is given to secure.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 29–42; Dec. Dig. § 25.*]

4. MORTGAGES (§ 51*)—CONSTRUCTION—TIME FOR PAYMENT.

A mortgage which contains an express covenant to pay the debt is not unenforceable because no date of payment is specified, since in such case the right to enforce it accrues immediately, or in a reasonable time after demand.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 121; Dec. Dig. § 51.*]

5. MORTGAGES (§ 186*)—RIGHTS OF CREDITORS—REASONABLE TIME FOR PAYMENT.

Where a mortgage specifies no date for payment, and hence is enforceable in a reasonable time, a defendant in foreclosure proceedings, asserting a claim as a judgment creditor, has the burden of showing that a lapse of nearly two years without payment of either interest or taxes is not such reasonable time.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 449–455; Dec. Dig. § 186.*]

6. MORTGAGES (§ 173*)—RECORD—STATUTE—"CONVEYANCE."

Within Real Property Law (Consol. Laws 1909, c. 50) § 291, providing for the record of conveyances, a mortgage is a "conveyance."

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 412, 419–424; Dec. Dig. § 173.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1575–1584; vol. 8, p. 7619.]

7. MORTGAGES (§ 175*) — CONSTRUCTION — PRIORITY — SUBSEQUENT "PURCHASER."

Under Real Property Law (Consol. Laws 1909, c. 50) § 291, which provides that every conveyance not recorded as therein required is void as against any "subsequent purchaser in good faith and for a valuable

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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consideration" from the vendor whose conveyance is first recorded, a judgment creditor is not such a "purchaser," and an unrecorded mortgage takes preference over his judgment, unless there is a superior equity in favor of the judgment creditor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 417, 418; Dec. Dig. § 175.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5858-5860; vol. 8, p. 7775.]

8. MORTGAGES (§ 28*)—REQUISITES AND VALIDITY—"EQUITABLE MORTGAGE."

An "equitable mortgage" may be constituted by any writing from which the intention may be gathered, and an attempt to make a legal mortgage, which fails for want of some solemnity, is valid in equity.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 44, 56-58; Dec. Dig. § 28.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2442, 2443.]

9. MORTGAGES (§ 28*)—ACTION TO FORECLOSE—CONDITION PRECEDENT—REFORMATION OF EQUITABLE MORTGAGE.

It is not necessary to bring an action to reform an equitable mortgage, so as to make it a legal obligation, in order to enforce it.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 44, 56-58; Dec. Dig. § 28.*]

10. MORTGAGES (§ 151*)—PRIORITY—EQUITABLE MORTGAGE.

An equitable mortgage takes precedence over a lien, whether general or special, which only attaches, as does a judgment, to such right, title, or interest as the debtor has in such real property.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 307-329, 332-336, 358-370; Dec. Dig. § 151.*]

11. MORTGAGES (§ 175*)—PRIORITY—SUPERIOR EQUITY—JUDGMENT CREDITOR.

A creditor of a mortgagor, obtaining judgment after execution of the mortgage, but before its record, who does not show that his debt was in existence when the mortgage was executed, or that he extended credit to the mortgagor upon his supposed unincumbered ownership of the premises, has no such superior equity as to give him priority over the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 417, 418; Dec. Dig. § 175.*]

Appeal from Special Term, New York County.

Action by James J. Sullivan against one Monahan, the Corn Exchange Bank, and W. & J. Sloane. From an order granting judgment to plaintiff on the pleadings, defendants Corn Exchange Bank and W. & J. Sloane appeal. Affirmed.

Argued before HIRSCHBERG, BURR, THOMAS, CARR, and WOODWARD, JJ.

Seldon Bacon, of New York City, for appellants.

Clark A. Wick, of New York City (G. W. Minor, of New York City, of counsel), for respondent.

BURR, J. From an order granting plaintiff's motion for judgment on the pleadings, this appeal comes.

The complaint alleges that on October 31, 1910, defendant Monahan was justly indebted to plaintiff in the sum of \$4,000, and as security for the payment of such indebtedness promised to execute his bond for that amount, bearing date on that day, secured by a mortgage on real property in Kings county. On the date named he did execute

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and deliver such a mortgage, but failed to execute and deliver the bond. The mortgage contained a recital that Monahan was indebted to plaintiff in the sum named, "secured to be paid by his certain bond or obligation, bearing even date herewith, conditioned for the payment of the said sum of \$4,000." The grant of the land described in the mortgage was stated to be "for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, and also for and in consideration of one dollar." The mortgage contained an express covenant to "pay the indebtedness as hereinbefore provided." The mortgage was duly recorded January 27, 1911. Prior to the commencement of this action, which was on or about August 12, 1912, payment was demanded of the amount of such indebtedness, to wit, \$4,000, with interest from October 31, 1910.

Upon default of payment, this action was brought for a foreclosure of said mortgage. As incidental relief, plaintiff demanded that "said mortgage be reformed by omitting therefrom the recital in (sic) the giving of said bond." Defendants Corn Exchange Bank and W. & J. Sloane, each a domestic corporation, separately answered, denying none of the allegations of the complaint, but setting up—the Corn Exchange Bank, that on the 10th day of January, 1911, it recovered a judgment against said Monahan in an action in the Supreme Court for \$8,157.36, which judgment was docketed in the office of the clerk of Kings county on January 11, 1911; and W. & J. Sloane that it also recovered a judgment against said Monahan on January 10, 1911, in an action in the Supreme Court for \$7,733.74, which judgment was also docketed in said clerk's office January 11, 1911. No attack is made upon the bona fides of said mortgage, nor do defendants contend that it was given in fraud of creditors. Plaintiff's motion for judgment on the pleadings was granted, and the question here is solely one of priority of lien.

[1] The mortgage in question became and was from the date of its delivery a perfectly valid lien and incumbrance upon the premises therein described, as between the parties thereto. Even if it was given to secure payment of an antecedent debt, the same rule applies as between the parties and against all others who had at the time no equitable interest in the property, or who did not acquire rights as subsequent purchasers or incumbrancers for value. 1 Jones on Mortgages, § 459; Young v. Guy, 23 Hun, 1, affirmed 87 N. Y. 457; Obermeyer & Liebmann v. Jung, 51 App. Div. 247, 64 N. Y. Supp. 959.

[2] The fact that no bond was actually given at the date of the execution and delivery of the mortgage does not impair it, since there was other sufficient consideration therefor. 1 Jones on Mortgages, § 353; Goodhue v. Berrien, 2 Sandf. Ch. 630; Baldwin v. Raplee, 4 Ben. 433, Fed. Cas. No. 801.

[3] Its validity does not depend upon the form of the indebtedness, whether by note, bond, or otherwise, but upon the existence of the debt which it was given to secure. Goodhue v. Berrien, supra; Burger v. Hughes, 5 Hun, 180, affirmed 63 N. Y. 629. This case is distin-

guishable from *Bergen v. Urbahn*, 83 N. Y. 51, where a bond was in fact given, which was not produced upon the trial, nor was any explanation offered for the failure to produce the same.

[4] The mortgage itself contains an express covenant to pay the debt, and the fact that no date is specified when it shall become payable does not render it unenforceable. Either the right to enforce it accrues immediately (*Purdy v. Philips*, 11 N. Y. 406; *Eaton v. Truesdail*, 40 Mich. 1; *Rhoads v. Reed*, 89 Pa. 436), or it may be enforced after the lapse of a reasonable time and upon demand.

[5] The complaint alleges demand, and if the rule of reasonable time does apply, it is for defendant to show that a lapse of nearly two years after delivery, without payment of either interest on the debt or taxes or assessments upon the property, is not such reasonable time.

[6, 7] We think, therefore, that without reformation the mortgage was a valid and enforceable legal obligation on plaintiff's land, and as against defendants, judgment creditors of Monahan, a lien prior to the lien of such judgments, even although the mortgage was not recorded until after the judgments were docketed. The cases relied upon by appellants (*Ogden v. Ogden*, 180 Ill. 543, 54 N. E. 750, *Whiting Paper Co. v. Busse*, 95 Ill. App. 288, *Bramhall v. Flood*, 41 Conn. 68, and *Porter v. Smith*, 13 Vt. 492) are clearly distinguishable.

In the *Ogden Case* it appeared that no actual indebtedness existed at the time of the delivery of the mortgage, nor until the delivery of the note recited therein, which was some six years subsequent to the date of the execution of the mortgage, and in the meantime the right of subsequent incumbrancers had intervened. In the case of the *Whiting Paper Co.*, supra, the original security had been surrendered, the bona fides of the debt was questioned, and the rights of subsequent incumbrancers had also intervened. In *Porter v. Smith*, supra, where plaintiff held two promissory notes of defendant, and it was agreed that two new notes should be given, secured by a mortgage, and the mortgage was drawn correctly describing said notes, but, by mistake, the new notes were retained by the debtor and the old notes returned to the creditor, the mortgagee, all that was held was that the mortgagee could not proceed at law in ejectment as he might otherwise have done, but must proceed in equity to enforce his claim. In *Bramhall v. Flood*, supra, the decision rested upon the peculiar provisions of the recording act of that state, which would seem to put judgment creditors upon a similar footing with purchasers and incumbrancers for value. See *Pettibone v. Griswold*, 4 Conn. 158, 10 Am. Dec. 106.

Our statute only provides that every conveyance (and for the purposes of the recording act a mortgage is within the definition of a conveyance) not recorded as therein required "is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded." Real Property Law (Consolidated Laws, c. 50 [Laws of 1909, c. 52]) § 291. A judgment creditor is not such a purchaser, and an unrecorded conveyance has a preference over a judgment, unless there is a superior equity in favor of the holder of the latter. *Thomas v. Kelsey*, 30 Barb. 268;

Flagler v. Malloy, 9 N. Y. Supp. 573¹; Obermeyer & Liebmann v. Jung, *supra*; Russell v. Wales, 119 App. Div. 536, 104 N. Y. Supp. 143.

[8] But if it could be successfully claimed that the instrument under consideration was so defective in form as to be invalid as a legal obligation, it might still be sustained as an equitable mortgage. "An equitable mortgage may also be constituted by any writing from which the intention may be gathered; and an attempt to make a legal mortgage, which fails for want of some solemnity, is valid in equity." Miller on Equitable Mortgages, 1; Payne v. Wilson, 74 N. Y. 348; Perry v. Board of Missions, 102 N. Y. 99, 6 N. E. 116; Hamilton Trust Co. v. Clemes, 163 N. Y. 423, 57 N. E. 614; Hughes v. Edwards, 9 Wheat. 489, 6 L. Ed. 142; Flagg v. Mann, 2 Sumn. 486, Fed. Cas. No. 4,847.

[9] It is not necessary to bring an action to reform an equitable mortgage, so as to make it a legal obligation, in order to enforce it. Sprague v. Cochran, 144 N. Y. 104, 38 N. E. 1000.

[10] An equitable mortgage takes precedence over a lien, whether general or special, which only attaches, as does a judgment, to such right, title, or interest as the debtor has in real property. Matter of Howe, 1 Paige, 125, 19 Am. Dec. 395; Keirsted v. Avery, 4 Paige, 9; Dwight v. Newell, 3 N. Y. 185; Chase v. Peck, 21 N. Y. 581; Robinson v. Williams, 22 N. Y. 380; Payne v. Wilson, *supra*.

[11] If this controversy had arisen between purchasers or incumbrancers of the property in question, the fact that the mortgage was given to secure an antecedent debt might have been a factor of consequence, since in such case, in the absence of an enforceable agreement to extend the time for the payment of the debt, plaintiff might not be deemed a purchaser for value within the meaning of the recording acts. Real Property Law, *supra*, § 291; O'Brien v. Pleckenstein, 180 N. Y. 350, 73 N. E. 30, 105 Am. St. Rep. 768. But in the case of a judgment creditor, who can claim no benefit under the provisions of the said act, if the mortgage was valid between the parties, we can see no reason for any distinction, in the absence of some superior or at least equal equity. The only authority which we have been able to find directly to the contrary is the case of Wheeler v. Kirtland, 24 N. J. Eq. 552. The statement in the opinion to that effect cites no authority in support of it, and it seems to us to be directly contrary to the authorities in this state to which reference has been made. In this case no superior equity is shown on the part of the judgment creditors. It does not appear that the debts were even in existence at the time when the mortgage in suit was given, or that they extended credit to the mortgagor upon his supposed ownership of the premises in question, free from the lien of said mortgage.

If plaintiff's equitable lien had arisen subsequent to the docketing of the judgment, or simultaneously therewith, a different question would have been presented (Dwight v. Newell, *supra*; Goodhue v. Berrien, *supra*); but, upon the facts here disclosed, the order appealed from was correctly made, and it should be affirmed. All concur.

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 56 Hun, 643.

MALDONADO & CO. v. YGLESIAS et al.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. LIBEL AND SLANDER (§ 9*)—ACTIONABLE WORDS—CHARGING PROTEST ON DRAFT.

A charge that a draft accepted by a merchant had been protested for nonpayment, standing alone, is libelous per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 80-90; Dec. Dig. § 9.*]

2. LIBEL AND SLANDER (§ 9*)—ACTIONABLE WORDS—DECLINING TO ACCEPT DRAFT.

Defendant sent to his customers a circular letter to the effect that a draft drawn on plaintiff by a foreign correspondent and accepted by plaintiff was protested for nonpayment, and that therefore defendant would not accept drafts on plaintiff, except for collection. The reason given for declining plaintiff's drafts was true. *Held*, that defendant had a right to so notify his customers, and that irrespective of the plaintiff's financial responsibility, or whether in fact plaintiff paid the dishonored draft, such notice was not libelous, as a charge that plaintiff was insolvent and unworthy of credit.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 80-90; Dec. Dig. § 9.*]

Appeal from Special Term, New York County.

Action by Maldonado & Co. against Luis F. Yglesias and another. From an order denying defendants' motion for judgment on the pleadings, they appeal. Order reversed, and motion granted.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and MILLER, JJ.

Mark G. Holstein, of New York City, for appellants.

Adam K. Stricker, of New York City (James J. Franc, of New York City, on the brief), for respondent.

MILLER, J. The question in this case is whether a cause of action for libel is stated in a complaint which shows that the alleged libelous article is true. The plaintiff is a corporation engaged in the import and export business, principally between the United States and the Dominican Republic and the Republic of Venezuela. The alleged libel consisted of a circular letter in the Spanish language, of which the following is a translation:

"New York, January 19, 1912.

"Dear Sirs and Friends: On the 12th inst. a draft accepted by Messrs. Maldonado & Co., of this city, and drawn on them by one of their connections in the Republic of Santo Domingo, was protested on account of nonpayment, and we therefore wish to make known to all our connections that we will by no means whatever accept drafts on the above-named firm in payment of amounts falling due, but only for purpose of collection. Kindly acknowledge receipt of this circular, and, asking you to kindly comply with our above wish, we beg to remain,

"Yours very truly,

Yglesias, Lobo & Co."

The complaint alleges that a draft drawn on the plaintiff to the order of the defendants by Battle, Vega & Co., at Santiago de los Caballeros,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Dominican Republic, for \$5,000, which matured January 12, 1912, and which had been accepted by the plaintiff, was in due course presented by the holder for payment, that payment was refused, and that it was protested for nonpayment. The complaint also alleges that the plaintiff refused payment because of a cable order from Santiago "to hold up payment for orders until January 18, 1912," that the reason for such refusal was stated in writing and attached to the draft, that the defendants were notified of the reason, and that, on the 15th day of January, 1912, the plaintiff received cable instructions to pay the draft, and thereupon and on that day notified the defendants, through their attorney, of said instructions, and paid the draft and the protest fees. By way of innuendo, the plaintiff alleges that the charge was:

"That the plaintiff was insolvent, and financially embarrassed, and unworthy of credit, and that it did not discharge, and was not able to discharge, its financial obligations as and when the same matured, and that the plaintiff was dishonest in its business dealings."

[1] We have no doubt that, standing alone, a charge that a draft accepted by a merchant had been protested for nonpayment is libelous per se. But the difficulty is that the plaintiff did not rest upon the averment of a false publication, but showed by other averments that the publication was true.

The contention of the plaintiff is that, although the article was literally true, it was false in fact, because it did not state that the draft had been paid. No doubt a publication, literally true, may be false in fact, because of the false impression which it creates. Half truths may be more injurious than positive misstatements. But the article in question, construed in the light of the extraneous circumstances, is not susceptible of the charge of being deceptive.

[2] The defendants had the right, without assigning a reason, to give notice to their customers that they would not accept drafts drawn on the plaintiff, except for collection. They also had the right to state the reason, if a true one. The plaintiff refused to pay at maturity a draft accepted by it, and allowed it to be protested for nonpayment. That was a sufficient reason to justify the defendants in refusing to accept other drafts in payment, irrespective of the financial responsibility of the plaintiff, or whether in fact it paid the dishonored draft. One merchant might well refuse to give another credit who allowed his paper to be dishonored, whatever the reason, or however certain collection by legal process might be. As the defendants confined themselves to the truth, and said only what they had a right to say, they cannot be held answerable for something they did not say.

The order should be reversed, with \$10 costs and disbursements, and the motion for judgment granted, with \$10 costs. All concur.

(154 App. Div. 203.)

PEOPLE v. SCHNEIDER.

(Supreme Court, Appellate Division, Second Department. December 30, 1912.)

1. CRIMINAL LAW (§ 1170½*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where defendant's counsel was allowed to interrupt the direct examination of a witness by the district attorney, and ask questions of the witness to show that statements of defendant to such witness were the result of unlawful pressure, the sustaining of objections to certain further questions, the court stating that such questions could be asked on cross-examination, was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.*]

2. CRIMINAL LAW (§ 406*)—ADMISSIONS TO FIRE MARSHAL.

Statements by one charged with arson, voluntarily made to a fire marshal with knowledge that he was such officer, were admissible in evidence; Greater New York Charter (Laws 1901, c. 466) § 779, restricting the use of testimony elicited in a formal examination by a fire marshal, not referring to a conversation with one charged with arson and not under oath.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. § 406.*]

3. WITNESSES (§ 387*)—IMPEACHMENT—CROSS-EXAMINATION—DISCRETION OF COURT.

Questions, asked a police officer, as to whether he had testified to certain things before the magistrate that he testified to on the trial, are properly excluded, in the discretion of the court, on cross-examination; it not being the rule that all details of the evidence must be given before the magistrate to entitle them to weight on the trial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1228-1232; Dec. Dig. § 387.*]

4. ARSON (§ 28*)—TRIAL—EVIDENCE.

In a prosecution for arson, it was not error to introduce in evidence books and papers showing business relations between the defendant and the record owner of the premises burned.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 56-61, 63; Dec. Dig. § 28.*]

5. WITNESSES (§ 367*)—IMPEACHMENT—BIAS—EVIDENCE.

The exclusion of questions in an arson case as to whether the witness, a fire marshal, had personally investigated the case, and looked up witnesses for the case, such being an incidental part of his official duties, was proper, since a witness is not necessarily an interested witness because he testifies in support of prosecutions based upon his investigations.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1184, 1185; Dec. Dig. § 367.*]

6. CRIMINAL LAW (§ 874*)—POLLING JURY—"PARTY."

Under Code Cr. Proc. § 450, providing that the jury may be polled when required by either party, it was not error to discharge a jury without polling it, where the defendant was present and did not require it, although defendant's attorney was not there; no reason being shown why he was not present, and the defendant being a "party," within Code Cr. Proc. § 6, defining who are parties in criminal actions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2085-2088; Dec. Dig. § 874.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5203-5213; vol. 8, p. 7747.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

7. CRIMINAL LAW (§ 1186*)—APPEAL—FAIR TRIAL—AFFIRMANCE.

Where there is nothing to show that defendant did not have a fair and impartial trial, a judgment of conviction will be affirmed, under Code Cr. Proc. § 542, providing that judgment should be given after hearing an appeal, without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219; Dec. Dig. § 1186.*]

Appeal from Trial Term, Kings County.

Barauch Schneider was convicted of arson, and he appeals. Affirmed.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

Frederick N. Van Zandt, of New York City, for appellant.

Edward A. Freshman, Asst. Dist. Atty., of Brooklyn (James C. Cropsey, Dist. Atty., and Hersey Egginton, Asst. Dist. Atty., both of Brooklyn, on the brief), for the People.

WOODWARD, J. The defendant was charged with the crime of arson in the first degree, was tried before the County Court of Kings County, and found guilty as charged, and sentenced to 15 to 30 years in Sing Sing prison. On the 12th day of June, on the day on which the judgment was entered, a certificate of reasonable doubt was granted by the county judge, and bail was fixed at \$15,000. This certificate of reasonable doubt was based upon two rulings of the court. The first of these was a ruling upon the admissibility of testimony on the part of a fire marshal, who had a conversation with the defendant, after he was arrested and while he was in jail; the objection being that under the provisions of section 779 of the Greater New York Charter (Laws 1901, c. 466) testimony or evidence taken by the fire marshal in the discharge of his duties is not to be used in any criminal proceeding. The second ruling was that of the court in refusing to continue a preliminary questioning of the said fire marshal in relation to the circumstances under which the conversation was held, the defendant's counsel urging that he was then prepared to show the testimony inadmissible as against the defendant; and as this latter is now insisted upon as constituting "the most prejudicial and gravest error committed by the trial court," we will dispose of that now.

The evidence shows without contradiction that the defendant was arrested at 2:45 a. m., on the 19th day of September, 1910, by Police Officer Reich, who heard an explosion at 677-A Sixth avenue, Brooklyn, and who immediately thereafter saw two men coming from the premises; the defendant running directly into his arms, apparently without seeing the officer, owing to the fact that he had one of his hands over his eyes. Questioned by the officer where he lived, defendant gave his residence as 135th street, Manhattan, and said that he had just come from Coney Island, and that he was going up to Twentieth street to take a Sixth avenue car. Defendant said he did not know the owner of the building from which he had just emerged,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and gave as his reason for being at this point that he had been to Coney Island, and had fallen asleep in the elevated train, and, not wanting to oversleep, had come to Sixth avenue to take a car. It subsequently developed from the evidence that the defendant had himself been the owner of the premises, that they had been transferred back and forth between the defendant and one Diamond several times, and at the time of the explosion that the title to the premises stood in the name of Diamond, who was shown to be associated with the defendant in a saloon in Manhattan and in other business matters, and that Diamond had the property insured. The officer took the defendant to the premises where the explosion occurred, and found the cellar filled with flames, and there was much testimony in relation to the conditions found about the premises, the fact of the explosion, and the necessary facts to constitute the crime charged, and, upon the merits, there does not appear to be any question that the verdict is supported by the weight of evidence.

[1, 2] One William R. Ferris, a deputy fire marshal, was called as a witness on behalf of the people, and testified that he reached the scene of the fire in the discharge of his duty of investigating its origin, etc., at about 4 o'clock in the morning of the fire; that he went over the premises, ascertaining the facts necessary for his purposes, and that at about half past 4 o'clock he visited the defendant at the station house at Fifth avenue and Sixteenth street and had a conversation with him. At this point counsel for defendant interposed an objection that it was incompetent. This objection was overruled. Defendant's counsel then said:

"I desire at this time to ask this witness one or two questions first, before your honor ultimately rules on that objection."

No objection appears to have been interposed, and defendant's counsel was permitted to bring out the following from this witness:

"I say that I am a duly appointed assistant fire marshal of the city of New York, and went to the station house where the defendant was after he had been arrested in connection with the fire; but what the charge was against him I don't know. I made the charge of arson the following morning. I knew when I went to see him that he had been arrested on account of his supposed connection with this fire. I saw him in the captain's room. I told him I was an assistant fire marshal. At that time I had a book with me containing extracts from the charter. I don't recollect taking the book out, but I remember telling him about my authority, and I explained who I was. I know I had the book with me. I think I quoted him from memory sections 779, 780, 781. Section 779 is a solid two pages of finely printed matter almost. I did not say I quoted the whole section. I quoted some portions of it. I think I quoted sections 780, 781, tracing the cause of fires. I don't remember the exact words; but I remember quoting the number of section 779, and I remember my telling him my authority to examine."

The witness was then asked:

"And do you remember quoting that portion of it where you showed you had authority to subpoena witnesses, and compel the attendance of any person or persons, the production of books and papers, and any inquiries that you made of witnesses, and any false swearing on their part, constituted perjury?"

To this he replied:

"No; not the false swearing."

Again he was asked:

"What did you say relative to any false statement?"

He answered:

"I said nothing to him about false swearing. I simply pointed out my authority to examine witnesses, and investigate the causes of fires, and the like."

The book was here marked in evidence, and the witness continued:

"Before I asked him any questions, I told him that I was the assistant fire marshal, that I had come there to investigate the fire, and I told him that anything he said to me might be used against him in court. That is all I said to him on the subject of his rights. There is no doubt about that."

Obviously, as a matter of law, up to this time the defendant's counsel had succeeded only in establishing facts showing the testimony competent. The witness had fully stated to him his official position, his duty in the premises, and had warned him that whatever was said was likely to be used against him. Under such circumstances the courts have held, even where the statement was made in an investigation of the coroner, after the arrest was made, that the statements of the prisoner were competent evidence against him upon the trial (*People v. Kennedy*, 159 N. Y. 346, 358, 54 N. E. 51, 70 Am. St. Rep. 557, citing *People v. Chapleau*, 121 N. Y. 266, 24 N. E. 469), and it was the duty of the court to determine, as matter of law, that the testimony offered was admissible (*People v. Meyer*, 162 N. Y. 357, 368, 56 N. E. 758).

We will now seek to discover wherein the alleged error lies in the court refusing to permit further preliminary examination of this witness. Defendant's counsel proceeded:

"Now, then, do you remember saying to him first, in substance: 'I am a fire marshal from the city of New York, and it is my duty to investigate fires, and I am here to see what I can do to help you.' Did you say anything like that to him?"

The witness answered:

"I did not testify that I said that. You asked me what I said to him, and I will state it."

Counsel said:

"I am asking you, did you say anything like that?"

This was objected to. The court responded:

"I will permit that question, of course, in the regular course of cross-examination. This is a preliminary examination interrupting the regular course of the district attorney's examination on the direct. Now, you are bringing in some of the main case. You are asking him if he said certain things, or if he did not say certain things, and I think, as a preliminary proposition, the examination should be about terminated."

Some discussion occurred between counsel for defendant and the court, in the course of which defendant's counsel declared that:

"I offer at this time to show first, by cross-examination, that this conversation that he had with the defendant, or any admission or alleged confession contained in it, was not legally obtained; that it was obtained contrary to law, and I offer to show that now, by the cross-examination of this witness, and by the production of witnesses in behalf of the defendant at this time on that particular question."

To this the court responded:

"Of course, I frankly state to counsel that, if he can substantiate that statement of his by proper proof, there is no question but what that should be submitted then to the jury; but I claim that at this time the regular orderly examination of this witness by the district attorney on the direct should not be further interrupted any more than I have already permitted it to be. * * * and upon the cross-examination of this witness you will have full opportunity to bring out the matters that you desire."

After some further discussion with the court, in which defendant's counsel was reassured of his right to bring out the matters desired on the regular cross-examination, defendant's counsel gave notice that he desired now "and at no other time to offer such proof," and took an exception to the ruling of the court. On the direct examination being continued, the witness said:

"I told the defendant that I was an assistant fire marshal, that I had come there for the purpose of investigating the fire, and that I was going to ask some questions; and I told him that anything he might say may be used against him in court, and he said, 'I am willing to make a voluntary statement,' he said, 'as I am an innocent man.'"

This statement of the witness is nowhere contradicted. The defendant made no effort whatever to show that he was deprived of any of his legal rights, and the further matters brought out on the examination of this witness were such as the defendant saw fit to make in explanation of his being at the point of the fire at 2:45 o'clock in the morning, his business connections, etc., at no time confessing to the crime, or making any admissions which in and of themselves, aside from their relation to other matters brought out in the evidence, would tend to prejudice him before the jury. Where, then, is the error? The witness had answered that he did not testify to having used the language which counsel suggested in his question, and the objection was interposed to the question of counsel:

"I am asking you, did you say anything like that?"

This was merely a repetition of the former question, which had been answered, and on the direct examination, which followed this interruption, the witness went on and stated what he had, in fact, said, and there is no dispute upon this point. Defendant's counsel did not call a witness, or attempt to call a witness, to establish his assertion that the conversation was the result of unlawful pressure upon the defendant, and, although assured that he would be permitted to do so at a proper time, he refused to make the offer at any other time than in the midst of the district attorney's direct examination. So far as the record discloses, the defendant was told what his rights were, that his conversa-

tion might be used against him in court, and he stated that he was willing to make a voluntary statement, as he was an innocent man; and all that he told to the witness was upon the defendant's theory that he was exculpating himself, for he all the time insisted that he was not involved in the creating of the fire. With this testimony in the case, the testimony was clearly admissible as a matter of law, and if the defendant had any evidence bringing in question the truth of the statement of the witness as to what occurred preliminarily to the conversation which was detailed, it was his duty to offer it, not in the midst of the direct examination, but in the course of the cross-examination of the witness, or upon the defendant's own case.

In *People v. Cassidy*, 133 N. Y. 612, 30 N. E. 1003, confessions by the defendant were made, while he was under arrest, to Inspector Byrnes of the New York police force. The inspector and others present testified that the confession was voluntary. The defendant testified that they were made under the influence of fear, produced by threats. The question of whether they were voluntary and reliable was submitted to the jury by the court, which found against the defendant, and it was held that they were properly in the case and sufficient to justify the verdict. See *People v. Kennedy*, 159 N. Y. 346, 356, 359, 54 N. E. 51, 70 Am. St. Rep. 557, inclusive, and authorities cited. We think the defendant was deprived of no right by the ruling of the court, and that the conviction should not be disturbed upon this account. See *People v. Meyer*, 162 N. Y. 357, 366, 367, 56 N. E. 758, and authorities there cited.

We are equally clear that the restrictions contained in section 779 of the Greater New York Charter have nothing to do with this case. The restrictions against using the testimony elicited in a formal examination of a witness in connection with a fire does not in any manner limit the fire marshal in testifying to a conversation held by him with a person who is merely in custody in connection with such fire, where the prisoner is not under oath, and his whole conversation is brought out in his own behalf. The intent of the statute was to enable the fire marshal to conduct an investigation under oath, and to get at all the facts, and to accomplish this it was thought proper to protect the witnesses against their testimony being used against them in criminal proceedings; but it has no relation to a voluntary declaration made by a party who is in custody on suspicion of having committed a crime.

[3] Having disposed of the most serious objections, it is necessary to inquire if any of the lesser objections have weight. Great stress is laid upon the fact that the police officer who arrested the defendant testified that he smelled gasoline upon the prisoner's clothes at the time of the arrest, and an attempt was made to show that the witness had not so testified before the committing magistrate; but the record shows that just prior to the questions where the objection was raised the witness had testified that he smelled gasoline when he searched the prisoner, and that he did not testify to that before the magistrate; "I did not get a chance, I don't think." Clearly it is not the rule that all the details of the evidence shall be given before the magistrate, in order to entitle them to weight upon the trial, and the ruling of the court, ex-

cluding a question, "Now, then, as a police officer, you knew that the odor of gasoline upon his clothes was an important fact, didn't you?" and another, "Did you testify before the magistrate, or before any other court, or in any other place except this court this morning, that you smelled the odor of gasoline upon his clothes?" were properly excluded in the discretion of the court on cross-examination.

[4] Next, defendant's counsel finds fault with matters which he brought out on cross-examination of the people's witness Ferris, the fire marshal, and then urges an objection to the admission in evidence of certain books and papers which were found by the witness in the premises which the defendant said he owned, and which showed business relations between the defendant and Diamond, the record owner of the premises where the fire occurred. We do not find the error.

[5] Next, there is complaint at the ruling of the court in refusing to permit answer to the question:

"Now, from the beginning of your investigation of this alleged fire to-day, have you had charge of the preparation of the case for trial?"

Suppose he had answered, "Yes." Would that have shown bias or prejudice on the part of the witness? It was a part of his duties as a public officer to investigate "any supposed cases of arson or incendiaryism" (section 779, Greater New York Charter), and if he had been preparing the case he would simply have been discharging an incidental part of his official duties, and it is well understood that a witness is not to be understood as an interested witness because he testifies in support of the prosecutions based upon his investigations, as has recently been held under the Liquor Tax Law. Equally applicable is this comment to the next question:

"Did you go, after this fire and endeavor to ascertain the names and addresses of witnesses whose testimony would tend to substantiate the charge that had been made against the defendant in that case?"

In short, all three of the questions which were excluded were of the same general nature, and, even if it be admitted that it would have been entirely proper to permit them to be answered, we are unwilling to hold in this case that the ruling of the court to the contrary would justify a reversal.

[6] Then we are asked to hold that it was error to permit the jury to be discharged upon rendering their verdict without polling the jury. Section 450 of the Code of Criminal Procedure provides that:

"When a verdict is rendered, and before it is recorded, the jury may be polled, on the requirement of either party."

There is no contention that the defendant was not present when the verdict was rendered, and there is no suggestion that he required the jury to be polled. The defendant is clearly a party (section 6, Code of Criminal Procedure), and if he was present and failed to require the polling of the jury, what right has he to complain? It was not the fault of the court that defendant's attorney was not on hand at the time; for he concedes that he was later than the time fixed for his appearance in court, and it appears from the record that there was

counsel in the case, and no reason is shown why he was not present to look after the interests of the defendant, if he had any.

[7] And so we might go on, following the objections raised to this judgment of conviction, and show that each one of them is without substantial foundation; but it hardly seems worth while to go further. It is sufficient to say that we have carefully examined the questions raised, and that there is nothing in the record to indicate that the defendant has not had a fair and impartial trial, and under the provisions of section 542 of the Code of Criminal Procedure, as well as under the general practice of this court, the judgment should be affirmed.

The judgment appealed from should be affirmed. All concur.

MARTIN L. HALL CO. v. TODD.

(Supreme Court, Appellate Term, First Department. December 16, 1912.)

1. **BILLS AND NOTES (§ 96*)—CONSIDERATION—ACCOMMODATION PAPERS.**

An accommodation note, transferred to a third person, either in payment of or as collateral security for a pre-existing debt, is supported by a sufficient consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 165; Dec. Dig. § 96.*]

2. **BILLS AND NOTES (§ 371*)—BONA FIDE PURCHASER—PAYMENT OF VALUE—"PURCHASER FOR VALUE."**

A transferee of an accommodation note, who receives the note in payment of or as collateral security for a pre-existing debt, is a holder for value, though at the time of taking the note he has knowledge that the maker thereof is an accommodation party.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 964; Dec. Dig. § 371.*]

For other definitions, see Words and Phrases, vol. 7, p. 5800.]

Appeal from Municipal Court, Borough of Manhattan, Sixth District.

Action by the Martin L. Hall Company against J. Jackson Todd. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued November term, 1912, before LEHMAN, PAGE, and HOTCHKISS, JJ.

Adolph M. Schwarz, of New York City (Louis F. Perl, of New York City, of counsel), for appellant.

Samuel C. Herriman, of New York City, for respondent.

LEHMAN, J. The plaintiff sues upon a note made by defendant to plaintiff's order. The answer sets forth as a defense that the note was made for the accommodation of the plaintiff, and that no value or consideration for the making of the note passed to the defendant.

[1] At the trial the defendant showed that the note was a part renewal of a note previously made to the plaintiff; that he had no personal transactions with the payee, but that he made the note at the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

request of a man named Phoenix, who owed money to the plaintiff, and who transferred the note to the plaintiff, either in payment of or as collateral security for a pre-existing debt. Conceding that the note was made for the accommodation of Phoenix, and that no consideration passed directly to the defendant, the defendant has no defense to the note, if plaintiff parted with consideration to Phoenix sufficient to sustain the note.

[2] The plaintiff is a holder for value, if it received the note upon consideration sufficient to support a simple contract, and the accommodation maker is liable on it, notwithstanding that, at the time of taking the instrument, it knew the maker to be only an accommodation party. Sections 51 and 55 of the Negotiable Instruments Law. In the case of *Grocers' Bank v. Penfield*, 69 N. Y. 502, at page 504 (25 Am. Rep. 231), the Court of Appeals stated:

"It is universally conceded that the holder of an accommodation note, without restriction as to the mode of using it, may transfer it, either in payment or as collateral security for an antecedent debt, and the maker will have no defense. The existing debt is a sufficient consideration for the transfer, and no new consideration need be shown."

See, also, *Lehrenkrauss v. Bonnell*, 199 N. Y. 240, 92 N. E. 637, where the court stated:

"A pre-existing debt, without extension or forbearance, is sufficient consideration upon which to hold the accommodation maker of a promissory note, where there has been no restriction placed upon its use."

It follows that the judgment must be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

J. P. DUFFY CO. v. TODEBUSH.

(Supreme Court, Appellate Term, First Department. December 16, 1912.)

1. GUARANTY (§ 87*)—CONTRACTS—CONSTRUCTION—"COMPANY."

Plaintiff, who furnished materials to the T. Co., a corporation, under a guaranty executed by defendant for the furnishing of goods to T. & Co., may recover, even though it appeared that there was a partnership by the name of T. & Co.; the difference in names not constituting an actual variance, or requiring a departure from the rule that a contract of guaranty must be strictly construed, and cannot be varied by parol, and the use of the word "company" not necessarily implying a partnership.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 101; Dec. Dig. § 87.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1347-1350.]

2. GUARANTY (§ 16*)—CONTRACTS—CONSIDERATION.

Where the form of a guaranty contemplated subsequent deliveries in reliance thereon, the deliveries themselves are sufficient consideration.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 14-17; Dec. Dig. § 16.*]

Appeal from City Court of New York, Trial Term.

Action by the J. P. Duffy Company against August Todebush. From a judgment on a directed verdict for plaintiff, defendant appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Argued November term, 1912, before LEHMAN, PAGE, and HOTCHKISS, JJ.

Otto A. Samuels and Joseph I. Stahl, both of New York City, for appellant.

Jeremiah J. Coughlan, of New York City, for respondent.

HOTCHKISS, J. Plaintiff, having taken an order for building materials from A. W. Todebush Company (a corporation), refused to make delivery, except for cash or upon a guaranty of payment, whereupon defendant delivered to plaintiff a guaranty in the following form:

"June 7, 1911.

"J. P. Duffy Company, 51st Street & Second Avenue, Brooklyn, N. Y.—Gentlemen: Your firm having taken an order from A. W. Todebush & Co. for the delivery of brick, lime, plaster, etc., to their buildings on the west side 6th Av., between 73d and 74th Streets, I hereby agree to be responsible for the payment of your bills for materials delivered to this job, and if A. W. Todebush & Co. do not pay you for same within sixty days after the delivery of the material, I will pay same myself as a primary obligee.

"Aug. Todebush."

At the time of the delivery of the guaranty there was a partnership known as A. W. Todebush & Co., which latter concern had nothing to do with the construction of the building above referred to, and of the existence of which it was not shown that plaintiff had any knowledge. Thereafter the plaintiff delivered to the Todebush corporation, at the building site, the materials contracted for. Subsequently plaintiff received from the Todebush corporation, in part payment of its debt, two notes. The due date of each was within a period of 60 days subsequent to the last delivery. At the close of the case, both sides moved for the direction of a verdict, and plaintiff's motion was granted.

[1] It is well settled that a contract of guaranty must be construed strictissimi juris, and may not be varied by parol. There are numerous authorities to the effect that the rule extends to a case where it is sought to show that the guaranty was intended for parties other than those named therein. In *Grant v. Naylor*, 4 Cranch, 224, 2 L. Ed. 603, the guaranty was addressed to John & Joseph Naylor. The guaranty in part read:

"By the recommendation of Mr. Travis, I take the liberty to address you." etc.

There was no such concern as John & Joseph Naylor, but there was a firm of John & Jeremiah Naylor, of which Travis was agent, and to which firm the letter was delivered by the persons therein named as those to whom credit was to be given. Having extended credit to these persons, plaintiffs (John and Jeremiah) brought their action against the guarantor, but were not allowed to recover.

In *McGovney v. State*, 20 Ohio, 93, an executor's bond, describing the testator as James L. Finley, was held not applicable to the estate of Joseph L. Finley. *Barns v. Barrow*, 61 N. Y. 39, 19 Am. Rep. 247, and numerous other cases in the courts of this state, rest upon the same principle. I think these cases are distinguishable from the pres-

ent, for the reason that in each the difference in name was so great as to constitute a material variance.

For many years, it has been the practice of copartnerships to become incorporated under their firm name, and certainly no one would contend that the name "A. W. Todebush & Co." necessarily implied a copartnership rather than a corporation. It has been held in this district that the use of the word "Company" did not necessarily imply a corporation. In *re American Cigar Lighter Co.*, 77 Misc. Rep. 643, 138 N. Y. Supp. 455. Since the adoption of section 6 of the General Corporation Law, the incorporation of a company bearing the name of the Todebush copartnership would have prevented the incorporation of a company under the name borne by the Todebush Company.

In *Beakes v. Da Cunha*, 126 N. Y. 293, 27 N. E. 251, the guaranty ran to George E. Beakes. There was an individual by the name of George E. Beakes, and also a partnership doing business under the *same* name, and the court held it competent for plaintiff to identify the actual creditor intended to be covered by the guaranty, by showing that credit was extended to the partnership, and not to the individual. Although no specific reference was made thereto in its opinion, the rule of law invoked by the court was evidently that which permits parol evidence to explain a written instrument in case of latent ambiguity. As Chief Justice Marshall said in *Grant v. Naylor*, *supra*, 4 Cranch, 235, 2 L. Ed. 603:

"It is not a latent ambiguity, for there are not *two* firms of the name of John & Joseph Naylor & Co., to either of which this letter might have been delivered."

In *Drummond v. Prestman*, 12 Wheat. 515, 6 L. Ed. 712, the guaranty was addressed to Charles Drummond, and covered "property of yours and *your brothers*" in the hands of the debtor. It was held that the guaranty could be availed of by a partnership composed of Charles Drummond and Richard Drummond, his brother; it being proved that credit was extended to the copartnership. In *Michigan State Bank v. Peck*, 28 Vt. 200, 65 Am. Dec. 234, a guaranty running to "C. C. Trobridge, President," was enforced by the corporation of which he was president, and which had extended the credit.

Unquestionably, had the name of the corporation been A. W. Todebush & Co., the plaintiff might have shown that credit was actually extended to the corporation, and not to the partnership. Does the inclusion of the word "and" in the name used in the guaranty to describe the creditor for whose benefit the guaranty was intended work such a change as necessarily to describe a concern other than the corporation? I think not. There was no variance in the sense of material difference, and I regard the two names, although not strictly idem sonans, as practically the same, and that, under the rule above referred to, it was competent for plaintiff to show that credit was extended to the corporation and not to the copartnership.

[2] There is nothing in the point that the guaranty should be construed as limited to merchandise delivered before its date. Its form contemplates subsequent deliveries on the faith of the guaranty. The subsequent deliveries, also, were sufficient consideration for the guar-

anty. The notes received by plaintiff were within the terms of credit expressly allowed.

The judgment should be affirmed, with costs.

PAGE, J., concurs.

LEHMAN, J. (concurring). The defendant signed a guaranty, and the only serious question in the case is whether the sale and delivery of the goods to A. W. Todebush Company comes within the meaning of the words used in the written guaranty. A guaranty must, under the Statute of Frauds, be in writing, and the transaction which it is claimed comes within the writing must come, not only within the intent of the parties, but within a fair interpretation of the written words. The courts will not extend the clear meaning of the words by implication, nor will they hold that a transaction comes within the meaning of the words when the parties have, even by mistake, used words which do not describe the transaction. The courts cannot, by implication, construction, or by reason of mistake, include within the terms of a written guaranty any transaction which does not strictly come within the meaning of the written words. The courts do not hold, however, that because a written guaranty cannot be enlarged by parol evidence, but must be strictly construed, they have no right to consider in the interpretation of the written guaranty surrounding circumstances, or that they are not bound to construe a written contract like other contracts, so as to give effect to the intention of the parties. On the contrary, the Court of Appeals in the case of *People v. Backus*, 117 N. Y. 196, 22 N. E. 759, has clearly laid down the rule as follows:

"No citation of authorities is needed to show that the contracts of sureties are to be construed like other contracts, so as to give effect to the intention of the parties. In ascertaining that intention, we are to read the language used by the parties in the light of the circumstances surrounding the execution of the instrument, and when we have thus ascertained their meaning we are to give it effect. But when the meaning of the language used has been thus ascertained, the responsibility of the surety is not to be extended or enlarged by implication or construction, and is *strictissimi juris*."

In other words, when the courts must determine whether a given transaction comes within a written guaranty, they must first, by the application of the usual canons of construction, determine the meaning of the words used. If, under a fair construction of these words, the transaction is covered by the words used, then the transaction falls within the guaranty; if, under a fair construction, the words themselves do not cover the transaction, the courts cannot hold that it falls within the written guaranty, merely because the parties had intended to use words sufficient to cover the transaction.

The defendant has cited many cases which show that the courts will not hold that a transaction comes within a written guaranty, merely because the parties intended the guaranty to cover the transaction, if they did not use apt words to indicate their intention; but they cite no case which holds that a guaranty is not enforceable where the plain meaning of the words used in view of the surrounding circumstances

describes the transaction intended to be covered by the guaranty, even though that description is not entirely accurate. In the case of *Grant v. Naylor*, 4 Cranch, 224, 2 L. Ed. 603, the Supreme Court of the United States held that a written guaranty made to John & Joseph Naylor could not be enforced by John & Jeremiah Naylor. In that case it was clearly shown that the name of "Joseph" was used by mistake; nevertheless, since the actual name used was not applicable to Jeremiah Naylor, the guaranty could not be enforced by him, since the court could not make a new written contract for the parties, nor enforce the actual contract made in favor of a person not therein described. In *McGovney v. State*, 20 Ohio, 93, the defendant made a bond conditioned upon the faithful performance of their duties by executors of James L. Finley. It was shown that the name James L. Finley was used by mistake for the name Joseph L. Finley; but, though the parties undoubtedly intended that the defendant should be responsible for the acts of the executors of Joseph L. Finley, they failed to state that fact, and the court would not enforce the bond, without making a new written contract different from the one signed by the defendant.

In other cases cited the defendants had signed guaranties of a joint debt of several parties, and the plaintiff tried to extend the guaranty by implication to cover debts of individuals. In other cases the guaranty was made to several parties jointly, and one of the parties attempted to enforce it as a guaranty of a debt incurred to himself individually. In still other cases the guaranty ran to a definite party, and other parties claimed the benefit of the guaranty. These cases merely show that the courts will not, by implication, extend the clear meaning of the words, or enforce a guaranty as if it covered a transaction, merely because the parties intended that it should cover the transaction. The intent of the parties in using the words of the guaranty is not the decisive point in construing these contracts, for the courts can enforce only a written guaranty, and they must look to the words of the writing to determine whether the writing covers the transaction. One point to be decided in all these cases is what the words themselves mean, when fairly interpreted in view of the surrounding circumstances.

In this case we have the fact that, while the guaranty states that it covers transactions with A. W. Todebush & Co., as a matter of fact the transactions were with A. W. Todebush Company. The description is, therefore, on that point inaccurate. The transaction is, however, further described as an order for the delivery of brick, lime, plaster, etc., to the building of A. W. Todebush & Co. between Seventy-Third and Seventy-Fourth streets, and covers all "material delivered to this job." No firm of A. W. Todebush & Co. gave any order for materials to be delivered at these houses, or had any connection therewith; but A. W. Todebush Company did give an order to plaintiff for these materials and did receive them. Under these circumstances, in spite of the inaccuracy in the use of the name of A. W. Todebush & Co., instead of A. W. Todebush Company, I think that the written words of the guaranty themselves sufficiently describe the transaction with-

out possibility of mistake. In enforcing the guaranty, therefore, as one covering a transaction with A. W. Todebush Company, we are merely enforcing the guaranty according to the fair meaning of the words used, and are not extending those words to cover a transaction not described, but merely intended to be described, in the written instrument.

Judgment should therefore be affirmed, with costs.

**WALNUT HILL BANK v. NATIONAL RESERVE BANK OF CITY OF
NEW YORK.**

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

BANKS AND BANKING (§ 126*)—DEPOSITS—DRAFTS—ESTOPPEL.

In an action on a draft, drawn on defendant bank with instructions to place it to the credit of plaintiff bank, where it appeared that defendant on the same day notified plaintiff that it had received the draft to its credit, and that but for the notice the plaintiff would have made a strong effort to collect the amount from the drawer, plaintiff, without a showing that it sustained damage by not making an effort to collect, or that, if it had, the debt or some part of it could have been collected, could not recover.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 305-309; Dec. Dig. § 126.*]

Miller, J., dissenting.

Appeal from Appellate Term, First Department.

Action by the Walnut Hill Bank against the National Reserve Bank of the City of New York. From a determination of the Appellate Term (76 Misc. Rep. 220, 134 N. Y. Supp. 756), affirming a judgment in favor of plaintiff entered upon a directed verdict, defendant appeals. Reversed, and new trial ordered.

See, also, 76 Misc. Rep. 208, 134 N. Y. Supp. 504.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, MILLER, and DOWLING, JJ.

John K. Byard, of New York City, for appellant.

C. H. Payne, of New York City, for respondent.

PER CURIAM. This action was brought in the City Court, and there have been two trials. Upon the first trial plaintiff had a judgment, which was affirmed by the Appellate Term, and its determination reversed by this court, and a new trial ordered. 141 App. Div. 475, 126 N. Y. Supp. 430. The second trial also resulted in a judgment in favor of the plaintiff, which was affirmed by the Appellate Term, and the defendant appeals from that determination.

The facts are fully set forth in the opinion delivered on the former appeal, so that it is unnecessary to restate them. It was there said that:

"The notice sent by defendant to plaintiff that it had recovered the draft for the latter's credit was undoubtedly enough to lay the foundation for an estoppel, if it appear that plaintiff, in reliance upon such notification, had done anything, or refrained from doing anything, to its damage."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On the second trial proof was offered for the purpose of showing that the defendant was estopped from asserting that the draft had, in fact, been credited to the plaintiff. The testimony of plaintiff's cashier was taken by commission, and he testified, in answer to a question whether the plaintiff refrained from doing anything with respect to the indebtedness of the Merchants' & Farmers' Bank, in consequence of the receipt of the postal card from the defendant to the effect that the draft had been received for its credit, that:

"But for the receipt of the card from the defendant, the plaintiff would have made a strong effort to collect the \$1,000, now in litigation with the National Reserve Bank, from the Merchants' & Farmers' Bank."

It is claimed that this additional proof brings the case within our former decision, entitling the plaintiff to recover. This would be so, if the defendant had proved, in addition, that it sustained damage by reason of its not making "the effort to collect." It was bound to prove that it not only did not do anything, but, if it had, the debt, or some part of it, could have been collected.

The determination of the Appellate Term is therefore reversed, and a new trial ordered, with costs to appellant to abide event.

MILLER, J., dissents.

FENICHEL v. ZICHERMAN et al

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. **MECHANICS' LIENS (§ 146*)—PERFECTION OF LIEN—COMPLIANCE WITH STATUTE.**

Where the notice of mechanic's lien did not comply with Lien Law (Consol. Laws 1909, c. 33) § 9, subd. 6, requiring the notice to state when the first and last items of work were performed, the lien was invalid.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 246-252; Dec. Dig. § 146.*]

2. **INTEREST (§ 19*)—ALLOWANCE OF INTEREST—UNLIQUIDATED DEMANDS.**

A claim for extra work being unliquidated as to amount, interest thereon should not be allowed.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. §§ 35-40; Dec. Dig. § 19.*]

Appeal from Special Term, New York County.

Action by Charles H. Fenichel against Bernat Zicherman and another. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

David B. Cahn, of New York City (Herbert H. Maass, of New York City, of counsel), for appellants.

Cohen Bros., of New York City (Lawrence B. Cohen, of New York City, of counsel, and Edgar M. Troutfelt, of New York City, on the brief), for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM. This is an appeal from a judgment entered in an action to foreclose a mechanic's lien.

[1] The notice of lien did not comply with the provisions of subdivision 6 of section 9 of the Lien Law (chapter 33 of the Consol. Laws; chapter 38, Laws of 1909), providing that the notice of lien shall state:

"6. The time when the first and last items of work were performed and materials were furnished."

There was no statement in the notice of lien at bar as to when the last items of work were performed and the materials furnished. The lien, therefore, was invalid.

"The provision of the statute that the law shall be construed liberally does not authorize the courts to entirely dispense with what the statute says the notice shall contain. We are, therefore, constrained to hold the notice of lien insufficient." *Mahley v. German Bank*, 174 N. Y. 499, 67 N. E. 117.

[2] The claim being for extra work, and hence unliquidated, the allowance of interest was error. A personal judgment, however, was proper to the amount of \$608.50.

The nineteenth finding of fact is modified, by striking out the statement that the notice of lien therein referred to set forth the time when the last items of work performed and the last items of materials were furnished, and the fifth, sixth, and seventh conclusions of law are reversed, and so much of the eighth as limits the plaintiff to a personal judgment for any deficiency of the amount found due that may remain due him after such sale; and the judgment is modified by striking out the provisions for foreclosure of the lien and a sale of the property, so that it should provide for a personal judgment for the amount found due, without interest up to the time of the judgment, and without costs at the Special Term, and, as so modified, affirmed by this court, without costs to either party.

EVERDELL v. CARRINGTON.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. PRINCIPAL AND AGENT (§ 154*)—ABUSE OF AUTHORITY—REMEDY OF PRINCIPAL.

Where defendant's lease of premises from plaintiff's agent only required defendant to pay rent on the last day of each month, plaintiff could recover from defendant the amount of rent paid to the agent in advance under a subsequent agreement with him, made by the agent without authority, with interest thereon.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 572, 573; Dec. Dig. § 154.*]

2. PRINCIPAL AND AGENT (§ 100*)—AUTHORITY.

Authority given an agent merely to execute a lease did not authorize him to thereafter change its terms.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 262-273, 345, 364, 368-373; Dec. Dig. § 100.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. **PRINCIPAL AND AGENT (§ 147*)—AUTHORITY—NOTICE.**

One dealing with an agent must ascertain the extent of his powers and bear any loss from his failure to do so.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 528-533; Dec. Dig. § 147.*]

4. **PRINCIPAL AND AGENT (§ 106*)—AUTHORITY.**

An agent, who merely had authority to execute a lease and receive rent at the end of the month as provided therein, had no implied authority to receive payment in advance.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 311, 312; Dec. Dig. § 106.*]

5. **PRINCIPAL AND AGENT (§ 120*)—AUTHORITY OF AGENT—EVIDENCE.**

An agent's authority to receive payment of rent in advance for his principal's property could not be proved by showing prior similar payments to him, unless it were shown that the principal had knowledge of such prior payment.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 402-412; Dec. Dig. § 120.*]

Action by Henry C. Everdell against William T. Carrington. On submitted controversy. Judgment for plaintiff.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Julian T. Davies, Jr., of New York City, for plaintiff.

Nicholas Danforth, of New York City, for defendant.

McLAUGHLIN, J. The plaintiff's assignor, one Kate Reed, has a 99-year lease, with the right to sublet, of an apartment in a building owned by a corporation. For some time prior to July, 1904, and continuously thereafter until about May 17, 1910, one John Cleary was the manager and superintendent of, and had his office in, the building, and in such capacity was in the employ of the corporation, having general charge of all parts of the building, except such apartments therein as were held under 99-year leases, of which there were several. Each lessee of an apartment under a 99-year lease had the entire and exclusive control over his particular apartment; but a number of them, including Mrs. Reed, turned over to Cleary, while acting as manager and superintendent of the corporation, the renting of their respective apartments, and in doing so he acted as their agent, and not for the corporation. On the 26th of March, 1907, Cleary, acting as the agent of Mrs. Reed, who lived in Montreal, leased to the defendant her apartment for a term of three years from the 1st of October, 1907, at an annual rental of \$4,000 per year. The lease was in writing, and provided that the rent stipulated to be paid should be—

"payable in equal monthly installments on the last day of each month until the expiration of said term at the office of the party hereto of the first part [John Cleary, as agent of Kate Reed], No. 121 Madison avenue, in the said city of New York, and said tenant hereby agrees to pay said rent at the times and in the manner hereinabove provided."

Cleary was dismissed from the service of the corporation on the 17th of May, 1910, and some time between that date and the ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

piration of the lease Mrs. Reed learned for the first time that Cleary had collected in advance from the defendant the rent, which he had not turned over to her, for the months of December, 1909, and January, February, March, April, May, and June, 1910, amounting in all to \$2,333.33. This sum has not been paid to her, or her assignee, although the same was demanded from the defendant prior to this submission.

The payment of the rent in advance was brought about, without the knowledge of Mrs. Reed, by Cleary's giving to the defendant certain discounts upon advance payments. The defendant, in accepting the discount and making the advance payments, acted in good faith, but without any inquiry, except from Cleary, to ascertain the latter's authority. The question submitted for decision is whether the plaintiff is entitled to recover from the defendant the advance payments of rent above stated, together with interest from the time the several installments fell due, or whether the payment by defendant to Cleary relieves him from any further payment.

[1, 2] I am of the opinion that the plaintiff is entitled to recover. Cleary had no real or apparent authority from Mrs. Reed to discount or accept payment of any installment before it became due. The defendant knew the terms of the lease, and that it provided for the payment of the monthly installments on the last day of each month, and in the lease he agreed to pay the rent "at the times and in the manner hereinabove provided." The fact that Cleary had executed the lease as agent for Mrs. Reed conferred upon him no authority to thereafter change its terms. As was said in *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157:

"No authority to change the terms of the contract can be implied from the fact that it was originally made through the attorney, and there is no evidence in this case of any such authority."

[3] The defendant, as said, knew the terms of the lease, and when he paid in a manner different from therein provided he was bound to know the authority of Cleary to receive the sum paid; otherwise, he paid at his peril. The general rule is that a party dealing with an agent must ascertain the extent of the powers delegated to him, and "must abide by the consequences if he transcends them." *Porges v. U. S. Mortgage & Trust Co.*, 203 N. Y. 181, 96 N. E. 424; *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150.

[4] While Cleary had authority to execute the lease and receive payment of the rent in the manner therein provided, he had no actual or implied authority to receive it in advance at any other time or manner than as stated in the lease. *Story on Agency* (9th Ed.) § 98; *Clark & Skyles on Agency*, § 277. The court, speaking of advance payments to an agent, in *Doubleday v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502, said:

"Nor can the agent receive pay otherwise than according to the terms of the obligation. If the debtor pay before due the principal, the payee is not bound."

And in *Smith v. Kidd*, supra:

"Even though an agent have authority to receive payment of an obligation, this does not authorize him to receive it before it is due."

See, also, *Schermerhorn v. Farley*, 58 Hun, 663, 11 N. Y. Supp. 466.

[5] Cleary's authority to receive the payments in question, of course, could not be established by showing prior similar transactions, without showing that Mrs. Reed had knowledge of them. *Bickford v. Menier*, 107 N. Y. 490, 14 N. E. 438; *Baldwin v. Burrows*, 47 N. Y. 199.

My conclusion, therefore, is that the plaintiff is entitled to judgment against the defendant for the sum of \$2,333.33, being the rent for the months of December, 1909, January, February, March, April, May, and June, 1910, together with interest on each installment from the time the same became due. All concur.

(79 Misc. Rep. 28.)

FINKELSTEIN v. SELWITZ.

(Supreme Court, Appellate Term, First Department. January 9, 1913.)

1. SALES (§ 418*)—BREACH BY SELLER—MEASURE OF DAMAGES.

Where a manufacturer contracts to manufacture and deliver merchandise, knowing that the purchaser has placed orders to resell, the measure of damages for a breach by the manufacturer is the difference between the market price at the time and place of delivery and the agreed price, if the goods are obtainable in the market, and, if not, then the difference between the contract price and the price at which the purchaser placed his orders for a resale, less his expense saved from the contract not being carried out.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174–1201; Dec. Dig. § 418.*]

2. SALES (§ 416*)—EVIDENCE—PLEADING.

Where, in an action for breach of a contract to manufacture and deliver merchandise bought for resale, the complaint stated a cause of action, it was error to exclude plaintiff's evidence that he endeavored to buy goods of the character contracted for in the open market, though the complaint did not state the measure of damages to which such evidence would be pertinent.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1171, 1172; Dec. Dig. § 416.*]

3. SALES (§ 418*)—BREACH—DAMAGES.

In an action for breach of a contract to manufacture and deliver merchandise bought for resale, the purchaser is entitled as general damages to the difference between the market price at the time and place of delivery and the price at which defendant agreed to sell, though he fails to prove special damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174–1201; Dec. Dig. § 418.*]

Appeal from City Court of New York, Trial Term.

Action by Irving Finkelstein against Abraham Selwitz. From a judgment dismissing the complaint, plaintiff appeals. Reversed, and new trial ordered.

Argued December term, 1912, before SEABURY, GUY, and GERARD, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

House, Grossman & Vorhaus, of New York City (Charles Goldzier and Gerald B. Rosenheim, both of New York City, of counsel), for appellant.

Louis Nahemow, of New York City (Max D. Steuer and Julian Arthur Leve, both of New York City, of counsel), for respondent.

GERARD, J. The complaint alleges that on or about October 19, 1910, in consideration of the agreement on the part of the plaintiff to pay the sum of \$6.75 for each garment, the defendant promised and agreed with plaintiff to manufacture for him 585 ladies' coats and to make delivery at certain specified times, that the plaintiff at the time of the making of such contract had orders for such merchandise at a price on which he would have realized a profit of about \$2,000, and that he had informed the defendant of the fact that he had such orders and would realize such profits, and that said agreement was made in view of such orders and such anticipated profits; and the plaintiff alleged that, by the failure of the defendant to perform, the plaintiff lost the profits which would have been realized as aforesaid, and sustained injury to his damage in the sum of \$2,000, and demanded judgment for the sum of \$2,000 and costs. At the conclusion of the plaintiff's case, defendant moved to dismiss the complaint, on the ground "that plaintiff has wholly failed to establish any measure of damages"; and this motion was granted, after plaintiff had asked leave to go to the jury on the question of damages sustained by the plaintiff.

[1] Upon the breach by a manufacturer of a contract to manufacture and deliver merchandise, where the manufacturer is advised at the time when the contract is made that the purchaser has placed orders to resell the merchandise, and the contract was made in view thereof, the measure of damages is the difference between the market price at the time and place of delivery and the price at which the manufacturer agreed to sell and deliver the goods, if the goods are obtainable in the market, and, if not, then the difference between the contract price and the price at which the purchaser had placed his orders for a resale, less his expense in carrying out the contract. *Ideal Wrench Co. v. Garvin Machine Co.*, 92 App. Div. 187, 87 N. Y. Supp. 41, affirmed 181 N. Y. 573, 74 N. E. 1118; *Lowenstein v. Hargraves Mills*, 141 App. Div. 232, 125 N. Y. Supp. 1090.

[2, 3] The learned court below excluded testimony offered by plaintiff tending to show that the plaintiff had endeavored to buy goods of the character contracted for in the open market. Even if the plaintiff failed to prove special damage, he was entitled to recover as general damage the difference between the market price at the time and place of delivery and the price at which the defendant agreed to sell and deliver the goods.

We think that the complaint here contained sufficient allegations of general damage; but, even if it did not, if the complaint stated facts that constituted a cause of action, the evidence should not have been excluded, although plaintiff specified only items of damage to which

he was entitled. As was said in *Colrick v. Swinburne*, 105 N. Y. 503, at page 507, 12 N. E. 427, at page 428:

"The complaint was sufficiently specific to authorize the recovery of whatever legal damages were recoverable for the wrong. * * * The complaint averred a legal wrong and a resulting pecuniary injury, and it was competent for the court, under the complaint, to adjust the recovery upon the true basis." "It is not material that the plaintiff did not demand the precise damage to which he was entitled, or that he mistook the true rule of damages in his complaint."

See, also, *Coppola v. Kraushaar*, 102 App. Div. 306, 92 N. Y. Supp. 436.

The judgment appealed from must be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

SMITH et al. v. SMITH.

(Supreme Court, Appellate Division, Second Department. December 30, 1912.)

1. PERPETUITIES (§ 4*)—TRUSTS.

Where a testator devised his estate in trust for five years, to be distributed at the end of that time, one-third to his wife and the remaining two-thirds between his three children, with the provision that, should any of them die before time of distribution, then their share should descend to their lawful issue, if any, but if none, should go to the survivors, the trust estate is invalid, because not certain to vest in interest within a life or two lives in being; it being the apparent intention of the testator to fix an absolute period of five years, not measured by any life, during which distribution shall be postponed.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-44; Dec. Dig. § 4.*]

2. WILLS (§ 439*)—CONSTRUCTION—RULES.

While a will must be construed, if possible, so as to render it valid, yet the intent of the testator, when ascertained, controls.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.*]

3. WILLS (§ 688*)—CONSTRUCTION—TRUSTS—INVALIDITY.

Where testator devised his property in trust for five years, then to be distributed, one-third to his wife and the remainder to be divided between his children, the share of any child dying to descend to her lawful issue, if any, and if none, then to the survivors, the trust being invalid, the trust term could not be disregarded, and the estate distributed immediately, as it would cut off the ultimate limitation to surviving children and the widow, and such contingent limitations cannot survive the failure of the trust, but the estate must be distributed in accordance with the law as to estates of persons dying intestate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1574; Dec. Dig. § 688.*]

Burr, J., dissenting.

Submission of controversy by Evelyn Woodford Smith and others against Evelyn V. Smith, individually and as executrix of Orlando J. Smith. Judgment for plaintiffs.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Submission of controversy on agreed statement of facts, under sections 1279-1281 of the Code of Civil Procedure. This submission presents for consideration articles 3 and 4 of the last will and testament of Orlando J. Smith, deceased, which are as follows:

"Third.—I hereby give, devise and bequeath unto my wife, Evelyn V. Smith, and unto my brother-in-law, Jesse Holdom, all of the real estate, stocks, bonds, securities and other personal property, except the household furniture and property bequeathed to my wife under the preceding clause of this my will owned by me at the time of my decease or to which I may be entitled, to have and to hold the same upon the trusts and for the uses hereinafter expressed and not otherwise.

"To take possession of all my real and personal estate and to collect all the income thereof and to pay all taxes and other necessary and lawful charges at any time resting thereon; to make and execute leases of my real estate for such terms not exceeding five years and upon such rentals as my said trustees may, from time to time, deem for the best interests of the trust estate with full power to sell any of my real or personal property, at such times and upon such terms as my said trustees shall deem adequate and with like full power to make, execute and deliver all contracts, deeds and acquittances by parol or under seal necessary to vest title to any of such real or personal estate in the purchaser or purchasers thereof.

"I direct my said trustees to re-invest all of the proceeds of any sales from time to time of any of the trust property so that the corpus thereof, during the continuance of said trust, shall, as near as practicable, be kept intact and income producing and that no part thereof shall, during that time, be expended unless conditions not now foreseen may render it necessary to in-trench thereon for the necessary support of my said wife and my children, Courtland, Evelyn Woodford and Mabel Follin Smith.

"I direct that the net income from all of my estate, together with any investment thereof, which may be made from time to time, shall be paid to my wife Evelyn V. Smith, during the continuance of the trust hereby created, out of which she shall not only support and maintain herself, but also our three children aforesaid.

"The trust created by this clause of my will shall cease and determine at the expiration of five years from the date of my death.

"Fourth.—I hereby direct that all of the real estate and personal property held in trust in virtue of the third clause of this my will shall, at the expiration of five years, from the time of my decease, be distributed as follows:

"One-third thereof to my said wife, Evelyn V. Smith, and the remaining two-thirds thereof, in equal parts share and share alike, between my three children, Evelyn Woodford Smith, Courtland Smith, and Mabel Follin Smith as an indefeasible and absolute estate of inheritance and I do hereby give, devise and bequeath the same to them and each of them accordingly.

"Should any of my said three children or my said wife, Evelyn V. Smith, depart this life before the time of distribution, then the share and part of my estate devised and bequeathed to my said children as shall so die, shall descend to the lawful issue of those of my children so dying in equal parts if more than one child, if only one then the whole thereof to such one child, and should either of my said children die before such time without leaving lawful issue her, him or them surviving, then such estate and property shall vest in and be delivered and is hereby granted to the survivors, including my said wife, Evelyn V. Smith, if she be then living, in equal parts and in the event of the death of my said wife, Evelyn V. Smith, before the period of distribution aforesaid, then the share of my estate then distributable to her but for her death shall go to and be divided amongst my children or the survivor of them, in equal parts, share and share alike.

"Or, if only one of my said children, or my wife survive the five year trust period, then the whole of said estate and property shall vest in and be delivered to such sole survivor."

Argued before HIRSCHBERG, BURR, THOMAS, CARR, and RICH, JJ.

Edward Bruce Hill, of New York City (Walter H. Pollak, of New York City, on the brief), for plaintiffs.

Lyle Evans Mahan, of New York City, for defendant.

RICH, J. The plaintiffs are the children of the testator, and the defendant is his widow, and sole executrix and trustee under his will. The plaintiffs contend that the trust attempted to be credited is invalid, as suspending the power of alienation for a period not measured by one or two lives in being at the death of the testator; that the contingent limitations over at the end of the trust period of five years to issue or survivors fail for the same reasons; that the contingent limitations to the wife and children cannot stand, because not certain to vest in interest within a life or two lives in being at the time of the death of the testator; and that the contingent limitations to the wife and children, if they survive the five-year term, cannot stand without the estates that precede and follow them.

[1, 2] If the proper construction to be placed upon the language used by the testator, considered in connection with his intent, which must be gathered from the whole scheme of the distribution of his estate, creates an absolute trust period of five years, and is not measured by any life or two lives in being at the time of his death, the trust is invalid, and plaintiffs' contention must be sustained, unless, as defendant argues, the term during which distribution of the estate is postponed may be disregarded, and the estate distributed immediately in accordance with the provisions of the will.

Under the well-settled law of this state, the will must, if possible, be so construed as to render it valid, and effect must be given to the intention of the testator, when ascertained. I think it was the intention of the testator that the income of his residuary estate, and, if subsequent conditions (not foreseen) rendered it necessary, the principal, should, for the full term of five years, be devoted to the support and maintenance of his wife and three children, and that if any of them survived that term the trust should continue; that it should not be terminated before the expiration of five years, unless the wife and all of his children should die during that time. There is no specific limitation of the five-year term upon a life or two lives in being at his death; but, upon the contrary, his language and the scheme of distribution establish, I think, that the testator did not intend such a limitation.

The entire residue, both real and personal, is to be kept intact, unless unforeseen conditions rendered it necessary to use principal, the net income paid to the wife during the continuance of the trust, to be used for her support and that of her three children, the survivor or survivors. It is directed that the trust shall cease and determine at the expiration of five years from his death, and it is clear, I think, that he intended that it should not be terminated until that time, and that in the event of the death of his wife or any of the children the trust is nevertheless to continue for five years.

It is difficult to conceive of language which would more clearly indicate the testator's intent that distribution should not be had of his entire estate until the expiration of five years after his death, irrespective of who or how many of his cestui que trusts might die during such trust period. Until the expiration of five years, all of the remainders are contingent only; the survivors of the cestui que trusts then, and not until then, are vested with "an indefeasible and absolute estate of inheritance." The vesting in interest as well as the vesting in possession is postponed until the expiration of the five-year period, and until such time it could not be determined who would be entitled to the residuary estate.

[3] The contention of defendant that the trust term should be disregarded and the estate distributed immediately cannot be sustained. Such a disposition would cut off the ultimate limitations to surviving children, their issues, and the widow, contrary to the testator's clearly expressed intent that neither widow nor child should have any portion of the residuary estate, unless the same should be necessary for their support during the trust period. The contingent limitations cannot survive the failure of the rest of the instrument, and the residuary estate, real and personal, must be distributed in accordance with the provisions of the Decedent Estates Law relating to the inheritance of property of persons dying intestate.

Judgment may be entered accordingly.

• HIRSCHBERG, THOMAS, and CARR, JJ., concur.

BURR, J. I dissent, and think that there is a construction possible which will save this will, and, if so, such construction should be adopted.

The purpose of the trust is to pay the income to testator's wife, Evelyn V. Smith, during the continuance of the trust hereby created, out of which she shall not only support and maintain herself, but also the testator's three children named. No trust can survive the purpose of its creation. If Mrs. Smith is the sole beneficiary of the income, then it must necessarily terminate at her death; but it may terminate before that time, to wit, at the expiration of five years. A trust for life, which may be terminated at some definite period within that life, is valid. *Provost v. Provost*, 70 N. Y. 141; *Kahn v. Tierney*, 135 App. Div. 897, 120 N. Y. Supp. 663, affirmed 201 N. Y. 516, 94 N. E. 1095. It does not seem to me that the trust could be construed as a trust in any sense for the benefit of the children, and that the clause with reference to the children's support out of the income was simply by way of relieving the mother from her legal obligation to support them out of her own estate. There is no direction that the income shall be divided equally among them, and there is no direction that, in the event of the death of one or more, the remaining income shall be paid to the survivors. I think this view is confirmed by the direction for the distribution of the corpus of the estate.

The first disposition provided is, one-third of such corpus to his wife, Evelyn V. Smith, and the remaining two-thirds in equal parts

to each of his three children, specifically named by him; that is, two-ninths each. Although this division is directed to be made at the end of five years, necessarily, to be accurately accomplished, both Mrs. Smith and all of the children must be then living. What happens if Mrs. Smith dies? The will says, in the event of the death of his wife before the period of distribution aforesaid, then (that is, at her death) the share of his estate distributable to her but for her death (that is, one-third thereof) shall go to and be divided among his children, or the survivor of them, in equal parts, share and share alike. What is to become of the other two-thirds? There is no provision for continuing the trust estate as to that, for there is no direction to pay the income to any one but testator's wife, and therefore, whether the five-year period has expired or not, the remaining two-thirds becomes immediately distributable among the three children, if they are then living. The death of one or more of the children during the five-year period would not terminate the trust, but the income would still be paid to Mrs. Smith during her life, or until the expiration of the five years. As to the corpus of the estate, should one or more of the children die during Mrs. Smith's life and before the termination of the five-year period, leaving issue, then, at the time of distribution, the share of the one so dying would go to such issue, and if either of such children should die during Mrs. Smith's life, or before the five-year period of distribution, without leaving lawful issue, then, when the estate was distributed, it would go to the survivors.

The only possible sentence that could cast doubt upon this construction is this:

"Or, if only one of my said children, or my wife survive the five-year trust period, then the whole of said estate and property shall vest in and be delivered to such sole survivor."

If testator's wife were the sole survivor of the five-year trust period, as I have pointed out, the will would be a valid one, since the period of distribution was reached during her life. But, suppose that Mrs. Smith and all but one of the children die during the five-year period, Mrs. Smith being the last one so to die; is the trust estate still continued until the expiration of five years? I think not: First, because there is no provision to pay the income to any one after her death; second, because at least as to one-third part thereof, by express provision of the will, the corpus becomes immediately distributable upon her death.

There being no intermediate trust estate as to the remaining two-thirds, the will might be construed as though it read:

"If my wife dies during the five-year period, leaving one child only surviving her, then, at the end of five years, I give two-thirds of the estate to such child."

But, there being no intermediate estate, the time for the devise to take effect would be anticipated, and, notwithstanding the five-year period had not expired, the remaining two-thirds of the estate would be immediately distributable.

(154 App. Div. 130.)

SMITH v. WESTERN PAC. RY. CO.

(Supreme Court, Appellate Division, First Department. December 20, 1912.)

1. LIMITATION OF ACTIONS (§ 46*)—TIME OF ACCRUAL—BROKER'S COMMISSIONS.

A bond broker's cause of action for commissions for procuring purchasers for first mortgage bonds accrued when the corporation executed its mortgage, pursuant to the acceptance of the purchasers, procured by the broker, of the offer to sell.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 240-253; Dec. Dig. § 46.*]

2. LIMITATION OF ACTIONS (§ 46*)—COMMISSIONS OF BROKERS—TIME OF ACCRUAL.

A broker's commissions become due upon the acceptance by his employers of purchasers produced by him ready, willing, and able to perform upon the prescribed terms.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 240-253; Dec. Dig. § 46.*]

3. LIMITATION OF ACTIONS (§ 2*)—PERSONS ENTITLED TO PLEAD—FOREIGN CORPORATIONS.

Code Civ. Proc. § 390, provides that where a cause of action, not involving realty, accrues against a nonresident, an action cannot be brought thereon in the state after the time limited by the laws of his residence for bringing a like action, except by a resident and in one of the following cases; that is, where the action originally accrued in favor of a resident, etc. Section 401 provides that if, when a cause of action accrues against a person, he is out of the state, it may be commenced within the time limited after his return, and if, after an action has accrued against a person, he leaves the state and remains absent for one year or more, his absence is not a part of the period of limitation. *Held*, that a foreign corporation, sued by a nonresident on contract for broker's commissions, may plead the statute of limitations of the state of its domicile.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 4-8; Dec. Dig. § 2.*]

4. CORPORATIONS (§ 668*)—SERVICE OF PROCESS—FOREIGN CORPORATIONS.

Service of process upon an officer or director of a foreign corporation casually within the state gives the court jurisdiction of such corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603, 2606-2627; Dec. Dig. § 668.*]

Appeal from Trial Term, New York County.

Action by Charles E. W. Smith against the Western Pacific Railway Company. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

See, also, 144 App. Div. 936, 129 N. Y. Supp. 1146.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and MILLER, JJ.

Herrick, Breckinridge, Carney & Sloane (D. Cady Herrick, of New York City, of counsel), for appellant.

Byrne & Cutcheon, of New York City (F. W. M. Cutcheon, of New York City, of counsel, and James Byrne and Harrison Tweed, both of New York City, on the brief), for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
139 N.Y.S.—9

CLARKE, J. The action is to recover \$1,244,900 and interest, which the plaintiff claims by virtue of an oral contract with defendant as commissions, in consideration of alleged services in assisting to market the first mortgage bonds of the defendant. Plaintiff is a bond broker, a resident of New Jersey, and the defendant is a foreign corporation, organized and existing under the laws of the state of California. The first cause of action set up in the complaint is upon an agreement to pay a sum of money equal to $2\frac{1}{2}$ per centum of the par value of \$50,000,000 of bonds; and the second cause of action is for the same amount upon the same transaction, but is upon a quantum meruit.

The defendant sets up, inter alia, as a defense in bar, the California statute of limitations. The Special Term, by order, directed the separate trial of the plea in bar, and pursuant thereto the trial of said issue was had at the Trial Term, a jury being waived. The learned court found as matters of fact: That this action and the causes of action alleged in the complaint are upon alleged contracts and obligations founded upon alleged agreements made and entered into in July, 1904, in the state of New York. From prior to the time at which the plaintiff's claims, alleged contracts, and employment, referred to in the complaint, were made, continuously down to a time subsequent to the date of the commencement of this action, plaintiff was not a resident or a citizen of the state of New York. Defendant is not and never has been a resident of the state of New York, but was and is a railroad corporation organized under the laws of the state of California, and is a resident and citizen thereof. That this action was commenced on the 14th of January, 1909, and was not commenced within two years after the causes of action, if any, alleged in the complaint, accrued. That at the times mentioned in the complaint there were, and ever since have been, in force in the state of California the following statutory provisions of the Code of Civil Procedure thereof:

"Sec. 312. Commencement of Civil Actions.—Civil actions without exception can only be commenced within the periods prescribed in this title after the cause of action shall have accrued unless where in special cases a different limitation is prescribed by statute."

"Sec. 335. Periods of Limitation Prescribed.—The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:"

"Sec. 339. Within two years: 1. An action upon a contract, obligation or liability not founded upon an instrument in writing, or founded upon an instrument of writing executed out of the state."

That more than two years had elapsed subsequent to the time when this action or causes of action alleged in the complaint accrued, and said causes of action were prior to the commencement of this action barred by the statutes of the state of California above mentioned. And, as conclusions of law, that the causes of action were barred by the statute of limitations of the state of California and of this state, and that the defendant was entitled to judgment dismissing the complaint. From the judgment entered thereon plaintiff appeals.

[1] The first question presented is: When did the causes of action accrue? The complaint alleges that:

"In about the month of July, 1904, in the city of New York, the defendant entered into an agreement with the plaintiff to employ the plaintiff to assist the defendant in the sale of \$50,000,000 par value of the first mortgage bonds of the defendant to be issued and sold by the defendant, the said bonds to be secured by the first mortgage, hereafter mentioned; and in consideration of said employment, and the promises of the defendant to the plaintiff in this cause of action hereinafter specified, the plaintiff in and by said agreement promised to assist the defendant in devising plans to give said bonds a substantial value, and to assist said defendant in selling and finding purchasers for the said bonds, or in finding persons or corporations through or by the assistance of whom purchasers for said bonds could be procured; and the defendant in said agreement further promised that the defendant and its officers and agents should and would co-operate with and assist the plaintiff in procuring purchasers for the said bonds, all to the end that by the co-operation of the efforts of the plaintiff and of the defendant, its officers and agents, and such other persons or corporations as the plaintiff might find and procure the assistance of, the said bonds should be sold, and upon terms satisfactory to the defendant. And in said agreement the defendant further promised that for and in consideration of the services to be rendered by the plaintiff as in this paragraph alleged, and if all said bonds should be sold and disposed of through or by the assistance of the said services of the plaintiff, or through or by the said services and assistance of the plaintiff in co-operation with the services and efforts of the defendant, its officers and agents, and such other persons or corporations as the said plaintiff might find and procure to assist therein, then the defendant should and would pay to the plaintiff a sum of money equal to $2\frac{1}{2}$ per centum of the par value of said bonds, to wit, $2\frac{1}{2}$ per centum of \$50,000,000; but it was further agreed between plaintiff and defendant, in and by the said agreement, that, unless all the said bonds were so sold and disposed of, the defendant should not be liable to the plaintiff on the said agreement, or for the payment to the plaintiff of any compensation or any sum of money whatever. That * * * the plaintiff in the said city of New York, and in pursuance and performance of the contract upon his part, rendered to the defendant the services therein mentioned and performed all the conditions of said contract upon his part to be performed; and the plaintiff did find and procure, and cause to be found and procured, and there was found and procured by and through the assistance and services of the plaintiff, purchasers for all of the said first mortgage bonds of the defendant, and amounting to \$50,000,000 par value thereof, and at a price and upon terms satisfactory to the defendant. On information and belief, that in the said city of New York the defendant accepted the offer of the said purchasers so found and procured, and sold all the said bonds to the said purchasers; and pursuant thereto, and on or about the 23d day of June, 1905, and in the said city of New York, the defendant executed, acknowledged, and delivered its certain mortgage, bearing date as of the 1st day of September, 1903, to the Bowling Green Trust Company * * * as trustee, to secure an issue of \$50,000,000, par value, of its first mortgage 5 per cent. 30-year gold bonds, * * * and the defendant thereupon agreed to sell and did sell in the city of New York all of the said bonds to the said purchasers procured and caused to be procured by the plaintiff, and by and through the assistance and services of the plaintiff as aforesaid; and that the plaintiff has duly performed all the terms and conditions of the said contract between the plaintiff and defendant to be performed by or on the part of the plaintiff. As partial payments and on account of the money due and to become due the plaintiff under the said contract, * * * the defendant paid to the plaintiff at different times in and prior to April, 1906, sums of money aggregating \$5,100, but the said defendant has wholly failed and refused, and still fails and refuses, to pay to the plaintiff any other or further sum of money whatsoever, and there remains due and unpaid to the plaintiff

from the said defendant the sum of \$1,244,900, with interest thereon at 6 per cent. per annum from the 23d day of June, 1905."

The second cause of action differs from the first only in the allegation as to the reasonable worth and value of the services of the plaintiff, and as follows:

"That the said services so rendered to the defendant by the plaintiff as aforesaid were of the value and were reasonably worth the sum of \$1,250,000, which said sum became due and payable to the plaintiff on or before the 23d day of June, 1905."

A letter was written by the plaintiff to the defendant, dated May 18, 1906:

"I inclose you herewith my bill for services as broker in the placing of \$50,000,000 bonds of your company, and would like you to kindly give this matter immediate consideration and send me check for the amount. The fact of my employment and the nature of the services rendered are undoubtedly within your knowledge."

The inclosed bill was dated May 18, 1906, and is as follows:

"Western Pacific R. Co. to Charles E. W. Smith, Dr. To services as broker in placing of the issue of \$50,000,000 of bonds of said company, \$1,250,000. Received on account, \$5,100. Balance due, \$1,244,900."

Under a stipulation, and for the purposes of the trial, the plaintiff offered in evidence a statement:

"That \$49,725,000 face value of bonds secured by the first mortgage of the defendant, dated as of September 1, 1903, and executed June 23, 1905, were delivered to and paid for by a syndicate upon the following dates and in the following amounts, face value, respectively."

And there follow enumerated transactions, the first being June 29, 1905, and the last December 17, 1908. The stipulation proceeds:

"That the bonds above mentioned are \$49,725,000 face value of the bonds intended to be referred to in plaintiff's complaint as having been sold as therein stated; that the defendant, while, for the purposes of the issue now on trial only, it admits the truth of the foregoing statements, hereby objects to the reception thereof, or any thereof, in evidence, upon the grounds that the same are irrelevant and immaterial, and that they are not admissible under the pleadings. That nothing contained herein shall be deemed to be a concession upon the part of the defendant that any such delivery or payment was pursuant to or connected with any contract or agreement between the plaintiff and the defendant, or any employment of the plaintiff by the defendant."

It seems to me to be clear that the causes of action alleged in the complaint must be held to have accrued upon the date stated therein, to wit, the 23d of June, 1905. The allegations are that the defendant *accepted the offer of the said purchasers so found and procured*, and *sold* all the said bonds to the said purchasers, and *pursuant thereto*, and on or about the 23d day of June, 1905, executed and delivered its mortgage, in the first cause of action; and in the second cause of action, that the said services so rendered were worth \$1,250,000, which said sum became due and payable to the plaintiff on or about the 23d day of June, 1905.

[2] If the mortgage was made pursuant to the acceptance by the defendant of the offer of the purchasers found and procured, and to

whom all the bonds were sold, as is alleged, why, then the services of the broker were completed and his commissions became due, upon the well-settled doctrine that a broker has earned his commissions upon acceptance by his employer of the purchasers produced by him who were ready, willing, and able to perform upon the terms prescribed by the employer. That he was of that opinion is established by his statement that the sum became due and payable on that date, by his claim of interest therefrom, by his allegation of part payment, and by the submission of his bill. The facts sought to be established by the schedule of the bonds delivered and paid for by a syndicate at the dates mentioned, no more affect the question of when they were sold, and the right of this broker to recover his commissions, than does the question of when real estate is to be paid for under a contract for the purchase thereof upon partial and postponed payments, or upon the dates for the collection of rentals upon long-term leases, when a real estate broker sues for commissions in procuring the sale or leasing of real estate. His commissions are due when his services are rendered—that is, when he has brought the minds of the parties together and the transaction becomes a binding contract—unless there is a special reservation in the contract for the deferred payment of his commissions upon expressed contingencies. This contract was alleged to be oral. The plaintiff has himself set out the terms, he expressly alleges that he was a broker, and he sets up a brokerage contract, and he has himself fixed the terms of its completion and the date of his debt thereunder as of June 23, 1905. I can see no escape from the conclusion that the causes of action, if any, accrued upon said date.

[3] Second. The further question presented is whether, in an action in the courts of this state, brought by a nonresident against a foreign corporation, that foreign corporation may plead the statute of limitations of the state of which it is a resident and citizen. Sections 380 to 389 of the Code of Civil Procedure, our statute of limitations, originally were in substance section 74 et seq. of the Code of Procedure of 1848, and before that was part 3, c. 4, § 18 et seq., 2 R. S. p. 295 et seq., edition of 1829. Section 401, omitting the last sentence, was originally section 100 of the Code of Procedure, and before that was part 3, c. 4, § 27, 2 R. S. p. 297, and read as follows:

"Sec. 27. If at the time when any cause of action specified in this article shall accrue against any person, he shall be out of this state, such action may be commenced within the terms herein respectively limited after the return of such person into this state, and if after such cause of action shall have accrued such person shall depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action."

In *Olcott v. Tioga R. R. Co.*, 20 N. Y. 210, 75 Am. Dec. 393, it was held that foreign corporations are persons "outside of this state," within the meaning of the statute of limitations, which excepts from its operation cases where, at the time a cause of action accrues against any "person," he is outside of the state; that a foreign corporation sued in this state cannot avail itself of the statutes of limitations of New York, on the theory that a foreign corporation is incapable of

being present in a state other than that under whose laws it exists, and hence under all circumstances the foreign corporation is absent from all other states than that of its domicile.

As that case established that in the then condition of the law a foreign corporation could not plead the New York statutes of limitations, so, under the same statutes, *Miller v. Brenham*, 68 N. Y. 83, held:

"It is well settled in this state that a plea of the statute of limitations of the state or country where the contract is made is no bar to a suit brought in a foreign tribunal, and the *lex fori* governs all questions arising under the statute."

So that from 1859, when the *Olcott Case* was decided, until May 1, 1877, when section 390 of the Code of Civil Procedure went into effect, foreign corporations could not plead *any* statute of limitations in an action in the courts of this state.

Section 390, which was passed June 2, 1876, to take effect May 1, 1877, provided:

"Where a cause of action, which does not involve the title to or possession of real property within the state, accrues against a person, who is not then a resident of the state, an action cannot be brought thereon in a court of the state, against him or his personal representative, after the expiration of the time, limited, by the laws of his residence, for bringing a like action, except by a resident of the state, and in one of the following cases: 1. Where the cause of action originally accrued in favor of a resident of the state. 2. Where, before the expiration of the time so limited, the person, in whose favor it originally accrued, was or became a resident of the state; or the cause of action was assigned to, and thereafter continuously owned by a resident of the state."

The exceptions do not apply to the case at bar. The *Olcott Case* decided that the word "persons," used in the statute of limitations, is applicable to a foreign corporation. It seems clear, therefore, that in that state of the law a foreign corporation, as well as an individual, nonresident could plead in bar the statute of limitations of its domicile.

In 1877, chapter 416 of the Laws of that year, to take effect on September 1st thereof, amended section 401 by adding thereto:

"But this section does not apply while a designation made as prescribed in section 430 or in subdivision second of section 432 of this act remains in force."

Section 430 provides for a designation by a resident of the state of full age of a person upon whom service of process may be made, and section 432 provides for service of a summons upon a foreign corporation, and among the persons upon whom such service may be made is:

"2. To a person designated for the purpose, as provided in section 16 of the General Corporation Law."

Section 15 of the General Corporation Law (Consol. Laws 1909, c. 23) provides that:

"No foreign stock corporation, other than a moneyed corporation, shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state."

And section 16 provides that:

"Before granting such certificate, the secretary of state shall require every such foreign corporation to file in his office a sworn copy in the English language of its charter, or certificate of incorporation, and a statement under its corporate seal and the signature of its president, vice president or other acting head, particularly setting forth the business or objects of the corporation which it is engaged in carrying on, or which it proposes to carry on, within the state, and a place within the state which is to be its principal place of business, and designating a person upon whom process against the corporation may be served within the state."

In *Wehrenberg v. N. Y., N. H. & H. R. R. Co.*, 124 App. Div. 205, 108 N. Y. Supp. 704, this court held that a foreign corporation which had strictly complied with the statute by filing the duly executed designation specified in section 16 of the General Corporation Law could plead the New York statute of limitations in bar, and overruled a demurrer interposed to an answer setting up such plea. Section 390 and section 401 do not seem to me to be at all in conflict, but are reasonably to be construed as consistent parts of a settled policy, and to definitely put an end to a harsh rule of law established by the *Olcott Case*, and together adapted to apply the remedy.

A nonresident individual and a foreign corporation, under section 390, in regard to causes of action which do not involve the title or possession of real property within this state, or a cause of action which originally accrued to or subsequently became possessed of by a resident of this state, could plead the statute of limitations of his or its own domicile; but if the nonresident individual, or if the foreign corporation, became qualified to do business within this state, by complying with our statutes permitting such business to be done, it acquired a residence *pro hac vice*, and then, upon filing a designation required by law, could avail itself of our own statutes of limitations.

[4] The tremendous increase in corporate activities, the fact that a very considerable portion of the business of the country is conducted by such artificial entities, and the further fact that, by the settled law of this state, its courts take jurisdiction of a foreign corporation upon service of process upon an officer or director casually within the state (*Pope v. Terre Haute Car Mfg. Co.*, 87 N. Y. 137; *Grant v. Cananea Cons. Copper Co.*, 189 N. Y. 241, 82 N. E. 191; *Sadler v. Boston & Bolivia Rubber Co.*, 140 App. Div. 367, 125 N. Y. Supp. 405, affirmed 202 N. Y. 547, 95 N. E. 1139), justify the conclusion that, if the state opens its courts to a nonresident plaintiff to here sue a foreign corporation, he must take that privilege burdened with the duty of prompt action. He may not here prosecute a stale claim, outlawed in the courts of the defendant's domicile, through service upon a traveling officer accidentally within the state.

In the following cases section 390 has been considered in its relation to foreign corporations without any reference whatever to the sentence in section 401 here relied on to nullify the patent meaning of section 390:

In *Clark v. Lake Shore & Mich. Southern R. R. Co.*, 94 N. Y. 217, the defendant corporation, which was the successor of the original

debtor, whose corporate origin was under the laws of Michigan and Illinois, proved upon the trial the statutes of limitations of those states, and claimed that they constituted a bar to the recovery. The Court of Appeals said:

"That contention rests upon the construction and effect of section 390 of the Code of Civil Procedure, read in connection with section 414; for it is agreed on both sides that, before September, 1877, when the Code took effect, the statutes of limitations of a foreign state constituted no defense to an action brought here. * * * Section 390 has changed that rule to some extent, and the argument at once comes to the point whether, under section 414, that change operates upon the cause of action in the case before us."

In that case the action had been brought in 1875, and the court considered the effect of the saving clause in section 414. The inference is fair that no one considered that section 401 was applicable.

In *Penfield v. Chesapeake, Ohio & Southwestern Ry. Co.* (C. C.) 29 Fed. 494, affirmed 134 U. S. 351, 10 Sup. Ct. 566, 33 L. Ed. 940, plaintiff brought suit against the railroad company, which set up the statute of limitations of Tennessee. The Circuit Court said:

"The defendant is a resident in and a citizen of Tennessee, and by virtue of section 390 of the New York Code of Civil Procedure the statute of Tennessee, limiting the time to commence an action like this, must control."

The Supreme Court said:

"As the railroad company is a corporation of Tennessee, where the injury occurred, and as the plaintiff was not a resident of New York when the cause of action originally accrued to him, the suit was barred by section 390, unless he became a resident of the latter state before the expiration of the period limited by the laws of Tennessee for the commencement of actions like this."

And as the court held that he did not, the judgment for the defendant was affirmed.

In *Olsen v. Singer Mfg. Co.*, 138 App. Div. 467, 122 N. Y. Supp. 822, the plaintiff was not a resident of the state of New York, and the defendant was a foreign corporation which pleaded the statute of limitations of New Jersey in bar. The court required the plaintiff to reply. In the same case in 143 App. Div. 142, 127 N. Y. Supp. 697, it appeared that plaintiff replied, denying any information sufficient to form a belief as to the time limited by the statutes of New Jersey, and as to the allegation that the cause of action did not accrue in favor of a resident of the state of New York. Defendant thereupon moved for judgment on the pleadings. The court said:

"The plaintiff must be presumed to know what he claims his place of residence was at the time that the cause of action accrued, and the statute of New Jersey specifically pleaded in the answer is a public record, easy of access, affording him all the means of information necessary to obtain positive knowledge of the facts"

—and granted the motion for judgment for the defendant.

I am of the opinion that under section 390 of the Code of Civil Procedure the defendant has the right to plead in bar the statute of California, under the laws of which it was created and exists as a corporation, and that, as the cause of action here sued upon by a

nonresident plaintiff did not accrue within the time limited by said statutes, the judgment appealed from should be affirmed, with costs and disbursements to the respondent. All concur.

(154 App. Div. 44.)

PEOPLE v. KATZ.

(Supreme Court, Appellate Division, First Department. December 20, 1912.)

1. **INDICTMENT AND INFORMATION (§ 174*)—ALLEGATIONS AS TO PARTIES—AIDERS AND ABETTERS.**

Though an indictment for larceny does not allege that any one else was concerned in the larceny, or that accused is only charged as aider and abettor, but simply charges that he committed the crime, he may be convicted upon proof that he was an accessory.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 540-543; Dec. Dig. § 174.*]

2. **CRIMINAL LAW (§ 1159*)—APPEAL—CONCLUSIVENESS OF VERDICT.**

It is not the duty of the Appellate Division to examine the evidence *de novo*, to determine whether it would have arrived at the same result as the jury, and it will not reverse because it might have decided differently.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

3. **CRIMINAL LAW (§ 345*)—EVIDENCE—DIFFERENT TRANSACTIONS.**

Where accused was charged with larceny by conspiring with others to loan another money upon collateral security of a much greater value than the sum loaned, and to then dispose of the collateral, making it necessary to find a well-known bank or trust company to make the loan, evidence was admissible, by a broker, that defendant solicited him to assist in finding a suitable intermediary to act as the ostensible lender, being admissible to show the nature of the conspiracy and the preparations made to carry it out.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 764, 765, 777; Dec. Dig. § 345.*]

4. **WITNESSES (§ 414*)—EVIDENCE—EXTRAJUDICIAL DECLARATIONS.**

Where it is claimed that a witness testified with a motive as to free himself, prompting him to testify falsely, evidence of similar declarations, at a time when such motive did not exist, was admissible, especially where the jury were informed that such evidence could not be considered as proof of such facts, but merely as it bore on the credibility of witness' evidence at the trial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1287-1288; Dec. Dig. § 414.*]

5. **CRIMINAL LAW (§ 1038*)—APPEAL—OBJECTIONS—PRESENTATION BELOW.**

Where the court stated that its reasons for refusing to charge several requests were that they had already been covered, it was counsel's duty to call the court's attention to any particular omitted proposition and request an instruction thereon, and, not having done so, but merely having excepted to the failure to charge each and every request, she cannot complain, on appeal, of failure to give an instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.*]

6. CRIMINAL LAW (§ 1173*)—INSTRUCTIONS—REFUSAL OF REQUESTS.

Where requested charges were not read in the jury's presence, a refusal to charge any of them could not have been taken by the jury as equivalent to charging the contrary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.*]

7. CRIMINAL LAW (§ 1173*)—APPEAL—HARMLESS ERROR—FAILURE TO INSTRUCT.

Failure to instruct that, if the jury believed that the witness testified falsely as to any material fact, they could disregard his entire testimony, if they saw fit, was not reversible error, especially where the jury was specially selected under the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.*]

Laughlin, J., dissenting.

Appeal from Trial Term, New York County.

Charles Katz was convicted of first degree grand larceny, and he appeals. Affirmed.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and MILLER, JJ.

Morgan J. O'Brien (John F. McIntyre and Samuel S. Koenig, both of New York City, on the brief), for appellant.

Robert C. Taylor, of New York City, for the People.

SCOTT, J. The defendant appeals from a judgment convicting him of grand larceny in the first degree.

[1] The basis of the charge against the defendant, as it developed upon the trial, was the allegation that he conspired with one Clark, described as a curb broker, one Persch, and one Sherwood, the cashier of a stockbrokerage firm, to steal certain stock, the property of one Heinze. The scheme devised to obtain possession of the stock was bold and ingenious, and involved the intervention of the officers of a trust company. It was not charged that defendant actually and physically stole the stock. He was claimed to be what, in former days, would have been termed "an accessory before the fact," but was charged and indicted as a principal under the provisions of section 29 of the Penal Code (now section 2, Penal Law [Consol. Laws 1909, c. 40]). He was indicted alone; Clark, Sherwood, Persch, and Field being separately indicted. Defendant's indictment does not mention any one else as having been concerned in the larceny, and does not explain that defendant is charged with the crime because he aided and abetted others in committing it. It simply charges him, substantially in the words of the statute, with having committed the crime. It is strongly urged that such an indictment is insufficient under the circumstances of the case, and that the indictment should have alleged who is said to have physically committed the crime. The Court of Appeals in *People v. Bliven*, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701, seems to have entertained a contrary opinion, and it is a well-known fact in the legal history of this state that the same contentions now

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

made by the defendant were vehemently urged upon the Court of Appeals on the motion for a reargument of the appeal from the conviction for murder in *People v. Patrick*, and were necessarily overruled when the motion for reargument was denied. *People v. Patrick*, 183 N. Y. 52, 75 N. E. 963. We are of the opinion, therefore, that this objection to the indictment is not well founded.

We have examined and re-examined the record with great care, and with the aid of exhaustive and able briefs on the part both of the people and of the defendant. We do not consider it necessary to recite at length the evidence upon which the jury reached their verdict. To prove the conspiracy and defendant's alleged relation to it, the people were, of course, obliged to rely upon the evidence of persons whose character was no better than that which it was sought to attribute to the defendant himself, including at least two self-confessed participants in the conspiracy. They were, however, for the most part, the defendant's self-chosen associates in other matters, if not in the particular crime charged against him. Their veracity and that of defendant, who contradicted them flatly, was essentially a question for the jury, which, as the record shows, was a special jury drawn from the list authorized by chapter 602, Laws 1901. This special jury list, as the statute requires and as is the fact, is composed of persons specially selected from the general jury list after careful personal examination as to their general intelligence and experience as jurors. We should hesitate long before overturning, on a mere question of veracity, a verdict reached by such a jury, especially when the defendant has been represented, as in this case by counsel of long experience in criminal trials and of unquestioned energy and devotion to his client's cause.

[2] It would be easy to go through this record, as it would in many other cases, and argue, from the evidence as it appears in type, that the jury must have believed some witnesses whom it should not have believed, and disbelieved some whom it should have believed; but it would also be equally easy to pick out corroborative evidence in many places, which, taken in connection with the testimony of the people's witnesses, would fully justify the verdict. It is not our duty to usurp the functions of the jury and to examine the evidence *de novo*, with a view to determining whether or not, on the same evidence, we should have arrived at the same result as that at which the jury arrived. So long as the verdict is not clearly against the evidence, as we think it is not in this case, and it appears that the defendant has had a fair trial before an impartial judge and an intelligent jury of his own selection, as well as the aid of competent counsel, we cannot feel that it is our duty to reverse the conviction because, perchance, if we had been sitting as jurors, we might have decided differently. *People v. Taylor*, 138 N. Y. 398, 34 N. E. 275; *People v. Shea*, 147 N. Y. 78, 41 N. E. 505; *People v. Egnor*, 175 N. Y. 419, 67 N. E. 906; *People v. Rodewald*, 177 N. Y. 408, 70 N. E. 1; *People v. Long*, 150 App. Div. 500, 135 N. Y. Supp. 491, affirmed 206 N. Y. —, 99 N. E. 1114.

[3] The record bristles with defendant's exceptions, of which nearly 400 were taken during the course of the trial. Comparatively few

of them are now relied upon, and of these some present no question requiring discussion here. Much stress is laid upon the fact that the court admitted evidence to be introduced concerning what is characterized as a different and distinct transaction. The conspiracy charged was that defendant and others had devised a plan to actually loan Heinze a considerable amount of money upon collateral security of a value much larger than the sum loaned, and then to dispose of the collateral. To carry out this scheme it was necessary to find a well-known Stock Exchange house, or a bank or trust company, to "clear the loan," as it was called, or, in other words, to become the ostensible lender, as Heinze was unwilling to intrust his securities to an irresponsible lender. To obtain a firm or corporation to "clear the loan," which would be of sufficient reputation to satisfy Heinze, and at the same time to be sufficiently pliable to deliver the securities to the conspirators, was not the least difficult feature of the scheme. The evidence objected to was that of a broker named Schwede, who testified that defendant solicited him to assist in finding a suitable intermediary. In our opinion the evidence was relevant, as tending to show the nature of the conspiracy upon which the defendant had embarked, and the preparations which he made to carry it out. Evidence of preparation to commit a crime stands upon the same footing as evidence of previous attempts to commit it, and is always relevant. Thus, in murder cases, it has been held relevant to show that the accused redeemed a pawned revolver (*People v. Scott*, 153 N. Y. 40, 46 N. E. 1028), or practiced shooting at a mark (*People v. McGuire*, 135 N. Y. 639, 32 N. E. 146;¹ *People v. Youngs*, 151 N. Y. 210, 45 N. E. 460), or, where the crime was committed by stabbing, ground a knife (*People v. Tice*, 131 N. Y. 651, 30 N. E. 494, 15 L. R. A. 669). In the present case Schwede's testimony merely tended to show that the defendant had endeavored to find a tool to use in committing the crime.

[4] It is contended that the court erred in admitting in evidence a statement made by one of the witnesses for the people (Clark) to his own counsel prior to the trial. Clark's character and previous history were, as the district attorney frankly stated, none of the best. On his direct examination he had given testimony to establish the defendant's guilt. He was subjected to a prolonged and unusually severe cross-examination, aimed at breaking down his credibility with the jury, and upon the cross-examination the defendant's counsel himself read from and used parts of Clark's previous statement to his own counsel. This statement substantially agreed with the evidence given upon the trial. The evident purpose of the defendant's counsel was to persuade the jury that in giving his evidence upon the trial Clark was actuated by a motive to save himself at the expense of the defendant, and therefore that his evidence was untrustworthy. We are of the opinion that the evidence was properly received. The rule applicable to such a

¹ Reported in full in the *Northeastern Reporter*; reported as a memorandum decision without opinion in the *New York Reports*.

case is well settled by *Matter of Hesdra*, 119 N. Y. 615, 23 N. E. 555, and *Robb v. Hackley*, 23 Wend. 50. It is thus stated:

"Where a witness is charged with giving his testimony under the influence of some motive prompting him to make a false or colored statement, it may be shown that he made similar declarations at a time when the imputed motive did not exist."

The learned trial justice was at great pains to impress upon the jury the fact that Clark's previous statement was not received, and could not be considered, as proof of the facts therein stated, but was to be considered only with reference to its bearing upon the evidence given by Clark at the trial. For the same reason, and under the rule of evidence above quoted, the defendant can take nothing by his exception to the admission of proof of former statements made by the witness Birmingham. Nor was it error to leave it to the jury to determine whether or not the defendant Birmingham was an accomplice. Such submission was, if anything, more rather than less than the defendant was entitled to demand. The court would probably have committed no error if it had held that Birmingham was not an accomplice.

The other exceptions to which we deem it proper to refer relate to those taken, or endeavored to be taken, to the refusals to charge as requested by the defendant. The charge of the trial justice was eminently fair, full, and impartial. The defendant's counsel took many exceptions to its language, in pursuance apparently of a general policy, maintained throughout the trial, to except to everything, but now insists upon only one, and that raises no question necessary to be discussed.

Before the jury was charged, counsel for the defendant handed to the court 102 written requests to charge. It is apparent that the court intended to incorporate into the charge practically all of these, and in fact did so incorporate, either in paraphrase or in the language of the request, nearly every proposition thus submitted. That the court intended to charge all of the proper requests, and believed that they had been covered, is evidenced by what took place at the end of the charge. Referring to the requests, defendant's counsel said: "

"May they all go on the record, and may we have an exception to each one?"

To which the court replied:

"Certainly. The counsel have submitted to the court 102 requests to charge, and the court grants an exception to each and every request refused by the court, *on the ground that they are already covered in the charge.*"

It is very doubtful whether exceptions taken in this wholesale fashion raise any question of error. To submit so large a list of requests, and then interpose an omnibus exception, amounts to little else than a trap "better adapted to confuse and trip a court than to serve any useful purpose." *People v. McCallam*, 3 N. Y. Cr. R. 189-198, affirmed 103 N. Y. 587, 9 N. E. 502.

[5] Counsel had been clearly and distinctly advised by the court that the reason for refusing to repeat and recharge the several propositions embraced in the requests was "that they had already been covered in the charge." If some of the proper requests had been overlooked by

the court, and thus not included in the charge, it was the duty of counsel to have called the attention of the court to the omitted propositions, and ask specifically as to them that the jury be instructed. *People v. Birnbaum*, 114 App. Div. 480-489, 100 N. Y. Supp. 160. Having failed to take this course, the defendant is not entitled as a matter of right to insist upon his exception; and we are not required, in consequence, to reverse the judgment by reason of the exception, unless we can clearly see that the defendant has been prejudiced. We are satisfied that the defendant has not been prejudiced.

[6] The requests were not read in the presence of the jury, and the refusal to charge any of them cannot have been accepted by the jury as tantamount to charging contrary thereto. *People v. Lumsden*, 141 App. Div. 158-169, 125 N. Y. Supp. 1079. One of the requests (numbered 72 on the list) was that the jury be charged that:

"The fact that two or more accomplices testify to the commission of a crime does not dispense with the necessity of corroboration, and the same amount of evidence is required to connect the defendant with the crime as if there had been but one accomplice."

The court had already charged fully upon the necessity for corroboration of the admitted accomplices, and, while he had not adopted the words of the request above quoted, he had covered the same idea in language which an intelligent jury could hardly have failed to understand. If counsel desired a more ample charge on this subject, he should have clearly indicated his desire by calling attention specifically to his request.

[7] The other omissions to which our attention is called are those relating to the requests numbered 74 and 93, in which the court was requested to charge as to certain witnesses that:

"If the jury believe that the witness willfully testified falsely as to any material fact, they are at liberty to disregard the entire testimony of the witness if they see fit."

This request is not covered by the main charge; but it is entirely certain that if counsel had been more explicit with the court, and had directed its attention to the omission to charge as requested in this particular, the court would have instantly supplied the omission, probably stating the rule as it should be stated—that the jury under such circumstances might, but need not, reject the whole testimony of the witness. We do not consider that the omission of this particular charge constitutes reversible error. The proposition embraced in the request is scarcely a rule of law, although its propriety has been affirmed in many cases. It is rather the statement of a rule by which the weight of evidence is to be tested—a rule derived from the experience of mankind, both lay and legal. A jury, carefully selected for their intelligence and experience, as this jury was, would undoubtedly apply this rule in considering how far a witness was to be believed, even without a reference to the rule by the court.

We are satisfied that the conviction was without legal error, and was justified by the evidence.

The judgment is therefore affirmed.

INGRAHAM, P. J., and CLARKE and MILLER, JJ., concur.

LAUGHLIN, J. (dissenting). The defendant was indicted on three counts. The first count charges that on or about the 2d day of August, 1909, he stole with force and arms from one Joyce 46 certificates, for 100 shares each, of the capital stock of the Davis-Daly Copper Company, of the par value of \$15 per share, and worth \$7.25 per share, and 156 certificates, for 100 shares each, of the capital stock of the Ohio Copper Company, of the par value of \$10 per share, and of the value of \$5 per share. The second count charges that the stealing was as agent, bailee, and trustee; and the third count is for receiving the certificates of stock as stolen goods. None of the counts was formally withdrawn from the jury; but the case was submitted on the first count, and the charge of the court made no reference to the other two counts.

In opening the case the assistant district attorney did not charge that the defendant actually stole the certificates of stock, or that he *directly* participated in the stealing. He stated that the evidence in behalf of the people would show that the defendant conspired with one Clark, a curb broker, and one Persch, who officed with him, and one Sherwood, a cashier for the stock brokerage firm of Leonard J. Field & Co.; Clark, Persch, and Sherwood being the principal actors in the conspiracy. No evidence was offered tending to show that the defendant directly participated in obtaining the stock from the owner, and the court instructed the jury that the people did not claim that the defendant actually stole the stock, but merely that he was liable under the law as a principal, on the theory that he aided and abetted others in the commission of the crime. The defendant was indicted alone. The indictment contains no reference to any one else as having participated in the commission of the crime, and it does not charge the defendant with having aided or abetted in the commission of the crime. Clark, Persch, Sherwood, and Field were separately indicted for stealing these certificates of stock. Clark became a witness for the people and was promised immunity. Persch was tried, and the jury disagreed. The district attorney dismissed the indictment against Sherwood. Leonard J. Field was also indicted for perjury, presumably in testifying before the grand jury, and that indictment was also dismissed by the district attorney.

All evidence tending to show that the defendant aided and abetted in the commission of the crime, or conspired with others to commit it, was received over objections duly made in behalf of the defendant on the ground that he was not indicted jointly with another or others, and that the indictment only charged him as a principal. The learned counsel for the appellant contends that the only effect of section 29 of the Penal Code, now section 2 of the Penal Law, which defines a principal as "a person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime," was to change the former requirement of the law that an accessory before the fact should be indicted and prosecuted as such, and to enable the people to prosecute him as a principal, and that

it does not relieve the people from alleging in the indictment, particularly where the defendant is indicted alone, who *actually* committed the crime, and charging him with having aided or abetted in its commission. In support of this contention it is further argued that, unless this be so, the indictment does not charge the *acts* constituting the crime as required by section 275 of the Code of Criminal Procedure, and there would be nothing to prevent a second indictment; and numerous authorities are cited in support of this argument. See *People v. Peckens*, 153 N. Y. 576, 47 N. E. 883; *People v. Willis*, 158 N. Y. 392-396, 53 N. E. 29; *People v. Seldner*, 62 App. Div. 357, 71 N. Y. Supp. 35; *People v. Kane*, 161 N. Y. 386, 55 N. E. 946; *People v. Albow*, 140 N. Y. 130-134, 35 N. E. 438; *People v. Helmer*, 154 N. Y. 595-600, 49 N. E. 249; *People v. Corbalis*, 178 N. Y. 516, 71 N. E. 106; *People v. Wolf*, 183 N. Y. 464, 76 N. E. 592; *People v. McKane*, 143 N. Y. 455, 38 N. E. 950.

No bill of particulars is required in a criminal case, and therefore there is force in the contention that a defendant, indicted alone and only charged with having actually and personally committed the crime, may be seriously prejudiced if he can be convicted on evidence that he was at the most remote part of the world from the scene of the crime at the time, and that he induced any one or more of the inhabitants of the globe to commit it. For those reasons we intimated in *People v. Seldner*, *supra*, that the indictment in such case should specify the actor and charge the defendant with having aided and abetted him; but since our decision in the *Seldner* Case this question appears to have been presented to the Court of Appeals by a motion for a reargument in *People v. Patrick*, the defendant there having been indicted alone as a principal, in that he "gave and administered" poison to Rice, without being charged in the indictment with having aided and abetted in the commission of the murder, and the evidence upon which he was convicted showed merely that he aided and abetted in the commission of the crime, but that the poison was administered by the valet, Jones (*People v. Patrick*, 182 N. Y. 131, 74 N. E. 843); and the Court of Appeals denied the motion (*People v. Patrick*, 183 N. Y. 52, 75 N. E. 963). It is possible that that ruling was made upon the theory that the question was not properly presented; but in view of the fact that such objection could not have been obviated, if taken, we are not at liberty to accept that theory, and therefore the decision of the Court of Appeals in the *Patrick* Case, in the light of the broad views expressed by that court in *People v. Bliven*, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701, which were, to some extent, obiter, preclude the further consideration of the question by this court.

The case is quite complicated. The salient facts, however, relating to the larceny of these certificates of stock, are not in dispute; but the evidence relating to defendant's connection with it is very conflicting. The defendant was 38 years of age, and the president of the Eastern Brewing Company, and had been president of a brewery for some 12 years. He was born in Paterson, N. J., but at the time in question resided in New York. He had borne an unblemished reputation. His good character was testified to by nine witnesses of prom-

inence and respectability in various walks of life, one of whom was called by the people on another question. Clark, according to his own testimony, was 28 years of age at the time of the trial, and at the age of 18 he had been indicted for forging a check and pleaded guilty, and he admitted on this trial that he was guilty of that crime, and was sentenced to the Elmira Reformatory and served a term therein. He was indicted for this larceny as a second offense, and knew that on conviction he could be imprisoned for 20 years; and about the same time, or shortly thereafter, he was indicted for stealing diamonds of the value of \$6,000, and had been promised immunity if he would testify in behalf of the people. He concedes that he deliberately went into a crooked deal with Sherwood and Persch and the defendant to obtain these certificates of stock as security for a loan, with a view to selling them and dividing the proceeds over and above the amount of the loan, and that he induced the owner, one Augustus Heinze, to part with the securities upon the representation that the Windsor Trust Company would make the loan and hold the securities, when he had already planned to obtain possession of and sell the stock, if he could induce the owner to part with the possession thereof, on the theory of pledging the same as security for a loan. Down to the time of the trial, he continued to associate with the defendant, who had furnished his bail, and with Persch, and concealed from them the fact that he intended to testify in behalf of the people against them and obtain freedom for himself. He admitted that he testified on the trial of Persch that he and Persch conceived and discussed the plan to get Heinze's stock, if they could procure a bank to clear the loan, knowing that Sherwood could obtain the money with which to make the loan for them; that he knew Heinze was desirous of obtaining loans, and he thought that he could get the stock, if some bank would clear the loan; that they had tried, by submitting different names, "to get hold of some Heinze stock, but he turned them down, he would not take them"; and that he and Persch took the matter up with defendant, to see if he knew anybody who could get "the bank"; and he admitted on this trial that that testimony was true, and that when they first talked with the defendant the latter said that he could not get a bank, and that then the witness thought of one Eugene Clark, who was connected with a bank in New Jersey, and communicated with him on the subject, and through him opened negotiations with the First National Bank of Perth Amboy, and arranged with that bank to have the money advanced through its agents, the brokerage firm of Keene & Van Cortlandt, of Pine street, New York, and that afterwards this fell through because said brokers refused to give a trust certificate for the stock.

The uncontroverted evidence further shows that in the latter part of July, on an occasion when one Kaufmann, a broker, called at Clark's office, where the defendant had desk room, to see the defendant, Clark and Persch brought the matter to the attention of Kaufmann, in the hope that he might be able to get a bank to clear the loan, and also requested the defendant to speak to Kaufmann with reference thereto,

that Persch and Clark represented to Kaufmann that the Eastern Brewing Company was desirous of making a loan of \$50,000 on Heinze stocks, but did not wish to be known to Heinze in the matter, and therefore desired to arrange with some bank to clear the loan; that Kaufmann undertook to endeavor to find a bank, and reported that the Windsor Trust Company would act in the matter; that Clark then went to Heinze, whom he had known since January before, and represented, in substance, that the Windsor Trust Company would make a loan of \$50,000 on stocks of a market value of double that sum, but that it would not loan the money to Heinze direct; that Heinze said he would transfer the stock to Joyce, whom Clark met and took to the Windsor Trust Company, and introduced to one Birmingham who was the manager of the bond department, and with whom Kaufmann had had his negotiations; that Clark held himself out to the Windsor Trust Company as the broker for the borrower, and when the loan was consummated received from Joyce \$2,000 as a commission, but represented to the defendant and Persch that he received only \$1,000, and divided that amount with them; that the plan was to have it appear to the Trust Company that Kaufmann was the broker for the lender, the Eastern Brewing Company, and that Sherwood, who was to and did deliver \$50,000, which he obtained from Field & Co., to the Trust Company and was to and did receive the stock and Joyce's note for one year at 6 per cent., represented the lender; that Sherwood was then to sell the stock on the market, and, after reimbursing Field & Co. for the \$50,000 advanced by that firm, was to divide 35 per cent. of the surplus between himself and Field, as agreed upon, and was to deliver the remaining 65 per cent. to Persch; that the money was paid over on the 2d day of August, 1909, and stock of the then market value of \$109,000 was received by Sherwood, and with the exception of 400 shares, which he delivered to Persch the next day, was sold by Sherwood, the first sale having been made on the 3d and the last on the 6th of August; that Sherwood deposited the proceeds of the sale in his individual bank account, in which prior to that time he had a credit of only from \$100 to \$200, and, after checking out \$50,000 to the order of Field & Co., he drew two checks to the order of Persch, one for \$4,070.12, and another for \$10,175.30, and had Persch indorse and deliver them back to him, and delivered the one for the larger amount to Field in payment of his share of the commission, and retained the smaller one for his own share of the commission, and thereupon delivered to Persch a check for \$30,455.78, being for the balance of the proceeds of the sale of the stock; and that Persch deposited this check to his own credit in the Carnegie Trust Company, and delivered a check for one-third of the amount to Clark.

Persch was not a witness on the trial of this indictment. Clark testified that at the Marquette Club, on the evening of the 6th of August, Persch tendered to the defendant a check for his one-third of the \$30,455.78, and the defendant refused to accept it, stating that he wanted his share in cash, and that Persch said, in substance, that he would pay him in cash; that the next morning the defendant and Persch entered their office, and the defendant exhibited a roll of mon-

ey, which he testified positively, on the mere observation of it, without having seen the denomination of any bill, contained at least \$10,000, and said, "I have got mine."

Clark's stenographer, a girl 19 years of age, testified that she was in the office at this time; that the defendant took his pocketbook out of his pocket, but showed no money, and said, "I have mine," or, "I have got mine," and that the day before she had heard the defendant, Clark, and Persch talking about some "deal," and say that "they expected the deal to go through," and that on the morning when the defendant showed his pocketbook she heard them say that it had gone through, and they seemed very happy, but that she did not know what the deal was. No conviction could be allowed to stand on her testimony. It appears that, when she was 17 years of age, she was employed in the office of a wine and liquor dealer, and she sued him, and he settled for \$1,000. The nature of the suit is not shown. She testified that her memory of this transaction was quite poor, and that she was not testifying "with any degree of certainty." She afterwards attempted to qualify this by saying that she meant with respect to details. She was subpoenaed by the people, but not sworn, on the trial of Persch. She testified that she did not remember whether Clark, her employer, had asked her to testify against the defendant; that the defendant came to her, and stated in substance that he had heard that she had said that he had made this remark, to which Clark testified on this trial, and had shown the money, or his pocketbook, and said to her that she knew that those statements were not true, and asked how she came to make them, and she admitted that they were not true, and that she did not know how she came to make them, and that she accompanied him to his attorney's office, and, after an interview with the attorney, the latter in her presence dictated a statement to a stenographer, all of which was in every respect as she stated the facts to him, and that she then stated that Kaufmann came to the office and said to defendant, "You know the deal went through," and defendant asked, "What deal?" to which Kaufmann replied, "Why, the Windsor Trust Company," and defendant said, "I do not know what you are talking about," and that she did not at any time hear defendant say, "I have mine," or see him exhibit his pocketbook.

On this trial she said that the things she so stated to defendant's attorney were not true; but she admitted that he interviewed her apart from the defendant, and informed her that he only wanted her to tell the truth. According to her testimony, she refused to sign and swear to the statement, without consulting her uncle, who was an attorney, although at the time she admitted that the statement was in every respect truthful, and that she took it to her uncle, who read it over and advised her not to sign it, but did not ask her whether or not it was true. Her uncle did not claim that he refused to advise her to sign it on the ground of any erroneous statement in it, but said he did so because he desired to shield her from being brought into the matter. According to the testimony of the defendant and his attorney, the latter said to her that he did not wish her to verify the statement in his office, and when informed that she had an uncle, a member of the

bar, advised her to take it to him. It is quite as probable that her statement made to the defendant's attorney was true, as that her evidence given on the trial, which is diametrically opposed thereto, is true; and in view of her failure to deny that her employer had induced her to testify against the defendant, it and other testimony tending to show that he endeavored to induce her to state the things which she denied in her statement to the defendant's attorney, it may well be that she was influenced to corroborate his testimony.

The defendant testified in effect that he knew nothing derogatory to the character of either Persch or Clark, and had been introduced to Persch by the latter's father some time before the transactions in question, and had associated with him more or less; that in the latter part of June Persch said to him that he had an opportunity of obtaining an office with a broker named Clark, whom the defendant had met, who was about to dissolve a partnership, at a rental of \$25 a month, which was more than he could afford to pay, and he asked the defendant if he would not take desk room and pay one-half of the rent, and use the office afternoons after finishing his business at the brewery, and said that Clark was a curb broker, and that if the defendant could get them the curb business of a certain firm they would pay him one-third of the commissions, and he accepted the proposition, and undertook to get the business, but was unsuccessful; that he had no knowledge that Persch and Clark were attempting to get these stocks with a view to selling them, and that while he understood that they knew that Heinze was desirous of obtaining loans, and were attempting to negotiate a loan, and expected to share in the commissions, he had no reason to anticipate that there was anything illegal in what they were contemplating; that it was represented to him that they procured a loan of \$50,000 on Heinze's stock, and received a commission of 5 per cent., \$1,000 of which was paid in cash, and delivered to him by Clark and deposited to his credit, and \$800 of which he checked out by their direction to pay commissions which they had promised, viz., Kaufmann \$500, and to Ulmann—the collector of the Eastern Brewing Company, who had at the request of Persch two days before signed a collateral note for \$50,000, which defendant supposed was to be used in making the loan upon the theory that the Trust Company, which he supposed was making the loan, was not to know the name of the real borrower, whom Ulmann was to represent—\$300, and the remaining \$200 of which was divided between them after deducting a small amount which Persch and Clark owed him; that it was represented to him that the remaining \$1,500 of the commission was paid by the delivery by Heinze, or his representative, of 300 shares of the same kind of stock as that upon which the loan was made, and that they had authorized it to be sold by one Reilly, a curb broker; that he doubted this, and went to Reilly's office, and found that it was true that he had been authorized to, and had, sold 300 shares of that stock, and was ready to pay over the proceeds, and did so by a check to the order of Persch, delivered in the presence of the defendant; that on the receipt of this check Persch said he desired to open an account, and defendant recommended the Carnegie

Trust Company, and offered to accompany Persch there and introduce him; that he and Persch and Clark went there, and Clark stated that he had had trouble with the bank he had been doing business with, and said that he thought that he would also open an account; that they were both introduced by defendant, and opened accounts at the Carnegie Trust Company, Persch depositing this Reilly check, and Clark depositing a check for one-third of that amount, for which Persch gave him a check, and that Persch also gave defendant a check for one-third; that on Friday evening thereafter, at the Marquette Club, Persch tendered him a check for a little over \$10,000, and he asked what it was for, and Persch said that it was for commissions, and to ask no questions, but that he insisted upon knowing, and Persch admitted that they had made \$30,000 more on this transaction, and he expressed the view that that could not be legitimate, and refused to take the check, and Persch tore it up; that Persch said, that, if he was afraid to take the check, he would draw one to the order of Ulmann, and did so, and delivered it to defendant, who kept it overnight, but was disturbed in mind about it, and early in the morning summoned Persch, and, on getting no further information with respect to the theory upon which such a large amount of profit was made, he tore it up; that he then stated to Persch that he was informed that the Trust Company telephoned to him the day before, and he supposed that it was with reference to opening an account there, concerning which Kaufmann had talked with the officers of the Trust Company, and that he would call there; that on the way down town they were passing the Carnegie Trust Company, and Persch said he wished to draw some money, and they stepped inside, the defendant waiting near the entrance; that he did not see what Persch did (it appears that Persch then cashed a check for \$10,000, drawn on his own account, to the order of cash, and dated that day, being the amount which it is claimed, on the testimony of Clark and his stenographer, the defendant a few moments later publicly announced, without even having been asked, that he had received), and that he received no money from him; that before going to the Trust Company he, at Persch's request, no reason being assigned, went to their own office and there met Kaufmann, and requested him to go to the Windsor Trust Company and introduce him, and they went over and met Birmingham, to whom he was introduced by Kaufmann; that Birmingham appeared to be worried over the loan, and seemed to be in doubt as to the defendant's identity, and the defendant stated that he had come with a view to opening an account, but Birmingham said he had requested Kaufmann to bring the defendant there, with a view to ascertaining his (Ulmann's) and the Eastern Brewing Company's connection with the loan, and asked who Ulmann and Sherwood were, and where the stocks were; that defendant informed him that Ulmann was the collector for the brewery and was a reputable man, and that if Ulmann had the stocks they were all right, and that Sherwood was not connected with the brewery; that at Birmingham's request they went to the Chatham National Bank, where defendant had an account, and Birmingham was there assured by one of the officers as to who the

defendant was, and that he was a man of means, standing, and respectability; that he criticised Birmingham for not telephoning or ascertaining whether Sherwood was authorized to represent the brewery or Ulmann; that two days later he was summoned to the district attorney's office by a detective, who accompanied him, where he answered all questions put to him, but on the advice of counsel volunteered nothing that was not asked.

The court instructed the jury as matter of law that Sherwood and Clark were accomplices, and that their evidence could not be considered, unless corroborated. Aside from their evidence, and the testimony of Clark's stenographer, to which reference has been made, the only evidence connecting the defendant with the crime is testimony given by Birmingham and by Kaufmann with respect to admissions made by him, and some testimony by Ulmann tending to show that defendant knew that a loan was to be made. One Schwede gave testimony tending to show that defendant, prior to this transaction, contemplated, with Persch, obtaining stock on a loan and selling it, but did not know that it was illegal to do so, provided other stock were obtained when the loan was paid, and abandoned that project, and announced that he did not wish to do anything unlawful, and thereupon Schwede, who was distantly related to him by marriage, introduced defendant to brokers who were his friends and did not deem it necessary to warn them with respect to what he claims defendant proposed, which, however, defendant denied.

No conviction should be allowed to stand on Sherwood's evidence, even though it be corroborated. He admitted that he deliberately willfully committed perjury before the grand jury at the request of Field, in an endeavor to shield Field, and his testimony further shows that he had no regard for honesty in business transactions, and he had a motive in sustaining the position which he took with the district attorney for the purpose of obtaining immunity. No one should be deprived of his liberty on the testimony of such an accomplice. Of course, if the corroborating evidence were sufficient, in itself, to establish the guilt of the defendant, a conviction might stand. The testimony of Birmingham and Kaufmann, concerning interviews with the defendant and admissions made by him, tends to show that he had guilty knowledge of the purpose for which the stocks were obtained, and of the manner in which they were obtained; but the evidence warranted a finding that they also were accomplices, and required a finding that Kaufmann was an accomplice. Birmingham, according to his testimony and that of Joyce, received for the Trust Company \$1,000 for undertaking to deceive Joyce and lead him to believe that the loan was being made by the Windsor Trust Company, and that the stocks would be attached to the note and held by the Trust Company, and could be obtained at any time on payment of the amount due on the loan, with interest for the first year, and delivered the note and stock to Sherwood, without ever having seen the defendant, or communicated with his company, or with Ulmann, who it was represented was making the loan, and whose formal proposition in writing, which, however, was wholly unauthorised and a forgery, the Trust Company held, and Birmingham received and

retained personally \$250, being one-half of the commissions received by Kaufmann, and he took no receipt for the stock, and made no inquiry as to where it was, until four or five days thereafter, when he was notified by Joyce that some of it was being sold on the curb. Kaufmann prepared the formal application for the loan, first in the name of the Brewing Company, and then, according to his testimony, at the suggestion of the defendant, changed it to the name of Ulmann and presented it to the Trust Company, without consulting Ulmann, and probably signed Ulmann's name, although it does not definitely appear who signed it, and knew that neither the Brewing Company nor Ulmann was making the loan, and that Sherwood was not connected with the Brewing Company, but was represented to the Trust Company as bringing the money from and receiving the stock for the Brewing Company, and he allowed Heinze, whom he knew, to be thus misled, for he understood that the loan was for Heinze. He therefore, on his own testimony, knew that the transaction was not an honest one.

It is probable that the whole truth concerning these matters has not been told. These men must have known that sooner or later it would be discovered that they had sold these stocks. They may have figured, as some of the evidence with respect to another transaction tends to show, that the loan was for a year, and that the market price of the stocks, by selling a large number of shares, would be so depressed that the stocks could be bought in at a lower figure, and that they would thus be able to replace them before the loan fell due. Clark, Persch, and Sherwood, at least, had no particular standing, or large earning capacity, and were without financial resources. Clark and Sherwood admit that they deliberately entered into this scheme, which they knew was unlawful. The position of the defendant, however, was quite different. He had everything to lose, and nothing to gain, by such an unlawful enterprise, and it is extremely doubtful whether he would, with full knowledge of the effect of the transactions—that is to say, with criminal intent—become a party to these transactions. In the opening of this case, the defendant was pictured as the man higher up, who had conceived this unlawful plan, and used Clark and Persch, who were young and inexperienced, as his tools, and it was charged that he was more censurable than they. This record does not sustain that contention. The evidence does not warrant a finding that the defendant conceived this unlawful scheme, and put forward Clark and Persch to consummate it; but, on the contrary, the fair inference is that, if he was a participant in it, he was led into it by them, or one of them. The learned trial justice evidently had grave doubt as to whether the evidence satisfactorily showed the guilt of the defendant beyond a reasonable doubt, for he gave a certificate of reasonable doubt. In these circumstances, and in view of the damaging nature of some of the testimony, and the fact that in most instances the witnesses giving it were impeached by their own testimony on cross-examination, or by other evidence, it became most important for the protection of the rights of the defendant that the jury be fully instructed upon all material points of law that might aid them in determining the facts.

One hundred and two requests to charge, most of which, however,

were very short, only covering from two to four lines of print and containing clear and concise propositions, were handed to the court at the close of the evidence. At the close of the charge the court announced that the defendant might have an exception to every request not charged "on the ground that they are already covered in the charge," and the defendant's counsel duly excepted separately to the refusal to charge each request. That announcement indicates that the court considered that all of the requests had been charged in substance; but the taking of exceptions indicates that counsel for defendant did not acquiesce in that view, and it is quite clear that no instructions were given to the jury with respect to a great many of the requests. If the guilt of the defendant clearly appeared, errors in refusing to charge as requested in such circumstances might be disregarded, upon the theory that it was the duty of counsel for the defendant to draw the attention of the court to any particular request omitted; but this is not such a case, and, there being serious doubt with respect to the guilt of the defendant, his rights should not be jeopardized, either by errors of omission on the part of the court or of counsel.

The court failed to instruct the jury with respect to the weight to be given to the testimony of witnesses who gave false testimony. One of the requests specifically drew attention to this point, and it was in proper form, and the court was thereby requested to instruct the jury that, if they believed that any witness deliberately and intentionally testified falsely, they might disregard his entire testimony. By another request the court was asked to charge that, if the jury believed that either Clark or Sherwood willfully testified falsely as to any material fact, they were at liberty to disregard the entire testimony of either if they saw fit so to do. The court was also duly requested to make a like charge with respect to the testimony of Clark's stenographer and of her uncle. No instructions were given bearing on these points. It is customary and proper to charge the jury to this effect, where there is a basis therefor in the testimony of any witness, and the case at bar was eminently one in which such instructions should have been given. Laymen, ordinarily, do not understand this proposition, and are often troubled about disregarding particular testimony, although they may believe that the witnesses willfully gave false testimony in part.

On the cross-examination of the defendant he was asked concerning some prior transactions between Persch and himself and a man from Massachusetts, who was known to him by the name of Fiske, but who had several aliases, and he admitted that he received as a result of those transactions a commission of \$5,000, and that he was obliged to make up a loss on another. Sufficient was brought out by these inquiries to arouse suspicion with respect to the defendant's honesty in connection with those transactions, and he was required to testify, over objection and exception, that Fiske was indicted here, and he was asked if one Aldhouse, of Boston, whom he knew, was not convicted of grand larceny in Massachusetts; but sufficient facts were not brought out to show that he was guilty of any crime in connection with those transactions. One of the requests called for an instruction that defendant was not being tried for participation in any other trans-

action, and that, if he had no guilty connection with the transaction specified in the indictment, he should be acquitted, and a separate request asked for a charge that there was no proof that any other transaction which he participated was criminal or illegal. No instructions were given on these points, and while the learned trial justice charged generally that the defendant was entitled to an acquittal unless he was guilty as charged in the indictment, yet, in the circumstances of this case, the jury should have been instructed with respect to the effect of the evidence concerning the other transactions.

It appears that counsel for the people, in opening the case, conceded that the testimony of Clark and Persch was not very reliable, on account of their confessions of guilt in this transaction and the prior conviction of Clark and the arrest of Persch on another prior charge of grand larceny, from which he received immunity by testifying for the people; but it was charged, in effect, that the defendant was in no position to criticise their past, or was no better than they, for he became their partner and "a man is known by the company he keeps." There is no doubt that that was one of the damaging facts that led to the conviction of the defendant. The court was requested to charge two requests on this point, viz.: (1) That the existence of intimate relations is not a circumstance from which participation in guilty acts of associates is to be presumed; and (2) that such relations are consistent with innocence. No instructions with respect to this were given in the main charge, and at its close the court was again requested to charge these requests, and after some discussion charged the former, but not the latter. The request was clearly drafted to state a correct abstract proposition of law (*People v. Courtney*, 28 Hun, 589-593; *People v. Kathan*, 136 App. Div. 303-308, 120 N. Y. Supp. 1096), and should have been granted in its entirety, especially in view of defendant's testimony that he knew nothing derogatory to Persch and Clark, which was uncontroverted. It is probable that the jury attached too much importance to his having become their partner.

The court was also requested to instruct that, if the actions or conduct of the defendant following the taking of the stock indicated that he approved of the act, "such approval does not necessarily make him an aider or abettor." The refusal to so charge was error. See *Stover v. People*, 56 N. Y. 315.

The court was also requested to charge that, in considering the testimony of Clark, they must consider his motive and the fact that he had been promised immunity, and that the testimony of an accomplice that he took the stock is not evidence that the defendant induced him to take it, *and the fact that two or more accomplices testified to the commission of the crime does not dispense with the necessity of corroboration*. No specific instructions were given on these points. The court charged that the defendant could not be convicted on the testimony of Clark and Sherwood, "unless they each be corroborated by other evidence as tends to connect this defendant with the commission of the crime." The court was separately requested to charge that Birmingham, Kaufmann, and Ulmann were accomplices. I think the

court should have so charged as to Kaufmann, at least, and that the exception to such refusal presents reversible error.

On the subject of accomplices the court, after instructing the jury that Sherwood and Clark were accomplices, stated that it was for the jury to determine whether there were other accomplices, and that a conviction cannot be had on the testimony of accomplices alone. The court was also requested to instruct the jury that the fact that—

"two or more accomplices testify to the commission of a crime does not dispense with the necessity of corroboration, and the same amount of evidence is required to connect the defendant with the crime as if there had been but one accomplice."

This request involved a correct proposition of law, and it should have been charged. It was not covered by the specific charge with respect to the testimony of Clark and Sherwood.

After properly instructing the jury with respect to the corroborative evidence required in the case of accomplices, and that an accomplice was one so connected with the crime that he might himself be convicted therefor, the court instructed the jury that where a confession is made by an accomplice, which is consistent with and corroborated by other testimony of witnesses whom the jury believe to be honest and truthful, the testimony of the accomplice then—

"became testimony of such an order as entitled you to give it great consideration notwithstanding the fact that it is the testimony of an accomplice."

An exception to this charge was duly taken on the ground that the court unduly emphasized the importance of the testimony of the accomplice, by stating that it was in such case to be given "great consideration," which was not a question of law for the court, but of fact for the jury (see *People v. Ferraro*, 161 N. Y. 365-379, 55 N. E. 931), and the court did not modify the charge.

The importance of the errors in the charge with respect to these requests as to accomplices is emphasized by the fact that the jury, after being sent out, came into court, and at their request the testimony of Kaufmann was read to them. Birmingham's assistant, called by the prosecution, was permitted, without objection or exception, to testify to a conversation with defendant's father, upon whom he called with a view to having defendant get into communication with Birmingham, so that the latter would help him, at least, by not volunteering evidence against him. His testimony was hearsay, and utterly incompetent, and it must have been prejudicial to defendant; for he stated that Birmingham knew that defendant received \$10,000 from this transaction, and used \$8,500 of it to pay gambling debts, and stated to a friend a few days before, in substance, that he had a game that beat gambling at the club "all hollow." "I am going to make \$13,500 without putting up a dollar." In the circumstances, it cannot be said that the conviction was had upon the competent evidence in the case.

I am also of opinion that the reception of Exhibit 17 over objection on the part of the defendant constitutes reversible error. That exhibit was received to corroborate the testimony of Clark, who was the

author of it, and the ruling is sought to be sustained by *Matter of Hesdra's Will*, 119 N. Y. 617, 23 N. E. 555, which held that, where a subscribing witness to a will died before the will was admitted to probate, his declarations were competent to impeach the execution of the will, so far as his signature as a subscribing witness was concerned, precisely the same as if he had been called as a witness, and that where such impeaching evidence was given it was competent to show by other witnesses prior declarations of the subscribing witness during the life of the testator to the effect that the will had been made and that he was a subscribing witness. The court, however, expressly stated that the ruling was not intended as a modification of the general rule that, when it is shown that a witness has made declarations inconsistent with his testimony, he cannot be corroborated by showing that he made declarations consistent therewith, but was an exception thereto, and the court confined the exception to cases in which the witness is charged with giving testimony under the influence of some motive prompting him to give a false or colored statement, in which case it may be shown that he made similar declarations at a time when the imputed motive did not exist, and to cases where evidence is offered tending to show that an account of a transaction given by a witness is a fabrication of a late date, when it may be shown in contradiction of such evidence that he gave the same account "before its ultimate operation and effect arising from a change of circumstances should have been foreseen." I am of opinion that this evidence was not admissible within the ruling of the court in that case.

The assistant district attorney, in opening the case, announced that Clark had been previously convicted of forgery, and had served a term in a reformatory, and that he had been promised immunity in this case. The only additional fact of importance brought out on his cross-examination tending to affect his credibility was that, after being arrested on account of his connection with the transactions in question, he was also indicted for stealing diamonds, of the value of \$6,000, from his mistress. On redirect examination he was permitted to testify, over objection and exception duly taken in behalf of the defendant, that after his arrest in connection with the transaction involved on this appeal, but before his indictment for stealing from his mistress, he consulted two attorneys, and dictated a statement to a stenographer in the office of one of them, and subsequently received a transcript of it from the other attorney, and thereupon the statement was offered, received, and read in evidence, without further proof with respect to when or by whom it was prepared. It appears to be a statement of facts with respect to the transactions now in review, and with respect to the part taken by those who participated therein. It contains no statement with respect to some of the material evidence given by Clark on the trial of this indictment; but in part it tends to corroborate his testimony, and in other respects is more damaging to defendant than Clark's testimony given upon the trial. The learned court attempted by the charge to properly limit the effect of this evidence to corroborating the testimony of Clark. Although Clark had not been promised immunity at the time he says he dictated the

statement, it cannot be said that he was not actuated by the same motive in preparing the statement as he was in giving his testimony on the trial; for if his testimony, wholly uncorroborated, is to be accepted as to the time when he made the statement, it is manifest that he was influenced in making it by a desire to obtain immunity and to have the people use him as a witness against the others who were implicated at the same time. This statement, which from a legal standpoint had no probative force in corroborating the testimony of Clark, was given full effect as corroborative evidence by its reception and by the instructions to the jury with respect thereto.

I have examined this record with great care, and I am not satisfied that the competent evidence in the case establishes the guilt of the defendant, and I am convinced that the jury was influenced in reaching the verdict of guilty by incompetent evidence and errors committed upon the trial, and therefore, in the interests of justice, the judgment of conviction should be reversed, and a new trial granted.

I therefore vote for the reversal of the judgment of conviction and for a new trial.

(78 Misc. Rep. 284.)

HALFMOON BRIDGE CO. v. CANAL BOARD et al.

(Supreme Court, Special Term, Albany County. November, 1912.)

CANALS (§ 17*)—BRIDGES—INTERFERENCE BY CANAL BOARD—INJUNCTION.

Barge Canal Act (Laws 1903, c. 147) § 3, provides that new bridges shall be built over the canals to take the place of existing bridges, whenever required or rendered necessary by the new location of the canal. *Held*, that where complainant had erected and was maintaining a toll bridge over the Mohawk river, and the canal board and its employes had taken no steps to construct a new bridge and approaches, or appropriate complainant's bridge and approaches in the manner prescribed by such section, complainant was entitled to an injunction restraining their interference with such bridge.

[Ed. Note.—For other cases, see Canals, Cent. Dig. § 25; Dec. Dig. § 17.*]

Suit by the Halfmoon Bridge Company against the Canal Board and others to restrain defendants from interfering with complainant's bridge crossing the Mohawk river. On motion for preliminary injunction. Granted.

Thomas O'Connor, of Waterford (Collin, Wells & Hughes, of New York City, of counsel), for plaintiff.

Thomas Carmody, Atty. Gen., and Henry S. Bacon, Deputy Atty. Gen., of Rochester, for defendants.

CHESTER, J. There appears to be no distinction in principle between the plaintiff's application for an injunction in this case and that of the plaintiff in *Lehigh Valley R. R. Co. v. Canal Board*, 146 App. Div. 151, 130 N. Y. Supp. 978, modified and affirmed in 204 N. Y. 471, 97 N. E. 964, where it was held that a railroad company was entitled to a judgment restraining the defendants and their agents from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

trespassing upon or interfering with a railroad bridge over a stream used for and in the construction and improvement of the Barge Canal, unless either the state constructs a new bridge and approaches thereto or appropriates for the canal the bridge and its approaches in the manner prescribed by the statute. The Barge Canal Act (Laws of 1903, c. 147) provides in section 3, that:

"New bridges shall be built over the canals to take the place of existing bridges wherever required or rendered necessary by the new location of the canals."

The case referred to had reference to a railroad bridge. The bridge in question here is a highway bridge over the Mohawk river, where that is being enlarged as a part of the Barge Canal, and it is none the less a highway bridge because the plaintiff has been permitted under the law to operate it as a toll bridge. The statute mentioned is broad enough to cover bridges of either class.

Under the authority of the case cited, the plaintiff is entitled to an injunction restraining the defendants and their agents from trespassing upon or interfering with its bridge or overflowing the same with water, unless they construct as required by the statute a new bridge and approaches, or appropriate the said bridge as well as its approaches in the manner prescribed by section 4 of said chapter 147 of the Laws of 1903.

Motion granted.

DAVIDSON v. UNGER.

(Supreme Court, Appellate Term, First Department. December 9, 1912.)

1. APPEAL AND ERROR (§ 875*)—REVIEW—ORDERS REVIEWABLE.

An order providing for punishment of defendant for contempt on his failure to pay the costs of a reference could not be reviewed on appeal from an order denying defendant's motion to set aside a judgment on the ground that he was not served with summons, where the contempt order was not contained in the order appealed from.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3541-3548; Dec. Dig. § 875.*]

2. CONTEMPT (§ 63*)—REFERENCE—COSTS—FAILURE TO PAY.

Where defendant moved to set aside a judgment because he had not been served with summons, which motion was denied after a reference, the court had no jurisdiction to direct proceedings to punish defendant for contempt if he failed to pay the costs of the reference.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 195, 197-201; Dec. Dig. § 63.*]

Appeal from City Court of New York, Special Term.

Action by Morris Davidson against Pincus Unger. From an order denying defendant's motion to set aside a judgment, on the ground that he was not served with summons, defendant appeals. Affirmed.

Argued December term, 1912, before SEABURY, GUY, and GERARD, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

M. & B. Jaffe, of New York City, for appellant.
Jacob J. Schwebel, of New York City (Max Schwebel, of New York City, of counsel), for respondent.

GERARD, J. The finding of the court below as to the service of the summons will not be disturbed,

[1] The insertion of the provision as to punishment for contempt in case of failure to pay the costs of the reference is unauthorized, and defendant should not be punished as for a contempt if he fails to pay such costs. See *Karon v. Eisen*, 72 Misc. Rep. 12, 129 N. Y. Supp. 177. But as such a provision does not appear in the order appealed from, and as defendant's time to appeal from the order of reference has expired, the question does not arise here. If defendant was not satisfied with the provisions of the order of reference, he should have appealed, and cannot now review it upon an appeal from a subsequent order.

[2] But, as above stated, if proceedings to punish for contempt are brought against defendant, he can successfully resist them, because the court had no authority to insert such a provision in the order. See *Karon v. Eisen*, *supra*, which with strange carelessness is cited by respondent to a court, two of whose members sat in that case, as holding exactly the opposite of what it does hold.

Order affirmed, with \$10 costs and disbursements. All concur.

JONES v. GAY et al.

(Supreme Court, Equity Term, Erie County. October, 1912.)

USURY (§ 56*)—CONTRACT—ATTORNEY'S FEES.

Defendant G., being in financial straits, applied to his attorney to procure him a loan of \$5,000 on an undivided interest in certain real property, which was already incumbered by a prior mortgage. The attorney advised him as to the difficulty of obtaining the loan, and that it would be necessary to pay a bonus of 10 per cent. The attorney applied to plaintiff, who was another client, who agreed to make the loan on certain conditions, which were complied with, gave the attorney a check for \$5,000, and left the preparation of the necessary papers to him. These having been executed, the attorney distributed the proceeds of the loan for G., charging him \$500 for his services in procuring it. Plaintiff received no bonus, and had no knowledge of the attorney's act in retaining a part of the proceeds as commissions, did not authorize it, and was no party to G.'s agreement therefor. *Held*, that the attorney represented plaintiff only in preparing the necessary papers to secure the loan, and was the attorney for G. in receiving and disbursing the proceeds, and that the loan was not usurious because of the charging of such attorney's fees or commissions.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 122-127; Dec. Dig. § 56.*]

Action by Frank R. Jones against Louis W. Gay and others. Decree for complainant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

George Clinton and George H. Wade, both of New York City, and Ulysses S. Thomas, of Buffalo, for plaintiff.

William H. Hamilton, of New York City, for defendants Gay.

WHEELER, J. The action is brought to foreclose a mortgage for \$5,000. The principal defense is that of usury. The evidence shows that the defendant Louis W. Gay was in financial straits, and desired to borrow \$5,000 on an undivided interest in certain real estate owned by him. His interest was already incumbered by prior mortgages.

Mr. Thomas, one of the defendants in this action, is an attorney and counselor at law, and for some time prior to the giving of the mortgage sought to be foreclosed had acted in various matters as the attorney and counsel for the defendants Louis W. Gay and wife. Mr. Thomas at the time of this transaction had legal matters in hand for Mr. Gay. Mr. Gay consulted Mr. Thomas, explained his financial needs, and asked him to procure for him a loan on the property in question. Mr. Thomas explained to him that it would be difficult to obtain a loan on the property, as Gay's interest was an undivided one, and already heavily incumbered. He further stated that to procure such a loan the borrower usually had to pay a bonus or shave of 10 per cent. He, however, undertook to obtain the loan, if possible.

Mr. Jones, the plaintiff in this action, had been a client of Mr. Thomas. He had loaned, through Mr. Thomas, money on bond and mortgage on other occasions, and Mr. Thomas had acted for him in closing the transactions. Mr. Thomas went to Mr. Jones and stated that Mr. Gay wished to borrow \$5,000, told him about the security, and urged him to make the loan, and take the bond and mortgage. Thomas told Jones he would guarantee the loan, or bond and mortgage. After considering the matter, Jones informed Thomas he would make the loan on the conditions named, and provided Mrs. Gay would go upon the bond. He left it for Thomas to close the transaction. He sent or gave Thomas his check for \$5,000, the amount of the loan. The bond and mortgage was drawn by Thomas, who requested the mortgagors to come to his office to execute the papers. This they did. The mortgage was properly recorded, and Thomas then proceeded to distribute and pay out the money in his hands. The defendant Gay admits Thomas had authority to receive the amount of the bond and mortgage for him, and make payments for him.

Thomas, on August 5, 1902, rendered Gay a statement of his account with Gay. In this statement he charged Gay with various payments and disbursements made for his benefit, amounting to \$2,021.83. He charged him \$100 for services other than the transaction in question. He credited Gay with \$1,189.89, received for Gay's account in other ways, and also with the "proceeds of the Jones loan" \$4,500. This left a balance of \$3,568.06 still owing Gay, for which Thomas gave him his check.

It appears that on August 4th Thomas had given Gay a check for \$500, for which he had omitted to charge Gay on his books, and this

item was accidentally omitted from the statement rendered. Upon its discovery, Thomas called Gay's attention to the omission and asked a repayment of the \$500. Gay could not pay the money, but gave Thomas a note, which included the \$500 and some other sums. This note was discounted by Thomas at the bank; but, by reason of his indorsement of the note, Thomas has been compelled to take up and pay the note in question, or a renewal of it, so that, as matter of fact, Mr. Thomas has never been paid the \$500 commission for procuring and guaranteeing the mortgage, which he claims the right to charge against Mr. Gay.

The plaintiff, Mr. Jones, parted with the full amount of the bond and mortgage. He paid in full \$5,000. He received nothing back. He had no knowledge, so far as disclosed, that Mr. Thomas intended to retain \$500 for services or commissions. He authorized no such thing, and was party to no usurious agreement. The plaintiff acted in absolute good faith.

The contention on the part of the defendants Gay, however, is that Thomas was the attorney and agent for Jones, and that Jones became and is legally responsible for Thomas' acts in attempting to withhold \$500 from the amount advanced with the assent and agreement of Gay, and that this constituted usury, and avoids the bond and mortgage sought to be foreclosed. We are of the opinion, however, that Mr. Thomas was not, to that extent, the attorney and agent of the lender. He was his attorney in so far as to seeing that the title was satisfactory, that the papers were properly drawn, executed, and recorded, and the necessary legal steps taken to secure the loan to be made.

The evidence also shows that Thomas also acted for the Gays; that Gay authorized him to secure the \$5,000 for him, and from it to make certain payments to third parties, to whom Gay was indebted. Thomas received the \$5,000 check, and disbursed it for the defendant Gay. It is manifest that his relationship in doing this was as attorney and agent for Gay, and not for Jones. If Thomas had failed to account in full for the money so received, Gay would have had an action against Thomas, not against Jones; for Jones had done all he agreed to do, and legally paid the full amount of the loan. Assuming Thomas retained from the \$5,000, without authority, \$500, that is clearly a matter between him and Gay, and not one between Gay and Jones. He was not acting in this matter for Jones, but for Gay. Jones neither authorized nor sanctioned the retention of this \$500.

The case of *Stillman v. Northrup*, 109 N. Y. 473, 17 N. E. 379, is quite analogous to that in hand, although the facts in that case were more favorable for sustaining a charge of usury than in the case now before us for disposition. In that case the plaintiff's brother, as a condition of a loan of \$1,000, exacted \$50, no part of which the lender received. It was conceded, in making the loan, he acted as agent for the lender. There was no proof that she authorized him to take or exact more than the legal rate of interest, and it was undisputed that he took and exacted it for himself, and had the sole

benefit of it. It was held that it was not sufficient for the defendants merely to show that the plaintiff's agent took and exacted the \$50 as a condition of the loan, but it was incumbent upon them to show that he took the \$50 with the knowledge and assent of the plaintiff, so that she, at least by acquiescence, became a party to the usurious exaction, and that the plaintiff was entitled to recover as no usurious agreement was established—citing *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137; *Estervez v. Purdy*, 66 N. Y. 446; *Van Wyck v. Watters*, 81 N. Y. 352; *Philips v. Mackellar*, 92 N. Y. 34. The court said:

"It is not sufficient in this case for the defendants to show that the plaintiff knew of the usurious exaction after she had made the loan and the note had been given. She must have known of it at the time. Nor is it sufficient to show that she supposed that her agent was to receive some compensation for services which he rendered to the defendant." 109 N. Y. 478, 17 N. E. 380.

We deem this case decisive of that now under consideration.

The case of *Bliven v. Lydecker*, 130 N. Y. 102, 28 N. E. 625, cited by the defendants' counsel, is not, in our opinion, in point. In that case the lender loaned a given sum through an agent. The agent exacted an additional sum as a bonus, and drew the mortgage for an amount which included, not only the amount loaned, but the bonus agreed to be paid. The court simply held that, as the lender received an obligation for a larger amount than the sum loaned, it was a ratification by him of the act of his agent, and rendered the transaction usurious. In this case, however, the bond and mortgage are for the exact amount loaned, and there is an entire absence of any knowledge or ratification by the plaintiff of the act of Thomas in retaining the \$500 in question.

It only remains to consider another defense raised by Mrs. Gay, wife of the defendant Gay, as to her personal liability on the bond. Mr. Jones, the plaintiff, communicated to Mr. Thomas the conditions on which he would make the loan. Thomas, in making the application, acted for the Gays, not Jones. Thomas informed Mr. Gay of the conditions imposed, and the bond and mortgage were drawn accordingly. Thomas was quite as much attorney and counsel for the Gays as for the plaintiff, and we can discover no reason for relieving her from the liability imposed by the bond.

The defenses interposed are overruled, and judgment of foreclosure and sale directed in favor of the plaintiff. Let findings be drawn accordingly.

(153 App. Div. 630.)

CARROLL v. SILVER CREEK GAS & IMPROVEMENT CO.

(Supreme Court, Special Term, Erie County. October, 1912.)

1. GAS (§ 7*)—FRANCHISE—USE OF STREETS.

Where the right to use the streets of a city has been granted in general terms to a gas company, such grant contemplates the extension of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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mains along old streets as subsequently extended and through new streets as opened in accordance with the future growth of the city.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 2; Dec. Dig. § 7.*]

2. MINES AND MINERALS (§ 77*)—OIL AND GAS LEASE—CONTRACT WITH LAND-OWNER—EFFECT.

A landowner, having granted to plaintiff the exclusive right to drill for oil and gas on her land, subsequently subdivided the tract, receiving from plaintiff a release of its rights in the subdivided tract, except as to a well already down and to piping in connection with it, but reserving the right, if the owner, or her assignee, should drill for oil or gas, or grant permission to any other person or corporation to drill for oil or gas, on, or remove the same from, any of the lots or streets, or "lay gas or oil pipes therein," to reinstate its rights under the lease. *Held*, that such release should be construed only as applying to the drilling of oil and gas wells on the property, and on removal of oil and gas therefrom, and did not entitle plaintiff to renew operations on the village granting a right to another gas company to lay mains in the streets of the addition to supply consumers with gas from other sources.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 204; Dec. Dig. § 77.*]

Suit by William E. Carroll, as receiver of the property of the South Shore Natural Gas & Fuel Company, against the Silver Creek Gas & Improvement Company. On motion by plaintiff for final judgment on the pleadings, and motion by defendant to dissolve a temporary injunction previously granted. Motion for judgment denied, and injunction vacated.

George Clinton, Jr., of Buffalo, for plaintiff.

George Towne, of Silver Creek, for defendant.

WHEELER, J. Both motions are made upon the pleadings in this action, and the disposition of both motions turns upon facts alleged in the complaint and set forth in the answer. None of the essential and controlling facts are in dispute, and the question presented is whether those facts entitle the plaintiff to the relief asked.

The corporation of which plaintiff is receiver, and the defendant, are each corporations engaged in producing and supplying natural gas to consumers, and are rivals for their patronage. One C. Edele Swift was the owner of about 28 acres of land in the township of Hanover, Chautauqua county, N. Y., lying within the corporate limits of the village of Silver Creek. On the 15th day of July, 1909, she executed a lease of this property to the plaintiff's company, whereby she granted to it—

"the oil and gas in and under the premises hereinafter described, together with the exclusive right to drill and sink wells therefor, and to take and remove the same therefrom, the right to dig and use water wells thereon, the exclusive right to lay pipes and mains, and to conduct oil and gas from and through the said premises, and an exclusive right of way therefor upon, in, through, and over the said premises."

Later the tract in question was surveyed and divided into village lots, with streets running through and across it. It is known as "Swift Park," or "Swift's Addition." On March 20, 1911, Mrs. Swift, pursuant to section 144 of chapter 64, Laws of 1909 (Village Law),

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

offered to dedicate for public streets the streets in question, and on the same day the proposed dedication was duly accepted by the official action of the board of trustees of the village of Silver Creek. At the same time, by quitclaim deed, Mrs. Swift conveyed to the village of Silver Creek the fee of the streets.

On the 29th day of August, 1911, the plaintiff and Mrs. Swift entered into an agreement, reciting the making of the prior lease of June 15, 1909, and that Mrs. Swift desired to plat the property into building lots, with streets crossing the same, and to sell and convey such streets to the village of Silver Creek. The instrument then proceeded to release to her—

"all right to drill further oil, gas, or water wells on or in said lots or streets as platted on a plan or map of said premises made in September, 1910, by B. R. Train, surveyor, a copy of which is annexed hereto, and the right to lay pipes and mains in, across, or on any lot platted on said premises."

This release contained, however, this provision:

"Provided, further, that in case the party of the second part, her heirs, executors, administrators, or assigns, shall drill for oil or gas upon any of the lots or streets laid down upon the annexed plan, or shall remove oil or gas therefrom, or lay gas or oil pipes therein, or shall give or grant to any other person or persons, firm or firms, corporation or corporations, the right to drill for oil or gas upon, or remove the same from, any of said lots or streets, or to lay gas or oil pipes therein, then and in that event this release shall be void and of no effect as to the lot or lots, street or streets, upon which said drilling is done, or from which gas or oil is so removed, or with respect to which said right is given or granted, and as to such lot or lots, street or streets, the lease hereinbefore mentioned shall be reinstated in full force and effect."

It further appears that by agreements made on October 27, 1903, and February 23, 1904, the village of Silver Creek gave to the defendant the right to lay and maintain mains and supply pipes in and along all the streets in said village for the purpose of supplying gas for heating and lighting purposes. The defendant, pursuant to the franchise so given, proceeded to lay its pipes and mains in the streets within the "Swift Addition," so called, originally covered by the oil and gas lease given the South Shore Natural Gas & Fuel Company.

This latter company, through its receiver, now contests this right, claiming that by virtue of the prior lease, and by the terms of its release, providing that the "lease heretofore mentioned shall be reinstated in full force and effect," if the grantor shall give or grant to any other person or corporation "the right to drill for oil or gas or remove the same from any of said lots or streets, *or to lay gas or oil pipes therein,*" its former rights in the original lease have been revived, and it thereby enjoys the exclusive right to lay pipes in the streets in question.

It is to be noted in this connection that Mrs. Swift has not, by any affirmative action on her part, given or granted to any person or corporation the right to lay or extend pipes in the streets running through or across the tract surveyed and platted by her into village lots. The defendant bases its right to lay its mains and pipes in these streets, not by any grant from Mrs. Swift, but by virtue of its existing franchise from the village of Silver Creek, granted in 1903.

[1] Unless there is something in the agreements existing between the plaintiff's company and Mrs. Swift conferring on the plaintiff the exclusive right to lay mains and pipes in the new streets opened by Mrs. Swift, then the defendant, by virtue of its franchise from the village, has the undoubted right to so lay and extend its gas pipes and mains. It is a rule of law that, where the right to use the streets of a municipality has been granted in general terms to a corporation engaged in supplying gas for public and general use, such grant contemplates that new streets are to be opened, and old ones extended from time to time, and the privilege may be exercised in the new streets, as well as in the old. *People ex rel. Woodhaven Gaslight Co. v. Deehan*, 153 N. Y. 528, 47 N. E. 787; *People ex rel. N. Y. & R. Gas Co. v. Cromwell*, 89 App. Div. 292, 85 N. Y. Supp. 878.

[2] The inquiry is therefore directed to the agreements set forth between the plaintiff and Mrs. Swift, for the purpose of ascertaining whether the plaintiff now enjoys any exclusive right to lay pipes in the streets within "Swift's Addition." By reading the first agreement of June 15, 1909, we are impressed with the fact that this agreement, in its entire scope and all its provisions, contemplated simply the granting to the plaintiff of the right to drill wells for oil and gas, and to lay the necessary piping to care for such oil or gas when found.

At the time this lease or grant was given, there was no suggestion of the possible subdivision of the tract into village lots, or the extension of any streets through it, or the building of houses thereon with a possible demand for natural gas. It was apparently purely and simply a development venture, where the plaintiff proposed to sink wells with the expectation of producing oil or gas, and of piping it elsewhere, rather than for use on the property itself. Evidently these hopes were not wholly realized, for only one well appears to have been sunk, and further operations abandoned. In any event, some two years after the giving of this lease or grant to the plaintiff's company, we find Mrs. Swift subdividing the tract into village lots and running streets through it. And we also find the plaintiff, at substantially the same time, by a written instrument, canceling and releasing its rights in the subdivided tract, excepting and reserving, however, its right in a certain well already down, and to piping laid in connection with it. This release, however, contained the proviso already quoted—that if Mrs. Swift, her heirs "or assigns," should drill for oil or gas, etc., "or shall give or grant to any other person or persons, firm or firms, corporation or corporations, the right to drill for oil or gas upon or remove the same from any of said lots or streets, or to lay gas or oil pipes therein, then and in that event this release shall be void and of no effect as to the lot or lots, street or streets, upon which said drilling is done, or from which gas or oil is so removed, or with respect to which said right is given or granted, and as to such lot or lots, street or streets, the lease hereinbefore mentioned shall be reinstated in full force and effect."

This proviso evidently relates to and contemplates the possible resumption of the same class of operations provided for in the original lease or grant. I find nothing in the lease prohibiting supplying private consumers with gas from other sources. It is true, the release

uses the words, "*or to lay gas or oil pipes therein,*" but we do not think these words should be wrested from the general context and subject-matter to which they relate, so as to give them a force and purpose not contemplated by the parties to the agreement. Had it been the purpose and intent of the parties to provide against the laying of service pipes in the streets by any one other than the plaintiff for the purpose of supplying gas to private householders on the streets, it would have been a very simple matter to have expressed that purpose in simple and plain words, which are not present in this release in question.

We are of the opinion that, to justify a construction forbidding a public service corporation from carrying out the purposes of its organization of supplying gas, and exercising the franchise in the streets of the village given by the municipal authorities, the language employed to accomplish such a purpose must be plain and explicit.

The release in question, on which the plaintiff relies, recites that the tract was to be subdivided into lots, and streets run through it and conveyed to the village. The plaintiff must have known that lots would be sold and dwellings erected on them, and the occupants would require gas and water. It is significant, therefore, that with that knowledge, had it been contemplated that no other company should be permitted to operate in the streets, the release should not have so stated in so many words. On the other hand, it can be urged with force that, when the plaintiff relinquished its rights in the tract in order that streets might be opened through it, it at least impliedly contemplated those streets would be used like all other streets in a well-regulated village, by the laying of sewers and of water and gas mains for the accommodation and health of those living on the street.

We should not deprive those living on such streets of the benefit of all these things, unless the instrument by which such benefits are withheld clearly so declares. I am unable to find, in the agreements in question, any such clearly expressed purpose or provision, or any clause restraining the defendant from laying its mains and pipes for the purpose of supplying houses on the streets with gas.

Further, in order to be entitled to the relief asked, the plaintiff must show that either Mrs. Swift or her grantee has granted to others "the right to lay gas or oil pipes." This evidently contemplates the subsequent granting to others of any such rights. Mrs. Swift has done nothing, so far as she is concerned, but dedicate and deed the streets for public highways to the village. This the release contemplated she should do.

The village of Silver Creek, as grantee of these streets, has done nothing since the execution of the release. The defendant has been given no additional franchise beyond those conferred by the village in 1903 and 1904. Can it be fairly said that the assertion by the defendant of rights conferred by that franchise is equivalent to a subsequent grant by Mrs. Swift, or by the village? We think not.

If the plaintiff's contention be true that all his rights under the prior grant have been revived, then they were revived the moment the release was given, for the defendant's franchise was then in force; for

the proviso is not against the actual laying of pipes in streets, but the granting of the right to do so. It also follows, if the plaintiff's position is correct, that the plaintiff would have the right to set up its derricks and drill for oil or gas right in the public street. We mention these things for the purpose of showing to what absurd results the plaintiff's position would lead, and to demonstrate, so far as may be, that the parties, when they executed the release in question, could not have intended to provide against the situation presented, so as to preclude the defendant, a public service corporation, from laying pipes and mains under its existing franchise for the benefit of persons occupying houses on the newly opened streets.

These considerations lead us to the conclusion that the motion for judgment must be denied, and the injunction vacated. So ordered, with \$10 costs to the defendant.

OCCIDENTAL CONST. CO. v. MILLER et al.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

CORPORATIONS (§ 319*)—ACTION AGAINST OFFICERS—SUFFICIENCY OF COMPLAINT.

A complaint in a corporation's action against its president and the chairman of its executive committee alleged that the corporation had negotiated with a foreign government for the building of a railroad for which it was to receive a large subsidy; that a deposit of \$100,000 was required from plaintiff; that, knowing that another company was trying to obtain a similar concession, defendants negligently and fraudulently and in violation of their duties, and in furtherance of a conspiracy to defraud the corporation, and to deprive it of valuable property, by resolutions in directors' meetings, prevented the corporation from obtaining such subsidy, but did not allege plaintiff's financial status, or whether it was able to accept the concession and construct the railroad, or whether the enterprise would have been profitable. *Held*, that the allegations as to defendants' fraud were not allegations of fact tending to show a violation of their duties, and a liability to account to the corporation for breach of duty as directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1415, 1416-1425; Dec. Dig. § 319.*]

Appeal from Special Term, New York County.

Action by the Occidental Construction Company against Charles Miller, impleaded with Leonor F. Loree. From an order denying his motion for judgment on the pleadings, defendant Miller appeals. Order reversed and motion granted.

See, also, 137 N. Y. Supp. 1131.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and MILLER, JJ.

Walter B. Raymond, of New York City (Samuel S. Watson, of New York City, and Ernest G. Metcalfe, of Brooklyn, on the brief), for appellant.

Lewis H. Freedman, of New York City (Leland B. Garretson, of New York City, on the brief), for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LAUGHLIN, J. The plaintiff is a corporation organized under the laws of New Jersey, and it brings this action to recover damages alleged to have been sustained by it through the negligent and fraudulent acts of the defendants as directors and officers of the corporation by which plaintiff was deprived of obtaining from the government of Mexico a concession for building a railroad along the west coast of Mexico for which it would have obtained a subsidy of \$12,000,000 in Mexican money, equivalent to \$6,000,000 in American money, and in consequence thereof it lost all disbursements in connection therewith aggregating \$100,000. Judgment is demanded for these two items amounting to \$6,100,000, together with interest.

It is alleged that the defendants were incorporators of the plaintiff, and were elected directors, and that thereupon the appellant was elected president of the company and became ex officio a member of the executive committee, consisting of five, of which the defendant Loree was chairman; that the executive committee was authorized to exercise the powers of the board of directors when the board was not in session; that the company was organized to build a railroad between certain designated points in Mexico of an aggregate length of about 1,100 miles and to acquire mining claims, lumber lands, and water power in the vicinity of its line of railroad, and to exploit the same by subsidiary companies to be formed for that purpose; that the company duly authorized one Warfield, who was the vice president, to apply to the Mexican government for concessions for these purposes; that Warfield went to Mexico and obtained a concession from the Mexican government for the construction of a railroad by the plaintiff for which the Mexican government agreed to grant a subsidy of \$12,000,000, Mexican currency; that about 2½ years thereafter, at a meeting of the board of the executive committee of the plaintiff, a resolution was adopted approving the action of the vice president in "reopening negotiations with the Mexican government for the concession to build the proposed railroad to extend from Guadalajara to Guaymas," and he was directed "to conclude the negotiations, if possible, upon the basis that the amount of the subsidy for the road shall be sufficient to pay the interest on the bonds necessary to construct it for a period of ten years after sections are completed," and at the same meeting a resolution was adopted abandoning the plaintiff's proposed railroad in part; that pursuant to this last resolution Warfield concluded negotiations with the Mexican government for a change in the railroad proposed to be built by the plaintiff and for the payment by the Mexican government of a subsidy of \$12,000,000, which at that time was equivalent to \$6,000,000 American money, for the building of the railroad as changed, and reported this to the defendants; that the law of Mexico required that the applicant for a concession to construct a railroad should, after the concession was granted and accepted, make a deposit in the general treasury, and that the amount so required to be deposited by the plaintiff on account of said concession was \$100,000, and that this was known to the plaintiff and to the defendants; that the plaintiff and the defendants knew that the Southern Pacific Railroad Company was desirous of obtain-

ing a similar concession from the Mexican government, and that one Eaule was representing it, and, in effect, that it was necessary for the plaintiff to make said deposit of \$100,000 in order to prevent the granting of the concession or of a similar concession to the Southern Pacific Company; that at a meeting of the board of directors of the plaintiff on the 21st day of June, 1905, the defendant Loree introduced a resolution to advise the Mexican government that the plaintiff deemed it inadvisable to engage in the construction of the railroad, unless, as originally proposed by the plaintiff, a concession be granted by the Mexican government giving the plaintiff two years within which to make surveys and investigations over the entire route before accepting the same, on condition that the data thus acquired become the property of the Mexican government, and that Warfield moved as an amendment that the company put up and risk the deposit on the concession if the government of Mexico required it, and that the amendment was rejected and the original resolution was adopted; that the plaintiff then had "or could have obtained the money required to make the deposit required by the laws of Mexico and the terms of the concession, and was able to perform and comply with all the terms and conditions of said concession." It is further alleged on information and belief that the defendants "controlled the directors," other than Warfield, who were present at said meeting of the board of directors, and induced the directors to vote in favor of the resolution offered by the defendant Loree; that the defendants and each of them knew that the adoption of said resolution would prevent the plaintiff from obtaining the concession and deprive it of said subsidy, and that thereafter the Mexican government was advised of the action thus taken, and that thereupon it entered into negotiations with the representative of the Southern Pacific Company, and granted a similar concession to that road, except that the amount of the subsidy was \$15,000,000, Mexican money. It is then further alleged upon information and belief "that the defendants and each of them negligently and fraudulently, and in violation of their duties and the duty of each of them as a director and officer of the plaintiff, and in furtherance of a conspiracy to defraud the plaintiff and to deprive it of valuable property and valuable property rights, did and committed each and every of the acts" set forth in the complaint as resulting in the damages for which a recovery is sought, and that said negligent and fraudulent acts on the part of the defendants were done and committed "for the purpose and with the intention of depriving the plaintiff of valuable property and of valuable property rights," and that by reason thereof the plaintiff was prevented from obtaining the concession and the subsidy, and the expenses incurred by it in the premises were wholly lost.

It is quite plain that no cause of action against appellant is alleged in the complaint. It contains no allegation tending to show the financial status of the plaintiff at the time, whether it was able to accept the concession and construct the railroad, or whether the enterprise would have been profitable or otherwise advantageous to the plaintiff. The only allegations upon which it can even be claimed that the abandonment of the enterprise was unwise are those with respect to the sub-

sidy to be obtained from the Mexican government. It is not to be inferred, however, that the plaintiff was to obtain a subsidy of \$6,000,000 on depositing \$100,000 without further responsibility. It is manifest that, by accepting the concession, it would be required to construct and operate the railroad as a condition of obtaining the subsidy. The allegations that the action of the appellant in voting for the resolution to abandon the enterprise was negligent and fraudulent, and in furtherance of a conspiracy to deprive the plaintiff of the subsidy, are not allegations of facts tending to show a violation by the appellant of his duty to the plaintiff as a director and member of the executive committee, and are wholly inadequate upon which to predicate a liability on the part of the appellant to account to the corporation for a breach of his duty as a director. *People v. Equitable Life Assurance Society*, 124 App. Div. 714, 732, 109 N. Y. Supp. 453; *Wood v. Amory*, 105 N. Y. 278, 11 N. E. 636; *Pagnillo v. Mack Paving & Construction Co.*, 142 App. Div. 491, 127 N. Y. Supp. 72; *Knowles v. City of New York*, 176 N. Y. 430, 68 N. E. 860.

It follows that the order should be reversed, with \$10 costs and disbursements, and the motion granted, with \$10 costs. All concur.

WHITE et al. v. SHONTS et al.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. TRIAL (§ 3*)—EQUITABLE DEFENSES AND COUNTERCLAIM—SEPARATE TRIAL.

In an action on a note alleged to have been given by defendant S., secured by certain stock and transferred to plaintiffs, S. filed an answer denying the execution of the note and an equitable counterclaim that if she had executed it she had been induced to do so by the fraud of another defendant in obtaining its execution while she was executing papers in connection with the purchase of certain real property and a power of attorney for the purpose of pledging the stock as collateral for the performance of such contract, praying a return of the certificate, a cancellation of the note and power of attorney, for the value of the stock if it could not be delivered, and a stay of plaintiffs' action pending determination of the defenses and counterclaim, together with an injunction restraining a transfer of the note, power, and stock during the pendency of the action, etc. *Held*, that the facts pleaded in the counterclaim were available to S. as a defense to the action, and that S. was not entitled to a trial of the equitable issues so raised before the trial of the action on the note.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 6, 7; Dec. Dig. § 3.*]

2. PLEDGES (§ 55*)—RIGHTS OF PLEDGOR.

Where a note executed by defendant S., accompanied by certain stock, was transferred to plaintiffs under power of attorney, and S. first denied that she executed the note, and then alleged that if she had executed it she had been induced to do so by fraud, and that the stock was delivered by her to one of her codefendants to be deposited to secure her contract to purchase certain real estate and not to secure the note, her right to the stock depended on payment of the note in case she was liable thereon, or on a final judgment in her favor on that issue, since, if she was not liable on the note, she could recover the stock in replevin.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 140-151; Dec. Dig. § 55.*]

3. PLEDGES (§ 31*)—RIGHTS OF PLEDGEE—TRANSFER OF COLLATERAL—"CONVERSION."

Where a pledgee sells collateral deposited as security for a note so as to be unable to deliver the collateral on payment of the note or of a judgment recovered thereon, he is guilty of "conversion."

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 86-88; Dec. Dig. § 31.*

For other definitions, see Words and Phrases, vol. 2, pp. 1562-1570; vol. 8, p. 7618.]

Appeal from Special Term, New York County.

Action by Archibald S. White and others against Milla D. Shonts, impleaded with Charles E. Thorn and another. From so much of an order of the Special Term as granted a separate trial of the issues tendered by the counterclaims of defendant Shonts and the reply thereto, and as denied plaintiffs' motion to vacate part of an order granting a separate trial of such issues and staying a trial of the remaining issues in the action at Trial Term, plaintiffs appeal. Reversed, and motion denied.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and MILLER, JJ.

Wm. H. Griffin, of New York City, for appellants.

Charles A. Boston, of New York City, for respondents.

LAUGHLIN, J. This is an action on a promissory note made by the defendant Shonts to the order of the defendant Wanser which, it is alleged, was duly indorsed by the payee and for value delivered to the defendant Thorn before maturity, and by him duly indorsed and delivered for value to the plaintiffs before maturity, and was duly protested for nonpayment. The defendant Shonts admits that she received what purported to be a notice of protest; but, upon information and belief, she denies that she executed the note and delivered it, or that it was for value, or that the presentation and protest thereof were due presentation and protest, or that notice of protest was duly given, or that any sum of money is due and owing from her to the plaintiffs; and she denies that she has any knowledge or information sufficient to form a belief with respect to any of the other allegations of the complaint. The answer further contains two separate defenses pleaded as complete defenses, and one pleaded as a partial defense, and three counterclaims.

The first counterclaim alleges, by reference, all of the allegations pleaded as a first separate defense. The material facts alleged in that defense are, in substance, that on or about the day the note bears date the defendant Wanser presented to the defendant Shonts a proposed contract for the purchase by her from the executors or trustees of one Hoe the premises in the city of New York known as "Schuyler Arms," and a proposed power of attorney for the sale of certain stock to be pledged by her under the contract for the purchase of said property, which contract and power of attorney purported to have been examined and approved, as to form, by her counsel and who apparently

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

had indicated his approval thereon, and that after she signed the contract and power of attorney Wanser presented to her another document the purport of which she did not understand, but which she alleges upon information and belief was a form of power of attorney "for the sale of certain additional stock" belonging to her which Wanser had procured from her for the purpose of pledging the same as additional collateral for the performance of her contract to purchase said property, and she alleges upon information and belief that this power of attorney purported to empower Wanser to dispose of the stock by sale with power of substitution and revocation, but that it was not her intention, as Wanser well knew, to empower him to dispose of the stock, and that he well knew that she did not intend to sign any paper that had not been examined and approved by her counsel as proper for her to sign with respect to said purchase and to giving stock in pledge as security therefor, and that she executed said papers relying upon representations made by said Wanser that they had been approved by her counsel; that said representations made by Wanser to her were false and fraudulent, and that her counsel had never seen or approved any of the papers, and that she was not aware that she signed any promissory note, and that if her signature to a promissory note was thus obtained it was without validity; that after so obtaining the stock and power of attorney said Wanser proceeded to misapply the stock and to hold it as collateral "for the said alleged promissory note," and that the transfer of the note to the plaintiffs was accompanied by the delivery of said power of attorney and certificate of stock which was not indorsed by her, and that the plaintiffs received the note with notice of its invalidity, without value or value commensurate with its value as a valid instrument secured by collateral, and after maturity and not in due course; that she did not borrow or secure any loan by the pledge of said stock, and that she did not affix or cancel any stock transfer stamps on the certificate of stock or authorize any one so to do; that Wanser had no authority to borrow money upon the promissory note, and that she received no part of the proceeds and did not authorize him to pledge the stock, and that, inasmuch as the transactions all took place in the city of New York, the attempted pledge of the stock was notice to the plaintiffs of the invalidity of the note and of all defenses thereto. It is further pleaded in this counterclaim that prior to the commencement of this action the defendant Shonts rescinded the power of attorney obtained by Wanser on the ground of fraud and gave due notice thereof to the plaintiffs and demanded the return of the stock which they held as security for said note, and that this demand was refused, and that the plaintiffs thereupon converted the certificate of stock, which was of the value of \$3,680 or thereabouts, to their own use.

The only question presented is whether an equitable counterclaim is pleaded which should be first tried at Special Term. It is quite clear that the first counterclaim is for the conversion of the stock, and therefore a legal counterclaim, and the order cannot be sustained on the facts pleaded therein.

The second counterclaim merely alleges, by reference, the allegations

contained in the first separate defense, the substance of which has already been stated, and it contains no additional allegations. The third counterclaim merely alleges, by reference, the allegations of the second separate defense. The only material allegations of that defense are that the note was procured by the payee by fraud and subterfuge, and that it was never executed or delivered to him, and that he was not the owner and had no right or power to transfer any title thereto. The defendant by the prayer for relief demands judgment for the dismissal of the complaint and for the return of the certificate of stock and the cancellation of the note and the power of attorney and the delivery thereof to the defendant Shonts, and for the value of the stock in the event that its return cannot be compelled, and for costs, and for the usual other and further relief, and for the stay of the prosecution of the plaintiffs' cause of action pending the determination of the defenses and counterclaims, and that pending the action the plaintiffs be restrained from transferring the note, power of attorney, and stock, and that they be impounded for safe-keeping, and that it be decreed, in the event of a recovery by the plaintiffs, that they exhaust their remedies against the other defendants first, and that she have relief against her codefendants for the amount of any recovery against her by the plaintiffs and the value of the stock which may not be returned, and such other and further relief against them as may be proper, together with costs.

[1] The learned counsel for the appellants contends that the facts thus pleaded in the second and third counterclaims are available to the defendant Shonts as a defense to the action, and they undoubtedly are. *Hutkoff v. Moje*, 20 Misc. Rep. 632-634, 46 N. Y. Supp. 905, and cases cited. Counsel for appellants further contends that they should not be deprived of their right to a jury trial on the issues which arise under the complaint and the defenses thereto which are made the basis of these counterclaims to which the plaintiffs have replied, putting in issue the material allegations.

[2] I am of opinion that the facts of this case are exceptional, and that it does not fall within the rule that in an action at law an equitable counterclaim should be first tried. See *Brody, Adler & Koch v. Hochstadter*, 150 App. Div. 527, 135 N. Y. Supp. 550. I know of no authoritative decision in this jurisdiction, and none is cited, holding that the plaintiff can be deprived of his right to a jury trial in an action at law on a promissory note by the interposition of a plea of an equitable counterclaim for the cancellation and return of the note, or be delayed in procuring judgment by the presentation of an issue between the defendants as to which of them is primarily liable, or for the determination by a court of equity as to whether execution should first issue against the indorsers of the note. It may be said that the order does not necessarily deprive the plaintiffs of the right to a jury trial, and that they would still be at liberty to apply to the court to have the issues raised on the counterclaims settled and tried by a jury; but that would rest in the *discretion* of the court, and they would not be entitled *as a matter of right* to the settlement of these issues and their trial by a jury.

[3] Accepting the allegations of the counterclaims, the plaintiffs merely claim to hold the certificate of stock as collateral security for the note, and, if they should transfer the stock so that they would be unable to deliver it on payment of the note or of any judgment recovered herein, they would be guilty of conversion. If they lawfully hold the stock as security for the note, the defendant would not be entitled to a return thereof until after payment of the note or satisfaction of the judgment entered thereon, and her right to the return of the stock would not be presented by the issues in the action, but would follow as a matter of course upon the payment of the obligation to secure which the stock was held. *James v. Hamilton*, 2 Hun, 630, affirmed 63 N. Y. 616; *Jenkins v. Conklin*, 146 App. Div. 301, 130 N. Y. Supp. 778. The plaintiffs' right to hold the stock cannot survive a final judgment herein in favor of the defendant Shonts, and in the event of such judgment she will become entitled to the immediate delivery of the stock precisely as if the plaintiffs lawfully held it as security and the indebtedness for which it was held was paid or a judgment recovered thereon was satisfied. If the note had a lawful inception, then on the defendant Shonts' own theory it must have been given to represent in whole or in part the purchase price which she agreed to pay for the property she purchased, and, on that theory, the stock was intended as security therefor. The issues do not present a case where the decree of a court of equity is *essential to afford the relief to which the party interposing the counterclaim may be entitled*, and therefore the issues arising on the counterclaim and reply need not and should not be first tried. *Bennett v. Edison El. Ill. Co.*, 16 App. Div. 410, 46 N. Y. Supp. 459, affirmed 164 N. Y. 131, 58 N. E. 7; *Cohen v. Am. Surety Co.*, 129 App. Div. 166-172, 113 N. Y. Supp. 375; *Brody et al. v. Hochstadter*, *supra*.

In the event that the defendant Shonts succeeds in the action and the plaintiffs fail to deliver the stock to her, she would be entitled at once to maintain replevin therefor, and she would not even in that event require the assistance of a court of equity, even though equity might grant such relief; and the same is true with respect to the power of attorney and note if she regards them as of any value, but, as already observed, apart from the stock they cannot be used to her prejudice.

It follows therefore that the order should be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs. All concur.

SAVAGE v. BEECHER.

(Supreme Court, Equity Term, Erie County. October, 1912.)

INTEREST (§ 37*)—MORTGAGE—MATURITY OF DEBT.

Where a bond secured by a mortgage provided that the obligor should pay to the obligee the principal sum in five years, with interest at 4½ per cent., and thereafter interest to be paid semiannually on the 1st day of June and December until the principal sum shall be paid, the last provision did not preclude the obligee from raising the rate of interest

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

after maturity of the loan; the provision fixing the rate of interest applying only to payments before maturity, and the mortgagee upon default being entitled to claim the interest as damages.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 77, 78; Dec. Dig. § 37.*]

Action by William Savage against James C. Beecher. Complaint dismissed, and judgment entered for defendant.

John T. Ryan, of Buffalo, for plaintiff.

Simon Fleischmann, of Buffalo, for defendant.

WHEELER, J. On the 3d day of May, 1895, the plaintiff was the owner of a certain tract of real property located at the northeast corner of Church and Franklin streets, in the city of Buffalo, N. Y., and which is more fully described in the complaint.

On said day he executed to the Albany Savings Bank a bond; the condition of said obligation being that the plaintiff "shall well and truly pay, or cause to be paid, unto the above-named obligee, or its successors or assigns, the just and full sum of twelve thousand dollars (\$12,000), in current gold coin of the United States of America of the standard of weight and fineness of the date hereof at the end of five years from the date hereof, with interest thereon at the rate of four and one-half per centum per annum, such interest as may have then accrued to be paid on the first day of June, 1895, and thereafter interest to be paid semiannually on each first day of June and December until the principal sum hereby secured shall be paid and on the day when said principal sum shall be paid." On the same day plaintiff executed a mortgage which provided that the same was given to secure the sum of money mentioned in the bond, which, together with its terms, was fully described and set forth in said mortgage. Thereafter, and on November 3, 1904, the Albany Savings Bank communicated with the plaintiff by letter in reference to said mortgage, closing said letter with the following sentence:

"We now beg to inform you that until the whole of this mortgage is paid, the rate of interest on the same from November first instant will be 6%.

"Yours respectfully,

Theodore Townsend, Treas."

The plaintiff did not answer said letter, but upon the next interest day he received from the Albany Savings Bank a statement of the amount of interest due which was figured at the rate of 6 per cent., instead of 4½ per cent. and thereafter plaintiff paid the Albany Savings Bank interest on said mortgage at the rate of 6 per cent. The plaintiff informed Mr. Weppner, cashier of the German-American Bank, during one of the talks that they had together, that the Albany Savings Bank had increased the rate of interest from 4½ per cent. to 6 per cent. In 1909 an arrangement was made with Mr. Weppner by which he collected certain rents from properties belonging to the plaintiff, among them the property covered by the mortgage in question, and paid, among other obligations, the interest to the Albany Savings Bank therefrom at the rate of 6 per cent. This arrangement

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

continued until April, 1910, when it ceased. Thereafter, and on or about the 28th day of January, 1911, the Albany Savings Bank duly transferred and assigned to the German-American Bank of Buffalo the said bond and mortgage. Thereafter the plaintiff herein negotiated a sale of the property covered by the said bond and mortgage. A dispute arose between the plaintiff and said German-American Bank as to whether the plaintiff should pay the interest upon the said principal sum due and secured to be paid by said bond and mortgage at the rate of $4\frac{1}{2}$ per cent. or at the rate of 6 per cent., but that on or about June 1, 1911, the sale of said property being about to be consummated, the difference as to the rate of interest again came up, and it was finally agreed between the parties that the plaintiff should pay the German-American Bank the amount of said bond and mortgage with interest thereon at the rate of $4\frac{1}{2}$ per cent.; and it was further agreed that the sum of \$300 should be paid to the defendant James C. Beecher, to be held by him until the question as to the amount of interest due on said bond and mortgage was judicially determined in an action to be brought for that purpose. Thereafter a sum of money representing the difference between \$300 and the amount actually involved in this litigation was paid to plaintiff, so that the sum actually involved herein is the sum of \$211.50, with interest from June 1, 1911, which the said defendant holds subject to the determination of the questions involved in this litigation.

The plaintiff's contentions may be briefly summarized as follows: That by the express terms of the bond and mortgage given the Albany Savings Bank the interest on the principal indebtedness was to be at the rate of $4\frac{1}{2}$ per cent. until the principal was paid. That that contract cannot be varied except by agreement of the parties supported by a valid and sufficient consideration. That there was no agreement on the part of the Savings Bank or of the German-American Bank to extend the time for the payment of the principal for a day, but that either was at liberty, so long as either held the bond and mortgage, to foreclose at any time, and that, assuming that from the transactions between the plaintiff and these banks an agreement could be found to pay the larger rate of interest, such an agreement was without any consideration for want of mutuality, and therefore void and unenforceable.

[1] The initial inquiry, therefore, is whether the bond and mortgage in fact and effect provide that the rate of interest shall be $4\frac{1}{2}$ per cent. until the principal sum has been paid. This rests upon the proper interpretation and construction of the following clause in the bond, to wit:

"Shall well and truly pay, or cause to be paid, unto the above-named obligee, or its successors or assigns, the just and full sum of twelve thousand (12,000) dollars, in current gold coin of the United States of America of the standard of weight and fineness of the date hereof at the end of five years from the date hereof, with interest thereon at the rate of four and one-half per centum per annum, such interest as may have then accrued to be paid on the first day of June, 1895, and thereafter interest to be paid semiannually on each first day of June and December until the principal sum hereby secured shall be paid and on the day when said principal sum shall be paid."

Does this clause in terms provide for the rate of interest to be paid after the maturity of the bond and mortgage, or does it simply fix the interest days upon which interest shall be paid, to wit, the 1st days of June and December in each year until the mortgage shall be paid in full? We interpret this clause as simply providing that until the principal sum shall be paid the obligor shall pay interest semiannually on June and December 1st in each year. The clause is silent as to what the rate shall be after maturity. The latter part of the clause relates entirely to the interest days, not to the rate. The rate the bond and mortgage shall draw after maturity is not provided for. If the construction of the condition of the bond is correct, the disposition of the case is simple. The law governing such cases appears to be well settled.

In *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64, the Court of Appeals of this state laid down the following rule:

"By the decided weight of authority in this state, where one contracts to pay a principal sum at a certain future time with interest, the interest prior to the maturity of the contract is payable by virtue of the contract, and thereafter as damages for the breach of the contract. The same authorities show that, after the maturity of such a contract, the interest is to be computed as damages according to the rate prescribed by the law, and not according to that prescribed in the contract if that be more or less. But, where the contract provides that the interest shall be at a specified rate until the principal shall be paid, then the contract rate governs until payment of the principal, or until the contract is merged in a judgment."

See, also, to the same effect *Wells Fargo & Co. v. Davis*, 105 N. Y. 670, 12 N. E. 42; *Ferris v. Hard*, 135 N. Y. 354, 32 N. E. 129; *Bennett v. Bates*, 94 N. Y. 354; *Pryor v. City of Buffalo*, 197 N. Y. 142, 90 N. E. 423; *Zeller v. Leiter*, 114 App. Div. 155, 99 N. Y. Supp. 624.

After the mortgage in question fell due, the plaintiff was urged to pay it. He had made default. The parties had a perfect right to make any agreement they chose as to the rate of interest after maturity, and, in the absence of any such agreement, the law imposed by way of damages the rate of interest prescribed by statute. (See cases above cited.) We deem it immaterial in this case whether any agreement to pay 6 per cent. was made or not, but we are satisfied that from all the dealings of the various parties the evidence justifies a finding of an implied promise on the part of the mortgagor to pay the higher rate.

The defendant is entitled to judgment dismissing the plaintiff's complaint, and adjudging the German-American Bank entitled to the fund in dispute, for whom the defendant is acting as trustee, with costs.

Let findings be drawn accordingly.

(78 Misc. Rep. 216.)

GROSS v. GAYNOR, Mayor, et al.

(Supreme Court, Special Term, Kings County. November, 1912.)

MUNICIPAL CORPORATIONS (§ 689*)—USE OF PUBLIC BRIDGE—PERMIT—ACTION TO ANNUL.

Where the commissioners of bridges, pending the consideration by the board of estimate of applications by some of defendant railway companies for the extension of their franchise right over Manhattan Bridge, issued a permit to all the defendant railway companies for temporary operation only, on proper terms, such permit being revocable on 30 days' notice, and being confirmed by resolution of the board of estimate, a complaint by a taxpayer to annul the permit and resolution, which contains no allegation of fraud, corruption, bad faith, or collusion of any of the defendant city officials, will be dismissed on motion of all the defendants for judgment on the pleadings.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1477, 1478, 1480; Dec. Dig. § 689.*]

Action by Fred L. Gross against William J. Gaynor, Mayor of the City of New York, and others. On motion to dismiss the complaint. Granted.

Latson, Tamblyn & Pickard, of New York City, for plaintiff.

Archibald R. Watson, Corp. Counsel, of New York City, for City of New York.

James L. Quackenbush, of New York City, for New York Rys. Co.

George D. Yeomans, of Brooklyn, for Brooklyn Heights R. Co. and Nassau Electric R. Co.

Edward D. Kelly, for Coney Island & B. R. Co.

KELBY, J. This is a taxpayer's suit to annul a certain permit issued by the commissioner of bridges to the defendant street railroad companies, including the Brooklyn Heights Railroad Company, New York Railways Company, and the Third Avenue Railway Company, and providing for the operation of cars over the Manhattan Bridge, and also to annul a resolution of the board of estimate which purported to confirm the said permit. The defendant railway companies have demurred to the complaint. The city officials defendant have answered, and the sufficiency of the complaint is questioned by motions made by all the defendants for judgment on the pleadings dismissing the complaint. The complaint alleges that the bridge was constructed by the city at a cost of \$30,000,000, and is a public highway designed to accommodate pedestrians and vehicular and electric railway traffic. It has "two tracks fully installed and equipped," but lying idle. Pending the unhurried consideration by the board of estimate of applications by some of the defendant railway companies for the extension of their franchise rights over the bridge the commissioner, to meet the unquestionably great public necessity for some operation meanwhile, issued a permit to all the defendant railway companies providing for temporary operations only, on terms which are not claimed to be anything but proper, and making the same revocable upon 30 days' notice. Thereafter the board of estimate passed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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a resolution in terms confirming said permit, but requiring that the companies should select a single line of cars to perform such temporary service for all the companies, and providing that "the said permit shall be revocable by the said commissioner of bridges without notice."

The plaintiff contends that under section 242 of the Greater New York Charter (Laws 1901, c. 466, as amended by Laws 1905, c. 629, § 14), which provides that the "exclusive power to grant * * * franchises or rights or make contracts for or involving the occupation or use of any bridge" is in the board of estimate, the permit by the bridge commissioner is a nullity, because it attempts to grant a "right or contract" for the use of the bridge. He furthermore contends that the confirmatory resolution of the board of estimate is illegal because it was passed without observance of the formalities of public hearing and advertising prescribed by section 74 of the charter before a franchise operative over a bridge may be granted. There is no allegation in the complaint of fraud, corruption, bad faith, or collusion on the part of any of the defendant city officials. The recital in the permit as to the necessity for operation is not disputed, nor could it be. The court is not blinded as a judge to what it sees as a man, and that "the rapid transit facilities in the cities of New York and Brooklyn have been for a long time inadequate and unsatisfactory" has been judicially noticed even in the Court of Appeals. *Admiral Realty Co. v. City of New York*, 206 N. Y. 110, 99 N. E. 241. No injury to any private property is shown nor are there any facts alleged to support the pleader's conclusion that the acts complained of constitute an attempted waste of or any injury to the city property and to its taxpayers. Plaintiff must rest his complaint solely upon the charge that the action of the city officials is illegal.

In his brief plaintiff's counsel contends that it is "unnecessary to inquire whether the action of the bridge commissioner or the action of the board of estimate constituted a waste of municipal funds or a waste of municipal property"; that "their action was *illegal* and the statute under which the taxpayer's action is brought, and which gives to a taxpayer this right of action, entitles the plaintiff to maintain an action to '*restrain an illegal act.*'" The statute referred to is section 51 of the General Municipal Law (Consol. Laws 1909, c. 24). The question of the power or right of the plaintiff to maintain the action on the theory above outlined, it is claimed, has been determined in his favor by the decision rendered by Mr. Justice Van Sicken on an application for a preliminary injunction in this action. Plaintiff says that the court "came to the conclusion that this action could be maintained by the plaintiff." The opinion then delivered does not, I think, bear out this contention. The court recognized that the important question before it was, not whether the taxpayer's action was legally maintainable, but whether a court of equity should interfere by injunction pending the trial of an action involving a doubtful and technically illegal act, where the injury complained of was doubtful and uncertain. To reach that question the court tentatively accepted "for the purposes of the motion" the concession, which the railway

companies were then willing to make, that the action was maintainable, but advised reference to certain cases, as follows: See *Tompkins v. Pallas*, 47 Misc. Rep. 309, 95 N. Y. Supp. 875, and cases cited; *Ghee v. Northern Union Gas Co.*, 158 N. Y. 510, 53 N. E. 692; contra, if not distinguishable, *Gallagher v. Keating*, 40 App. Div. 81, 57 N. Y. Supp. 632, 1123; *Id.*, 57 App. Div. 626, 68 N. Y. Supp. 1138, affirmed 171 N. Y. 657, 63 N. E. 1116. This reference was not, I think, to these cases, as authorities supporting the correctness of the proposition conceded, but simply to them as cases in which various views of the question had been considered.

Gallagher v. Keating, supra, is, I think, decisive of the question adversely to the plaintiff. Whatever doubt may have been raised by earlier decisions as to the intent and effect of the taxpayer's suit status was thereby set at rest. It was an action by a taxpayer to annul certain permits issued by the commissioner of highways to connect the elevated road with the Long Island road at Atlantic and Flatbush avenues by passing a structure from the elevated railway across the street into the Long Island lines. Mr. Justice Bartlett, writing for the court, said:

"The legislation concerning taxpayers' actions was not intended to break down the established rule that suits to restrain common nuisances can be maintained only by the public authorities, or by private persons who show that they have suffered, or are likely to suffer, special injury therefrom."

The case is not shown to be distinguishable by any circumstances presented to me. The relief prayed for was the same. The facts were similar in their salient legal aspects; no fraud or bad faith, waste of public property, or injury to private property of the plaintiff was shown, and the acts of issuing the permits, if lawful, had been fully consummated. Nor has there been any change in the General Municipal Law, or in section 1925 of the Code of Civil Procedure, relating to taxpayers' actions, since that case was decided. The suggestion as matter of differentiation that in that case "the railways had undertaken and partly completed their structure" was disposed of when application was made for reargument, and the court said that this did not change the rule.

I regard the permit here involved as far less likely to occasion any possible future inconvenience or legal complications than that there involved, which provided for a structure of a fixed and permanent nature, while the present permit provides for no structure, and only for a temporary use of the city-owned tracks, and is revocable without notice. It is brief in its terms, of simple interpretation, and no tenable claim can arise that some right has become vested under it. It is not exclusive in its terms, nor intended to be exclusive in its effect. The motions for judgment dismissing the complaint are granted, with costs.

Motions granted.

PEOPLE ex rel. GERMAN-AMERICAN BANK v. PURDY et al., Com'rs of Taxes and Assessments.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. TAXATION (§ 496*)—ASSESSMENT—REVIEW—LIMITATION.

Laws 1909, c. 74, authorizes the board of taxes and assessments of New York City to cancel or reduce assessments of bank shares in that city for certain years, and provides that until October 21, 1909, the assessments should be open to public inspection, that applications for reductions or cancellation might be made on or before September 1, 1909, and a hearing, if requested, granted, that the board should determine every application on or before October 1st, that its determination might be reviewed by certiorari, that the proceeding to review must be commenced on or before October 31, 1909, that all assessments of bank shares for the years in question, as to which no application for relief should be made, were thereby ratified and confirmed, and that every determination by the board should be final and conclusive, unless reversed or modified upon certiorari proceedings. *Held*, that a certiorari proceeding to review such determination of the board, instituted November 29, 1910, was barred by the limitation contained in that act.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 890-910; Dec. Dig. § 496.*]

2. TAXATION (§ 496*)—ASSESSMENT—REVIEW—LIMITATION.

A remedy even for jurisdictional defects in the assessment of a tax may be barred by a statutory limitation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 890-910; Dec. Dig. § 496.*]

Appeal from Special Term, New York County.

Certiorari by the People, on relation of the German-American Bank, against Lawson Purdy and others, Commissioners of Taxes and Assessments of the City of New York. From a final order denying motions to dismiss the writ and directing payment to relator of certain interest on taxes paid on bank shares, defendants appeal. Reversed, and writ dismissed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, MILLER, and DOWLING, JJ.

William H. King, of New York City, for appellants.

Lewis G. Wallace, of New York City, for respondent.

MILLER, J. This appeal presents a new question as to the construction and effect of chapter 74 of the Laws of 1909, relating to the assessment of bank shares in the city of New York from 1901 to 1907, inclusive. For a history of the various proceedings which have been instituted to review said assessments, both before and after the passage of said act, reference may be made to the following decisions of the Court of Appeals: *People ex rel. Bridgeport Savings Bank v. Feitner*, 191 N. Y. 88, 83 N. E. 592; *People ex rel. American Exchange Nat. Bank v. Purdy*, 196 N. Y. 270, 89 N. E. 839; *Id.*, 199 N. Y. 51, 92 N. E. 232; *People ex rel. Merchants' National Bank v. Purdy*, 202 N. Y. 599, 95 N. E. 814. These proceedings and *People ex rel. National Bank of Commerce v. Purdy* and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Others, reported in 149 App. Div. 948, 134 N. Y. Supp. 1143, arose either before the passage of said act or were instituted under it. This proceeding was not instituted until November 29, 1910.

[1] The said act provided that the board of taxes and assessments should have power to cancel or reduce assessments of bank shares, made in and for said years; that, beginning 20 days after the passage of the act, and until October 21, 1909, the assessments should be open to public inspection, and that applications for reduction or cancellation might be made on or before September 1, 1909, specifying the grounds therefor, and that a hearing, if requested, should be granted; that on or before October 1, 1909, the board should determine every application, that any determination of the board under the act might be reviewed by certiorari, but that such proceeding to review must be begun on or before October 31, 1909. The act further provided:

"All assessments of bank shares made in said city of New York during the years nineteen hundred and one to nineteen hundred and seven, inclusive, as to which no application for relief shall be made under this act as herein provided, shall be and hereby are ratified and confirmed; and every determination by said board as herein provided, upon an application seasonably made for relief under this act, shall be final and conclusive, unless reversed or modified by the court in a certiorari proceeding thereafter brought as herein provided."

The Court of Appeals plainly stated in 196 N. Y. 270, 89 N. E. 839, that the Supreme Court might well, in the exercise of its discretion, dismiss the writ on account of laches, when there had been long delay in applying for it, and, for the sole purpose of emphasizing that statement, wrote the per curiam memorandum reported in 202 N. Y. 599, 95 N. E. 814. I am of the opinion that the said act of 1909 is an absolute bar to this proceeding. It afforded every one ample opportunity to apply to the board of taxes and assessments for a reduction or cancellation of the assessment, and for a review by certiorari of the determination of the board on such application, and expressly limited the time within which a proceeding to review might be begun. It then provided that all assessments as to which no application for relief should be made under the act were ratified and confirmed.

[2] So far, then, as the case in hand is concerned, the act was a statute of limitations, and a remedy even for jurisdictional defects may thus be barred. *Meigs v. Roberts*, 162 N. Y. 371, 56 N. E. 838, 76 Am. St. Rep. 322.

The order should be reversed, with costs, and the writ dismissed, with costs. All concur.

METROPOLITAN TRUST CO. OF CITY OF NEW YORK v. TRUAX.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. GUARANTY (§ 53*)—CONSTRUCTION AND OPERATION—VARIANCE.

Where an agreement guaranteeing the payment of a loan to be secured by certain collateral provided that interest should be paid semiannually, and that the loan should be made upon the principal's note for one year

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and should be for a specified amount, and where the note given for the loan provided for the payment of interest quarterly in advance, that if the securities pledged should for any reason become unsatisfactory to the lender he could immediately sell and apply such securities on the debt, that in the event of the principal's insolvency the obligation should become immediately due and payable, and pledged the collateral not only for the amount stipulated in the guaranty but also for any other liabilities of the principal, there were such variances between the note and guaranty as rendered the guaranty void unless there was a subsequent valid ratification.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 64, 66; Dec. Dig. § 53.*]

2. GUARANTY (§ 53*)—VARIANCE—CONSTRUCTION—PRESUMPTION.

Where, in an action on an agreement guaranteeing the payment of a loan, it appeared that the loan was made some time after the execution of the guaranty agreement upon terms differing materially therefrom, the presumption was that the guarantors did not consent to the variance.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 64, 66; Dec. Dig. § 53.*]

3. EXECUTORS AND ADMINISTRATORS (§ 209*)—POWERS—CREATION OF LIABILITY.

Where an estate was not liable upon a guaranty agreement executed by the decedent, the administratrix could not create such liability by recognition of liability.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 736; Dec. Dig. § 209.*]

Appeal from Trial Term, New York County.

Action by the Metropolitan Trust Company of the City of New York against Alice Hawley Truax, as administratrix. From a judgment for plaintiff and denial of a new trial, defendant appeals. Reversed, and new trial granted.

See, also, 122 N. Y. Supp. 739.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Lloyd Stryker, of New York City, for appellant.

Austen G. Fox, of New York City, for respondent.

SCOTT, J. The defendant is sued, as administratrix of the estate of Chauncey S. Truax, deceased, upon a guaranty agreement signed by the said Truax.

On March 1, 1906, one Charles E. Eitz was desirous of borrowing the sum of \$400,000 from the plaintiff, and in consideration of such loan and as an inducement to make it the above-mentioned Chauncey S. Truax (and a number of others) executed an agreement of guaranty, a copy of which is annexed to the amended answer. The agreement was a tripartite one, whereby the lender (not therein specified) agreed to loan to said Eitz, designated as the borrower, "upon his note for one year with interest at six per cent., payable semiannually, the sum of four hundred thousand dollars (\$400,000), to be secured by the deposit as collateral security of five hundred thousand dollars (\$500,000) par value of first mortgage six per cent. ten-year gold bonds of the Bulls Head Oil Works (a California corporation hereinafter

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

called the 'Company'), secured by mortgage to the Central Trust Company of California, trustee, and upon the further security of the agreement of the subscribers herein contained."

The subscribers, including said Truax severally, but not jointly, guaranteed to the lender the repayment of pro rata proportions of said loan with interest, but it was provided that no subscriber should be called upon to pay in the aggregate any more than the amount set opposite his signature with interest. In case the subscribers were called upon to pay any part of the principal, they were to be respectively entitled to receive from the lender a proportionate amount of the collateral security given for the loan in the ratio of \$1,000 face value of bonds for each \$800 so paid. The lender was authorized from time to time to detach and collect coupons from the bonds deposited as collateral, applying the coupon interest so collected to the payment of the interest due or to grow due upon the loan.

[1] The loan was made to Eitz upon his promissory note dated May 14, 1906. The terms of the loan, as recited in the note, varied in material particulars from the terms of the loan set forth in the guaranty agreement.

First. The note provided for the payment of interest "quarterly in advance." The guaranty agreement provided for the payment of interest "semiannually," without any stipulation that it should be paid in advance.

Second. The guaranty agreement provided that the loan was to be made to Eitz "upon his note for one year." The note provided that in case the securities pledged should decline in market value, or *for any reason* become unsatisfactory to the lender, the borrower agreed to deposit with the lender additional securities "to the satisfaction of the said company (lender) and in case of failure so to do forthwith this note shall become due and payable without demand of payment thereof, and the said company may immediately sell and apply the said securities in the manner and with the effect as hereinbefore provided."

It seems to require no argument to demonstrate that a note made under such conditions was not a note "for one year" such as Truax and the others agreed to guarantee.

Third. The note further provided that:

"In the event of the insolvency of the undersigned (Eitz) all the said obligations and liabilities shall at the option of the said company, become and be immediately due and payable without demand of payment."

Again it is apparent without argument that a note with this provision is not "a note for one year" such as the subscribers agreed to guarantee.

Fourth. The guarantors bound themselves only for the payment of the \$400,000 loan to be made to Eitz, and it was a part of their agreement that, in case they were required to pay the loan or any part of it, they were to receive the whole or a proportionate part of the collateral deposited.

The note pledged the collateral not only as security for the particular loan covered by the guaranty, but also for "any other liability or liabilities" of Eitz, and authorized the sale of the collateral not only

upon the nonpayment of the \$400,000, but as well upon the nonpayment of any other liability of said Eitz.

These discrepancies between the terms of the loan actually made to Eitz, and the terms to that which the subscribers agreed to guarantee, are manifest.

In addition, it appeared that plaintiff exacted an usurious rate of interest upon the loan, under the guise of commissions, and that this was done after the agreement of guaranty had been signed by Truax and the others.

Furthermore, the guaranty agreement provided that the interest coupons upon the bonds deposited as collateral should be detached and collected; the amount so collected being applied to payment of interest upon the loan. In violation of this provision it was shown that the plaintiff detached coupons to a large amount from the bonds so deposited, and, instead of collecting them, delivered them to Eitz or the company who had issued the bonds.

The loan was not paid at maturity, and thereupon all of the subscribers or guarantors, except Chauncey S. Truax, who had died meanwhile, signed an extension agreement whereby it was recited that said Eitz had applied for an extension of the loan until November 14, 1907, and in consideration thereof each of said subscribers consented to the extension of the time of payment, and agreed that, if so extended, his obligations under said agreement should remain in full force and effect. This agreement was signed by defendant as follows: "Estate of Chauncey S. Truax, by Alice Hawley Truax as administratrix."

The defendant offered upon the trial, in every conceivable way, to show that Chauncey S. Truax when he signed the guaranty agreement, and she herself when she signed the renewal agreement, had no knowledge of the transactions between plaintiff and Eitz, and had no knowledge of the actual terms on which the loan was made to Eitz or of the variances between these terms, and the terms of the loan which Truax agreed to guarantee. This proof was rejected and all necessary exceptions taken by defendant. We must assume for the purposes of this appeal that the defendant, if permitted, would have been able to prove what she offered to prove.

We think that there can be no doubt that the variances between the terms of the loan as contemplated by the guaranty, and the terms of the loan as made, were quite sufficient to destroy the efficiency of the underwriting agreement as a guaranty, and that the guarantors never became liable thereon to plaintiff, until they had executed the renewal agreement, which doubtless operated, as to those who signed it, as an estoppel in pais. It is familiar law that the contract of a surety or guarantor is strictissimi juris, and that he cannot be held beyond the terms of his contract, or for an obligation differing from that which he undertook to guarantee, and it is wholly immaterial whether the deviation harms him or adds to the burden of his obligation if he has not assented to it. *Grant v. Smith*, 46 N. Y. 97; *Barns v. Barrows*, 61 N. Y. 39, 42, 19 Am. Rep. 247; *Paine v. Jones*, 76 N. Y. 278; *Evansville Bank v. Kaufmann*, 93 N. Y. 273, 45 Am. Rep.

204; *Creamer v. Mitchell*, 162 N. Y. 486, 56 N. E. 977; *Shipman v. Kelley*, 9 App. Div. 321, 41 N. Y. Supp. 328; *Guardian Trust Co. v. Peabody*, 122 App. Div. 648, 107 N. Y. Supp. 515, affirmed 195 N. Y. 544, 88 N. E. 1120.

We think it quite clear, therefore, upon the evidence in the case, and upon that which we must assume, that defendant could have produced if permitted, that Chauncey S. Truax, defendant's decedent, never became liable to plaintiff upon the guaranty agreement, and that his estate was not so liable when his co-guarantors and this defendant signed the extension agreement.

[2] Indeed, that conclusion is compelled as the evidence stands, without regard to the excluded testimony, because the documents show on their face that the note was made some time after the guaranty agreement was executed, and that the variances above referred to existed. Upon these facts alone the presumption would be that the guarantors did not consent to the variances, and the burden to show the contrary would rest upon plaintiff.

[3] Having arrived at the conclusion that the estate of Chauncey S. Truax was not liable upon the guaranty when the original loan matured, it follows that it was not competent for his administratrix to create a liability on the part of the estate by agreeing to continue what she doubtless assumed to be a liability, but which in fact was not. The case is similar to those in which a claim against a decedent has been barred by the statute of limitations. In such cases it is the well-settled rule that executors or administrators have no power to use the funds of the estate to pay claims so barred, and that, if they do so, the claim paid will not be allowed upon an accounting. *Butler v. Johnson*, 111 N. Y. 204, 18 N. E. 643; *Spicer v. Raplee*, 4 App. Div. 471, 38 N. Y. Supp. 806; *Hamlin v. Smith*, 72 App. Div. 601, 76 N. Y. Supp. 258. If an executor or administrator cannot lawfully pay such a claim out of the funds of the estate, he certainly cannot validly create an obligation so to pay it.

The defendant relies entirely upon *Metropolitan Trust Co. v. Skitt*, 139 App. Div. 928, 124 N. Y. Supp. 51, affirmed 205 N. Y. 561, 98 N. E. 1108, a case which arose under the same guaranty and extension agreements. It is to be distinguished from the present case, however, by the circumstance that the defendant Skitt was alive when the original loan became due and personally executed the extension agreement.

Judgment and order reversed, and new trial granted, with costs to the appellant to abide the event. All concur.

In re BERRY'S WILL.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. PERPETUITIES (§ 6*)—SUSPENSION OF POWER OF ALIENATION—TRUST FOR DEFINITE PERIOD.

A provision of a will, bequeathing testator's estate in trust to invest and pay the income therefrom for five years to certain benefit associations, was invalid, because the trust was measured not by two lives in being, but by the definite period of five years.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-56; Dec. Dig. § 6.*]

2. WILLS (§ 473*)—VALIDITY—VESTED REMAINDER—INVALID LIMITATION.

A bequest of a vested remainder to a corporation in being, definitely ascertained, and competent to take at testator's death, was not invalid because limited to take effect at the expiration of a void trust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 992-995; Dec. Dig. § 473.*]

3. WILLS (§ 853*)—CONSTRUCTION—INVALID LIMITATIONS.

In such case, to avoid partial intestacy, the corporation was entitled to take its bequest at the testator's death, instead of at the time prescribed for the expiration of the trust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2169; Dec. Dig. § 853.*]

Appeal from Surrogate's Court, New York County.

Application for the probate of the will of Inslee H. Berry. From a decree refusing to admit to probate the tenth clause of the will, the Lutheran Hospital appeals. Reversed, and whole will admitted to probate.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Roger Hinds, of New York City, for appellant.

Rockwood & Haldane, of New York City, for respondent.

McLAUGHLIN, J. Mr. Inslee H. Berry died on the 30th of January, 1912, leaving a last will and testament, which, except the tenth clause, was admitted to probate. As to this clause probate was refused, on the ground that it violated the provisions of the statute relating to the suspension of the power of alienation, and was therefore invalid. It reads as follows:

"Tenth. All the rest, residue and remainder of my estate, real, personal and mixed, of whatsoever nature and wherever located, I give, devise and bequeath to my executor hereinafter named, in trust nevertheless for the following purposes, to wit: 'To invest the said rest, residue and remainder in good, safe securities and to pay the income therefrom for a period of five years from the date of my decease, one-half thereof, to the Employés' Benefit Association of the Department Store of Simpson-Crawford Company, of New York City, and one-half thereof to the Employés' Benefit Association of the Fourteenth Street Store, in New York City. At the expiration of said five years from the date of my decease, my executor, as such trustee, to pay over the principal of my said residuary estate to the Lutheran Hospital, now in process of organization, and of the medical board of which I am a member and its secretary. Should this said hospital not be organized at, or before,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the expiration of said five years, then and in that event, my said executor, as such trustee, shall pay the principal of my said residuary estate to Angeline Mott Berry, of Rockaway, New Jersey."

The appeal is taken by the Lutheran Hospital. The will purports to have been executed on the 20th of January, 1911. At that time the testator was a member of an unincorporated association known as the "Society of the Lutheran Hospital of the City of New York," one of the purposes of which was to effect the incorporation of the appellant, the "Lutheran Hospital of Manhattan," and it was in fact incorporated under article 7, § 130, of the Membership Corporation Law (Consol. Laws 1909, c. 35), on the 23d of November, 1911, and is the hospital referred to in the tenth clause.

[1] The learned surrogate, as appears from his opinion, held, and I think correctly, that the provision in the tenth clause relating to the Employés' Benefit Association of the Department Store of Simpson-Crawford Company, of New York City, and the Employés' Benefit Association of the Fourteenth Street Store, in New York City, was invalid because the trust was measured, not by two lives in being, but by the definite period of five years. *Brown v. Quintard*, 177 N. Y. 75, 69 N. E. 225; *Haynes v. Sherman*, 117 N. Y. 433, 22 N. E. 938; *Hagemeyer v. Saulpaugh*, 97 App. Div. 535, 90 N. Y. Supp. 228. And he concluded that, since the clause was void in this respect, the bequest to the hospital was also void, since it depended upon the former gift, and could not be separated from it.

[2] I am of the opinion that he was in error in holding that the gift to the hospital was invalid. The enjoyment of this gift by the hospital is definitely fixed—i. e., the expiration of five years—and the person to whom it was given was in being, definitely ascertained, and competent to take at the time of the death of the testator. There is nothing uncertain about it. It was a vested remainder. A future estate is vested when there is a person in being who would have an immediate right to the possession of the property on the determination of all the intermediate or precedent estates. Section 40, Real Property Law (Consol. Laws 1909, c. 50). The authorities, so far as I have been able to discover, are all to the effect that a vested gift, otherwise valid, will not fail merely because it is limited to take effect at the expiration of a trust which is void under the statute of perpetuities.

In *Kalish v. Kalish*, 166 N. Y. 368, 59 N. E. 917, the court expunged the intermediate trust estate, but held the remainder valid, and in doing so said:

"It is axiomatic that courts cannot make new wills for testators who have failed to make valid wills for themselves. While recognizing the force of this truth, courts have from the earliest times been compelled to choose between the alternatives of setting aside certain wills altogether or of cutting out simply their void provisions. This necessity has led to the rule, which is now firmly established in this state, that when the several parts of a will are so intermingled or interdependent that the bad cannot be separated from the good, the will must fail altogether; but when it is possible to cut out the invalid provisions, so as to leave intact the parts that are valid and to preserve the general plan of the testator, such a construction will be adopted as will prevent intestacy, either partial or total, as the case may be."

In *Brinkerhoff v. Seabury*, 137 App. Div. 916, 122 N. Y. Supp. 481, affirmed 201 N. Y. 559, 95 N. E. 1123, the will contained a provision for a 15-year trust. This was held bad, and expunged; but the trust for the testator's two daughters "at the expiration of 15 years" was held valid, and was accelerated when the 15-year trust was expunged.

In *Smith v. Chesebrough*, 176 N. Y. 317, 68 N. E. 625, the testator attempted to create a trust for a period of two years. This was held void as against the statute of perpetuities, and expunged; but the gift over after the expiration of the trust was held good, the court saying:

"The ultimate trust was not revoked by the codicil, and the nature of the estate devised to the ultimate trustees was not changed; but the testator made an attempt to postpone the enjoyment thereof, which was in contravention of the statute, and therefore void. By taking out of the codicil the invalid provision for postponement, the only change in the testator's plan for the disposition of his residuary estate is that the physical possession of the remainder is accelerated, so as to take effect upon the testator's death, instead of two years later."

[3] Here, by eliminating the provision of the tenth clause relating to the employes of the two associations, the intent of the testator will be carried out. The only change in his plan is that the physical possession of the residuary estate is accelerated, so as to take effect upon his death, instead of at the expiration of five years. By expunging the invalid part of the tenth clause, a partial intestacy, which the law does not favor, is avoided (*Harrison v. Harrison*, 36 N. Y. 543), and the substantial part of it is preserved in its entirety.

The decree, in so far as appealed from, is therefore reversed, and the whole will admitted to probate as indicated in this opinion, with costs to the appellant payable out of the estate. All concur.

CROWLEY v. MURRAY & HILL CO.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. MASTER AND SERVANT (§ 89*)—SCOPE OF EMPLOYMENT—MASTER'S LIABILITY.

Where a foreman of a company manufacturing interior woodwork ordered a servant to help a former employe, who was going away, to move his furniture, the company was not liable for injuries to such servant, received while doing so, since a master is liable only for injuries suffered in the course of his employment, or in performing services required by him, and no inference of authority is drawn from the mere fact that it was ordered by the company's foreman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 153-156; Dec. Dig. § 89.*]

2. MASTER AND SERVANT (§ 89*)—INJURY TO SERVANT—EXISTENCE OF RELATION—EVIDENCE.

Where plaintiff was ordered by his employer's foreman to assist in some outside work with other employes, the mere fact that he thought he was acting as his employer's servant is not sufficient to fix liability on the employer for a negligent injury, in the absence of further proof of the foreman's authority.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 153-156; Dec. Dig. § 89.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, New York County.

Action by John Crowley against the Murray & Hill Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Carl Schurz Petrasch, of New York City, for appellant.

Don R. Almy, of New York City, for respondent.

SCOTT, J. The plaintiff has secured a judgment for personal injuries which he received in May, 1909. On that date he was in the general employ of defendant, a corporation engaged in the business of manufacturing interior woodwork. It had a yard at Broadway and 130th street, in the city of New York, and plaintiff's employment was to handle the lumber which defendant received in its yard for manufacturing purposes. On May 28, 1909, a man named Massey, who was the brother-in-law of one of the defendant's officers and had himself been in defendant's employ, was about to return to Scotland to live and was taking his furniture with him. He had been living in an apartment on 133d street. On the morning of the day on which the accident happened, one Meyer, who was the shipping clerk and foreman for defendant, asked or directed plaintiff to go to Massey's house and help move his furniture. Several other of defendant's employes seem to have been engaged in the same work, and the truck used to move the furniture belonged to defendant and was driven by one of its drivers. Among the articles to be moved was an upright piano, which was safely brought down to the sidewalk, boxed, and loaded on the truck. After the truck was loaded, it was sent, in charge of the driver, to the pier of the Anchor Line of steamers. Plaintiff was either asked or directed by Meyer to go with the truck and its load. The evidence is that both Meyer and Massey gave to the driver money with which to hire help at the pier in unloading. The driver corroborates this, although plaintiff professes to have known nothing of it. When they arrived at the pier, plaintiff and the driver attempted, unassisted, to unload the piano from the truck, when, either because it was too heavy for them, or they were unskilled, it slipped and fell on plaintiff's leg, breaking it.

[1] The negligence attributed to defendant is that it failed to furnish sufficient men to unload the piano. There is a fundamental difficulty in the way of sustaining this judgment, which is that when the plaintiff received his injury he was not engaged in the master's business. The defendant was not in the business of moving furniture, and the general scope of plaintiff's employment did not include such services. It is a rule of the law of master and servant, too well settled to require discussion or the citation of authorities, that a master is liable to his servant only for injuries suffered in the course of his employment, or in performing services required of him by his master. There is not the slightest evidence that Meyer had authority from defendant to take plaintiff away from defendant's work and put him at work for others in doing something with which defendant had no

concern. Nor is any inference of such authority to be drawn from Meyer's position in defendant's employ.

[2] It may be, as plaintiff contends, that he believed that he was acting as defendant's servant in assisting in shipping the piano; but that cannot serve to fasten liability on defendant. Furthermore we are of opinion that plaintiff wholly failed to bear the burden of establishing his own freedom from contributory fault or negligence. The size and weight of the piano were apparent to him, and he should have been able to form a judgment for himself as to whether or not two men could safely handle it. The accident was probably due to his own maladroitness, or that of his fellow servant, the driver.

It is not necessary to consider on this appeal in whose employ the plaintiff was acting when the accident happened. It is sufficient that he was not then acting as defendant's servant.

Judgment and order reversed, and new trial granted, with costs to appellant to abide the event. All concur.

GOLDREYER v. FOLEY.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. MOTIONS (§ 19*)—NOTICE—NECESSITY.

Neither Code Civ. Proc. § 780, providing that, where special provision is not otherwise made by law or the general rules of practice, notice of a motion, if necessary, must be personally served, nor general rule of practice 37, relating to notice of argument and of motions, defines the cases in which notice is required, and whether notice should be given to the adverse party is dependent in part on the particular facts presented under which the application is made.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 14; Dec. Dig. § 19.*]

2. MOTIONS (§ 59*)—FAILURE TO SERVE NOTICE—EFFECT.

Where a motion is made *ex parte*, and from the nature of the application the adverse party should have received notice, the order granting the motion is merely irregular, and may be vacated.

[Ed. Note.—For other cases, see Motions, Cent. Dig. §§ 73-81; Dec. Dig. § 59.*]

3. EXECUTION (§ 450*)—EXECUTION AGAINST PERSON—DISCHARGE—VOID DISCHARGE—LIABILITY OF SHERIFF.

The failure to give notice to the judgment creditor of the application for the discharge, under Judiciary Law (Consol. Laws 1909, c. 30) § 775, of the judgment debtor adjudged guilty of contempt, and fined the amount of the judgment and costs, and confined to jail until payment or discharge, does not render the order of discharge void for want of jurisdiction; but the order protects the sheriff acting thereunder, though orderly practice requires the giving of notice.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1292-1305; Dec. Dig. § 450.*]

Appeal from Trial Term, New York County.

Action by Charles A. Goldreyer against Thomas F. Foley. From a judgment for defendant, plaintiff appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The following is the opinion of Greenbaum, J., at Trial Term:

This is an action against a sheriff of the county of New York for an escape. On November 1, 1907, the plaintiff recovered a judgment of \$1,487.50 in the City Court of the City of New York against one Vincent C. Currier and another, and upon the return of execution unsatisfied instituted proceedings supplementary to execution against the defendant Currier. In the course of these proceedings an order was entered requiring the judgment debtor to deliver certain property within a time therein specified to the receiver appointed in the proceedings. The judgment debtor failed to obey this order, and upon motion of the judgment creditor a further order was entered directing the judgment debtor to turn over the property in question, or, in default thereof, that the motion to punish for contempt be granted. Thereafter, on June 9, 1908, upon proof of the debtor's noncompliance with the order, an order was entered adjudging the debtor guilty of contempt, fining him the amount of the judgment and costs of the proceedings, and directing that he be confined to jail until such fine be paid or discharged according to law. Upon appeal by the debtor this order was affirmed. On the 24th of March, 1909, the debtor was taken into custody by the sheriff and lodged in jail. On the 23d of April, 1909, the debtor moved *ex parte* and without the knowledge of the plaintiff to one of the justices of the City Court of the City of New York for an order discharging him from imprisonment, and by order entered on that date the motion was granted. Acting thereunder the sheriff discharged the debtor from jail.

[1] The sole question presented is whether the failure to give notice of the application for a discharge to the judgment creditor rendered the order void for lack of jurisdiction, and therefore insufficient to protect the sheriff in acting thereunder, or whether such failure constituted merely an irregularity, which might be sufficient ground for the vacation of the order upon direct motion. In discharging the judgment debtor the court acted under the authority of section 775 of the Judiciary Law (Consol. Laws 1909, c. 30), which provides as follows: "Where an offender, imprisoned as prescribed in this article, is unable to endure the imprisonment, or to pay the sum, or perform the act or duty required to be paid or performed in order to entitle him to be released, the court, judge or referee, or, where the commitment was made as prescribed in section 2457 of the Code of Civil Procedure, the court out of which the execution was issued, may, in its or his discretion, and upon such terms as justice requires, make an order directing him to be discharged from the imprisonment." This section does not provide for notice to the judgment creditor, and there is no specific provision of the Code or general rules of practice requiring that notice be given of an application of this nature. Neither section 780 of the Code of Civil Procedure nor rule 37 of the general rules of practice defines the cases in which notice of motion is required. *Shaw v. Coleman*, 54 N. Y. Super. Ct. 3, 5, 6; *Matter of Salmon*, 34 Misc. Rep. 251, 253, 69 N. Y. Supp. 215. Whether notice of motion should be given to the adverse party is dependent in part upon the particular facts presented and the circumstances under which the application is made. *Matter of Salmon*, *supra*.

[2, 3] Where the motion is made and determined *ex parte*, in a case where from the nature of the application the adverse party should have received notice, the order is merely irregular, and may be vacated. *Shaw v. Coleman*, *supra*; *Matter of Salmon*, *supra*; *Tweedy v. U. S. Life Ins. Ass'n* (Com. Pl.) 33 N. Y. Supp. 412; *Pinckney v. Hagerman*, 4 Lans. 374, affirmed 53 N. Y. 31. In *Pinckney v. Hagerman*, *supra*, the action was brought against the sheriff for the escape of one Wagner, who was confined within jail limits under a body execution issued upon a judgment of the Supreme Court in plaintiff's favor in an action for breach of promise of marriage. Upon the application of Wagner an order was made *ex parte* at a Special Term of the Supreme Court setting aside the execution and discharging him from jail limits. It was contended in part by the plaintiff that the failure to give notice of the motion to vacate the execution rendered the order void for lack of jurisdiction. The court said: "The motion for the order was made without notice.

For this reason, also, it was irregular, for by the Code the motion should have been made upon notice. Code, § 414. But the want of notice, I apprehend, did not deprive the court of jurisdiction to make the order. This question has been decided, both as to the effect of want of notice and of the motion being made in the wrong county, in *Blackmar v. Van Inwager*, 5 How. Prac. 367, where it was held that there was for those reasons no want of jurisdiction in the court, and that the order was good till vacated or set aside. The same was held in *Geller v. Hoyt*, 7 How. Prac. 265. These are Special Term cases, but I agree with them in holding that, the court having by the Constitution general jurisdiction, its orders in cases pending therein entertain the application without notice to the judgment creditor, I am unable are within its jurisdiction, however irregular they may be in practice."

While I am of opinion that orderly practice and a due regard for the rights of the judgment creditor should have constrained the court to decline to to discover any absence of jurisdiction in the court to make the order, and it follows, therefore, that the sheriff was required to obey the directions therein contained, and was completely justified thereunder in discharging the judgment debtor from imprisonment.

Judgment for defendant, with costs.

M. Slade, of New York City, for appellant.

V. Taylor, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion of Greenbaum, J. Order filed.

SPERRY v. FARMERS' LOAN & TRUST CO. et al.

(Supreme Court, Appellate Division. First Department. January 3, 1913.)

1. CONVERSION (§ 11*)—CORPUS OF TRUST ESTATE—PERSONALTY.

An owner of an undivided interest in the estate of a testator executed a deed of trust conveying his interest consisting principally of real estate to trustees for a specified purpose. The executor of testator exercised his power and converted all the property into cash and paid the same to the trustees. *Held*, that the corpus of the trust estate was personalty, because the act of the executor in converting the realty into cash operated as a legal and actual conversion of real estate into personalty.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 19-24; Dec. Dig. § 11.*]

2. TRUSTS (§ 59*)—REVOCATION—"PERSON BENEFICIALLY INTERESTED."

The creator of a trust in personalty, whereby she grants to trustees her estate to receive the income and pay the same to her for life and deliver the corpus to persons as she may designate by will, is the only person beneficially interested in the trust within Personal Property Law (Consol. Laws 1909, c. 41) § 23, declaring that, on the written consent of all the persons beneficially interested in a trust, the creator may revoke it in whole or in part, and she may revoke the trust in part.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 78-81; Dec. Dig. § 59.*]

Submission of controversy on an agreed statement of facts by Ida Harriet Sperry against the Farmers' Loan & Trust Company and another, individually and as surviving trustee under a deed of trust made by Ida Harriet Sperry. Judgment for plaintiff.

On or about October 28, 1902, the plaintiff was the owner of an undivided interest in the estate of Hosea B. Perkins, deceased, and while such owner executed a document, denominated a deed of trust, which she delivered to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Ethan Allen, Frederick P. Sperry, and the Farmers' Loan & Trust Company, therein designated as "trustees."

By this document plaintiff granted to said trustees all the property "real and personal to her bequeathed by said Hosea B. Perkins."

At the time this instrument was executed and delivered, the interest of plaintiff in the estate of said Hosea B. Perkins, deceased, was an undivided interest of the value of at least \$48,000 in certain real estate, and an undivided interest of the value of at least \$2,000 in certain personal property of which said Perkins had died seised and possessed. The will of said Perkins contained a clause authorizing his executors to sell all or any part of his real property. Acting under this power, the executors converted into cash all of the undivided interest of the plaintiff in the estate, both real and personal, of said Perkins, and paid over the proceeds, amounting in all to \$51,645.55, to the trustees named in the above-mentioned deed of trust.

Ethan Allen, one of the trustees named, has died, and defendants, the sole surviving trustees, now hold, under the said deed of trust personal property, to wit, bonds and mortgages to the value of \$33,000, and cash in the sum of \$158.87, as well as certain real estate now used by plaintiff as a residence and purchased by defendants as trustees pursuant to one of the provisions of the deed of trust, of the value of not less than \$16,500.

The trust agreement, or "deed of trust" as we have termed it for convenience, conveyed the property described therein to the trustees named upon two trusts and a power in trust. The two trusts were: First, to pay any and all debts of the plaintiff which had accrued prior to the execution of the agreement. This trust had been fully executed; all of said debts having been paid. Secondly, to receive all the rents, issues, and profits of the assigned estate, and to pay the same, less the trustees' charges and expenses, to the plaintiff for her natural life. The power in trust was to transfer and convey the principal of said estate, and the balance of the income remaining in their hands, upon the death of the plaintiff, "to such person or persons and in such manner as may be designated in the last will and testament" of said plaintiff.

The plaintiff, claiming to be the sole beneficiary of the trust created by said deed of trust, has served upon the surviving trustees, defendants herein, a notice that, "pursuant to section 23 of the Personal Property Law (Consol. Laws 1909, c. 41) and other statutes made and provided, I do hereby revoke the said trust created by the said deed of trust to the extent of ten thousand dollars of such personal property, and as such beneficiary I hereby consent to such revocation and I accordingly require of the said trustees that they forthwith deliver to me, free from said trust, bonds and mortgages or other similar personal securities or cash of the amount and value of ten thousand dollars." The trustees have declined to accede to such request, and have refused, and still refuse, to deliver over to plaintiff any part of the principal of the trust fund aforesaid, and still retain the entire principal thereof.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Clarence De Witt Rogers, of New York City, for plaintiff.

Frederick Geller, of New York City, for defendants.

SCOTT, J. [1] We entertain no doubt that the corpus of the trust fund in the hands of the trustees, excepting the house occupied by plaintiff, is in contemplation of law personal property. It is true, as stated in the submission, that when the deed of trust was executed plaintiff's undivided interest in the estate of Hosea B. Perkins, deceased, was represented mainly by real estate; but the action of the executors in converting his realty into cash operated as a legal as well as an actual conversion, so that what was paid over to the trustees

was, when it came into their hands, personal property, and, except as to the amount invested in the house, so remains. As the plaintiff seeks to release from the trust only a part of the personal property so held, we are justified in treating the questions raised by the submission only with reference to a trust of personal property.

[2] Section 23 of the Personal Property Law reads as follows:

"Sec. 23. Upon the written consent of all the persons beneficially interested in a trust in personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof."

Although this section was enacted after the creation of the trust now under consideration (Laws 1909, c. 247), it is by its terms expressly made retroactive. It is clear that the plaintiff is a person "beneficially interested" in the trust, and the question we have to consider is whether any other person is also beneficially interested within the meaning of the statute. If no other person is so interested, and the plaintiff is the only person interested, her consent alone is necessary to the revocation of the trust.

There certainly is no other person now in existence, or who can now be identified, who is so interested either presently or in future. Under the terms of the deed of trust the corpus of the trust estate is to go, at plaintiff's death, to the appointee or appointees named in her last will. Until she dies therefore, leaving a last will, the person or persons to receive the property after her death must remain unknown and legally nonexistent. The deed makes no provision as to the disposition of the estate in case the plaintiff fails to designate the person or persons to take it after her death. Of course, in such an event the property would go, by operation of law, to her heirs or next of kin; but they would take by descent and not by purchase—by virtue of their relationship to the plaintiff, and not by virtue of or under any provision of the deed of trust. There is therefore no person now existent and who can be identified, save the plaintiff, who can in any proper sense be termed a beneficiary under the deed of trust, because there is no person who can claim to be entitled, after plaintiff's death, to receive the fund under the terms of the trust, nor can there ever be such person except by the voluntary act of the plaintiff in making an appointment by her last will.

In this respect the trust under consideration differs radically from that considered in *Genet v. Hunt*, 113 N. Y. 158, 21 N. E. 91. In that case, as in this, there was a conveyance to trustees of property which they were to hold during the joint lives of the creator of the trust and her husband, paying the income over to her or him, and at the death of the survivor were to convey and pay over the corpus of the trust estate to her appointees named in her last will and testament. The case differed from the present, however, in that the trust deed also provided that, in default of an appointment, the trustees were directed to pay over and convey the corpus of the estate "unto such person or persons living at the death of the said party of the first part (the creator of the trust) and being her heir or heirs at

law would be entitled to take the same by descent from her." It was held that the remaindermen, in case the creator of the trust failed to make a valid appointment, would take under the trust deed—by purchase and not by descent, notwithstanding they might be, although not necessarily so, the same persons who would have taken in case both of intestacy and of a failure to make a valid appointment. In other words, the deed of trust itself pointed out persons who would inevitably become entitled to the property at the death of the creator of the trust despite anything she might do or might omit to do. It was in view of this feature of the trust deed that it was remarked, in *Hoskin v. Long Island Loan & Trust Co.*, 139 App. Div. 258-261, 123 N. Y. Supp. 994, affirmed on opinion below 203 N. Y. 588, 96 N. E. 1116, that the question at issue in *Genet v. Hunt* was whether Mrs. Riggs, the creator of the trust, had reserved to herself an absolute *jus disponendi* or only a power of appointment. It was held that she had reserved only the latter, because she had specifically provided against every contingency, and had pointed out who should take the corpus of the estate in case no appointment was made. She had thus created rights in the remainder which she was powerless by action or nonaction to destroy.

The exact contrary is the case here. No one is entitled to be appointed to receive the corpus, and no one ever can receive it under the terms of the trust deed unless the plaintiff of her own free will elects to appoint them to be the recipients. She certainly can renounce the power to do that which she is under no compulsion ever to do, and, if she renounces the trust as to the \$10,000 which she now seeks to withdraw from its operation, she will have renounced, as to the sum so withdrawn, the power to appoint a person or persons to receive it after her death. As to those who might become entitled to receive the corpus in default of an appointment they will take, as has already been said, not at all under the trust deed, but directly from the plaintiff by virtue of their relationship to her. In this respect the trust under consideration is much like that considered in *Hoskin v. Long Island Loan & Trust Co.*, *supra*. We are therefore of the opinion that the case is brought directly within the terms of the statute above quoted. Having thus concluded, it is unnecessary to discuss the other questions argued upon the briefs as to the effect of other statutes, and as to the title to the real estate held by the trustees.

It follows that the plaintiff is entitled to judgment as prayed for in the submission, with costs and disbursements payable out of the trust estate. All concur.

BROOKFORD MILLS, Inc., v. BALDWIN et al.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. CORPORATIONS (§ 642*)—FOREIGN CORPORATIONS—"DOING BUSINESS IN THE STATE."

A foreign corporation, which sends its product here for sale through a commission merchant, who transacts the business, makes the sales, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

receives the consideration is not "doing business in the state," within General Corporation Law (Laws 1892, c. 687) § 15, re-enacted in Laws 1909, c. 28 (Consol. Laws 1909, c. 23), providing requirements for doing business in this state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2155-2160; vol. 8, pp. 7640, 7641.]

2. PARTIES (§ 6*)—REAL PARTY IN INTEREST.

A company which confirms and assumes as made in its behalf a contract by a commission merchant for goods is bound thereby and may sue or be sued; it being the real party in interest.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 6-8; Dec. Dig. § 6.*]

3. PRINCIPAL AND AGENT (§ 184*)—ACTION BY PRINCIPAL—ASSUMING CONTRACTS—LIABILITY.

Since a company which confirms and assumes as made in its behalf a contract by a commission merchant for goods becomes liable to the purchaser for a breach thereof, it may prove such assumption of the contract in an action for the price.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 701-703; Dec. Dig. § 184.*]

Appeal from Trial Term, New York County.

Action by the Brookford Mills, Incorporated, against Wilmer A. Baldwin and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, MILLER, and DOWLING, JJ.

W. M. K. Olcott, of New York City, for appellants.

John W. Boothby, of New York City, for respondent.

INGRAHAM, P. J. The action was commenced to recover damages for a breach of a contract for the manufacture and sale of certain material called "sateens." The case coming on for trial before a jury, it was agreed that a jury should be waived and that the case should be tried before the court without a jury. Subsequently the trial judge filed his decision, in which he found that the plaintiff was a foreign stock corporation, organized and existing under the laws of the state of North Carolina, and was engaged in the operation of a cotton mill in that state; that A. D. Juilliard & Co. were copartners, carrying on the business of commission merchants in the city of New York, and were the agents of the plaintiff in selling their goods in this city and throughout the United States; that Juilliard & Co., under their arrangement with the plaintiff, made sales of the plaintiff's manufactured products in their own name, attended to the delivery of the goods, collected the purchase price, and guaranteed the accounts on such sales to the plaintiff, and made advances to the plaintiff on the goods consigned to them; that the defendants were copartners in business in the city of New York; that on or about the 2d of August, 1907, Juilliard & Co., in their own name, but in fact as the agents and factors of the plaintiff, and on its behalf, agreed to and with the de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fendants to manufacture, sell, and deliver to the defendants 128,400 yards of sateens and to ship the same f. o. b. at the plaintiff's place of business in North Carolina, freight prepaid, to such Eastern finishing works as the defendants should designate; that said shipments were to be made in installments during the months of November and December, 1907, and January, February, March, and April, 1908; that the defendants further agreed to pay to Juilliard & Co. the purchase price of said goods; that on the execution of this contract between Juilliard & Co. and the defendants, Juilliard & Co. sent memorandum of the contract to the plaintiff "subject to your confirmation"; that the plaintiff duly confirmed the sale and commenced the manufacture of the goods called for by the order; that the plaintiff was ready, able, and willing to deliver the manufactured product, as required by the contract; that the defendants failed and refused to furnish shipping directions for the goods, and requested Juilliard & Co. to defer the shipments, which they declined to do, whereupon, on the 25th day of November, 1907, the defendants canceled the order and refused to comply with the contract. The court further found the difference between the cost price of the goods and the contract price agreed to be paid, and awarded the plaintiff judgment for the balance, from which judgment the defendants appeal.

[1] These findings were amply sustained by the evidence, but the defendants rely upon several grounds to defeat the plaintiff's claim. The first and only one that requires discussion is that the action cannot be maintained, because the plaintiff has never procured from the Secretary of State a certificate authorizing it to do business in this state. A complete answer to this objection is that the plaintiff never did do business in this state, within section 15 of the General Corporation Law (chapter 687 of the Laws of 1892, re-enacted in the Consolidated Laws as chapter 28 of the Laws of 1909 [Consol. Laws 1909, c. 23]). The plaintiff's mill is in North Carolina, and it has no office for the transaction of business in this state. It consigned its manufactured product to a commission merchant doing business in the city of New York, with authority to sell the goods, receive the proceeds, and remit. The commission merchant does business here and makes sales on behalf of the plaintiff; but certainly the plaintiff is not engaged in business in this state, because it sends its product here for sale through a commission merchant, who transacts the business, makes the sales, and receives the consideration. It is Juilliard & Co., the commission merchants, who do the business that is done in this state, and not the corporation. As was said by the Court of Appeals in *Penn. Collieries Co. v. McKeever*, 183 N. Y. 98, 75 N. E. 935, 2 L. R. A. (N. S.) 127:

"To be doing business in this state implies corporate continuity of conduct in that respect, such as might be evidenced by the investment of capital here, with the maintenance of an office for the transaction of its business, and those incidental circumstances which attest the corporate intent to avail itself of the privilege to carry on a business."

See, also, *Eclipse Silk Manufacturing Co. v. Hiller*, 145 App. Div. 568, 129 N. Y. Supp. 879.

[2, 3] The contract in this case was made by Juilliard & Co. in its own name. In its relation to the defendant it did not assume to act as agent for the plaintiff. Juilliard & Co. was liable for a breach of the contract, as it had, by its contract, assumed that obligation; and under the arrangement between Juilliard & Co. and the plaintiff it is quite possible that unless the plaintiff had approved the contract and accepted it as having been made in its behalf, the plaintiff would not have been liable for a breach of the contract, and Juilliard & Co. recognized that condition by transmitting the contract to the plaintiff as having been made in its behalf, subject to its confirmation. When plaintiff confirmed the contract, however, it then assumed the obligation to perform, and on proof of those facts it would have been liable to the defendant if it had committed a breach. It was entirely competent, therefore, for the plaintiff to prove that it had confirmed the sale as made by Juilliard & Co. as a sale on its behalf, and that clearly, under our system of practice, gives the plaintiff, as the real party in interest, a cause of action to sue for a breach of the contract, and to prove that fact it was competent to show that the contract had been transmitted by Juilliard & Co. to the plaintiff and had been confirmed and assumed by it.

The other objections taken by the defendants to the plaintiff's recovery have been examined; but we think the court below was right, and no discussion is required.

It follows that the judgment appealed from should be affirmed, with costs. All concur.

(78 Misc. Rep. 199.)

HERRINGTON v. DAVITT et al.

(Supreme Court, Special Term, Albany County. November, 1912.)

PLEADING (§ 317*)—BILL OF PARTICULARS—LIMITATIONS—NEW PROMISES.

A complaint on a note executed by defendants' testator alleged a subsequent promise to pay. Defendants admitted the making and delivery of the note, but denied nonpayment, and alleged that plaintiff joined in a composition in bankruptcy against the maker, which was completed, and also pleaded the maker's discharge in bankruptcy and the statute of limitations. *Held*, that defendants were not entitled to a bill of particulars of the details concerning the alleged promises by the testator to plaintiff as to the payment of the note, stating whether the promises were in writing, and, if so, requiring copies of the writing to be given, and that the original note be deposited for inspection.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 954-962; Dec. Dig. § 317; * Bills and Notes, Cent. Dig. § 1459.]

Action by Etta F. Herrington against Ida Akin Davitt and another, as executors of Albert W. Davitt, deceased. On motion by defendants for bill of particulars. Denied.

Holmes & Bryan, of Troy (John B. Holmes, of Troy, of counsel), for plaintiff.

Thos. O'Connor, of Waterford, for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RUDD, J. This action is brought upon a promissory note alleged to have been made by defendants' testator May 2, 1900. The action was commenced June 8, 1912. The complaint contains an allegation, evidently made for the purpose of avoiding the statute of limitations, which in substance is that the maker of the note, subsequently to its making, promised and agreed with the plaintiff that he would pay the note.

The defendants admit the making and delivery of the note, but deny its nonpayment, and allege that plaintiff joined in a composition in bankruptcy proceedings against the maker of the note, which composition proceedings were completed, and the answer also sets up a discharge in bankruptcy and the statute of limitations. The defendants here move for an order directing the plaintiff to furnish a bill of particulars with reference to the sixth allegation of the complaint above referred to, in substance asking that an order be made requiring a bill of particulars of the details concerning the alleged promises by the testator to and with the plaintiff concerning the payment of the note, and, if such promises were in writing, that copies of such writings be given, and that the original be deposited for inspection.

The application is made under section 531 of the Code of Civil Procedure, which reads:

"Upon application in any case, the court, or a judge authorized to make an order in the action, may, upon notice, direct a bill of the particulars of the claim of either party to be delivered to the adverse party."

The defendants contend that the sixth allegation of the complaint with reference to the alleged promises of testator to pay the note is in the nature of a claim on the part of the plaintiff, and that the defendants are entitled to a bill of particulars of such claim. In support thereof the defendants say that the cause of action would be barred by each of the three defenses set up—composition, discharge, and statute of limitations. The defendants say that the indefinite form in which the allegation is made in the complaint leaves the defendants uncertain as to whether the alleged promises were in writing or oral.

The answer to that suggestion seems to be that, in order to be effective in sustaining the cause of action, they must have been in writing, and that, therefore, the defendants should assume that they are in writing. The plaintiff will be unable to succeed if, on the trial, she does not produce a writing to the effect alleged. If the promises are in writing, then the defendants say they "are entitled to see the paper and inspect it, for the purpose of determining whether or not it is in the handwriting of their testator, or whether it is a forgery." Thus it seems that really the application is one for the privilege of inspecting a paper, rather than for a bill of particulars of a claim.

A bill of particulars is the proper remedy where the party seeks to be fully apprised of the particulars or circumstances of time and place of the matters set forth in his opponent's pleadings. It does not seem that it is the function of a bill of particulars to require the production of an instrument, so that the same may be examined to ascertain whether, in the opinion of the party making the examination, it is

genuine or otherwise, or to ascertain by its examination whether it is properly executed. Such matters are in the character of evidence.

The attention of the court is called by the defendants' attorney to the case of *Miller v. Miller*, 144 App. Div. 153, 128 N. Y. Supp. 965, as controlling on the motion here. The citation by defendants' counsel of the syllabus of that case indicates that the defendants are correct. The syllabus says:

"That a party 'is entitled upon a motion for a bill of particulars to receive a copy of each of the instruments and a statement as to the actual consideration of each, where his moving affidavit shows that he never heard of the instruments, and knows nothing about them. The fact that an order has already been made allowing the executor an inspection of the notes and check is no bar to his motion for a bill of particulars.'"

In reading the opinion by Mr. Justice Scott, it clearly appears that that was not the decision of the court as set forth in the syllabus. Justice Scott says:

"It appeared upon the hearing of the motion that an order had already been made allowing the defendant an inspection of the notes and check, whence it was argued that it would be unnecessary to furnish defendant with copies thereof, and upon this ground, apparently, no particulars were ordered to be given respecting said notes and check. It is quite apparent that an inspection of the notes and check will furnish no information as to the real consideration supporting them. As between plaintiff and defendant the consideration may be inquired into, and the defendant is entitled to know what the plaintiff claims that the consideration really was. The purpose of the bill of particulars containing such information is, not to furnish evidence for the defendant, but to limit and define the scope of the controversy. * * * *The order, in so far as it denied a bill of particulars of the consideration alleged to have been given for the notes and check, should be reversed.*"

In other words, the court did not order copies of the notes to be given when an inspection had already been had, but it did direct that a bill of particulars of the alleged consideration should be furnished; that is to say, that the items of the consideration should be furnished—just what a bill of particulars is intended to cover.

The case of *Nickel v. Ayer*, 141 App. Div. 576, 126 N. Y. Supp. 321, is controlling on this motion.

Motion denied, with \$10 costs.

D'ALTOMONTE v. NEW YORK HERALD CO.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. LIBEL AND SLANDER (§ 16*)—ACTIONABLE WORDS—EXPOSURE TO CONTEMPT AND RIDICULE.

A publication in a newspaper of a story falsely purporting to be written by plaintiff, followed by a short biographical sketch, and relating in the first person an adventure in an African forest in which plaintiff and his party rescued a young American from cannibals, and in which plaintiff sensationally described himself in an absurd and improbable adventure, was as to plaintiff, a member of the Italian nobility, of several geographical societies, a noted newspaper correspondent, traveler, and writer, a lecturer of recognized ability, who was internationally known, and had

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

held editorial and political positions, actionable libel, as tending to expose him to the suspicion and belief that he was guilty of sensationalism and of falsifying facts, incidents, and situations.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 1-9; Dec. Dig. § 16.*

For other definitions, see Words and Phrases, vol. 5, pp. 4116-4125.]

2. TORTS (§ 8*)—INVASION OF RIGHT OF PRIVACY—STATUTES—"PURPOSES OF TRADE."

Under Civil Rights Law (Consol. Laws 1909, c. 6) § 51, which provides that any person whose name, portrait, or picture is used within the state for advertising purposes, or for "purposes of trade" without his written consent, may maintain an action for damages, the false use of plaintiff's name as the writer of a story of adventure, attributed to him as a person of such reputation that an article written by him would be calculated to attract readers to the paper, was a use of his name for the "purposes of trade," and as such actionable.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 8; Dec. Dig. § 8.*

For other definitions, see Words and Phrases, vol. 7, p. 5866.]

3. ACTION (§ 48*)—JOINDER—CLAIM ARISING OUT OF SAME TRANSACTION.

A cause of action for libel for the publication of a newspaper article falsely represented to have been written by plaintiff, and tending to expose him to contempt and ridicule, and a cause of action under Civil Rights Law (Consol. Laws 1909, c. 6) § 51, giving an action for damages for the use of any name for advertising purposes or for purposes of trade, without written consent, arising out of the same publication, were properly joined, since all of plaintiff's damages must be recovered in the same action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 400-510; Dec. Dig. § 48.*]

Ingraham, P. J., and Scott, J., dissenting in part.

Appeal from Special Term, New York County.

Action by Antonio B. d'Altomonte against the New York Herald Company. From an order overruling a demurrer to the complaint, and awarding judgment to plaintiff, defendant appeals. Affirmed with leave to withdraw demurrer, and to answer on payment of costs.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Robert W. Candler, of New York City, for appellant.

Michael Schaap, of New York City, for respondent.

CLARKE, J. [1] I agree with the opinion of Mr. Justice SCOTT, except so much thereof as sustains the demurrer to the first cause of action upon the ground that the article complained of is not libelous. The complaint alleges that the plaintiff was and still is a member of the Italian nobility, being a baron by birth; that he was and still is a member of the Italian Geographical Society of Milan, and a member of the American Geographical Society of New York; that at the time of said publication he was of good name, fame, and credit, and well and favorably known throughout the world, having been prominent in many endeavors of international scope; that he was a noted professional newspaper correspondent, traveler, writer, and lecturer of recognized ability, commanding several languages; that from July, 1902, to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

December, 1905, he was commissioner of police in the Belgian Congo, was for some time chief editor of *La Mazione*, a daily newspaper of wide circulation published in Florence, Italy; that he had delivered lectures on African life and politics before the Geographical Society of Milan and Florence and their audiences; that he had been employed from time to time by the police department of the city of New York and by the Treasury Department of the United States to do work in the investigation of crime and criminals; that at the time of said publication he was a well-known authority on criminology and on African life and politics; that he had written books, articles, and pamphlets on said subjects which had attained wide circulation; that prior to the publications complained of he had enjoyed an international reputation for honesty, uprightness, integrity, fidelity, dignity, competency, and ability; that he had the acquaintance, friendship, and respect of various and numerous business and professional men of high standing, scientists, and scholars throughout the world, and had business connection with distinguished persons of various nations; that the article held him up to public scandal, infamy, and disgrace, ridicule, and contempt, and to cause him to be believed by his neighbors, associates, friends, and persons generally to have been guilty, and that he was guilty, of sensationalism and bad taste, and for the purpose of recording a personal adventure to have falsified, and that he had falsified facts and incidents, and to injure and destroy the esteem in which plaintiff as an individual and in his professional calling had been held, and to deprive him of his standing among scholars and professional men; that said article consists of a story purporting to have been written by plaintiff for defendant's newspaper, and at the head thereof a short biography of plaintiff; that said story was fabricated by defendant or some person in its employ, or by some person from whom it bought said article; that plaintiff is not the author of said story, nor was he ever connected with the persons or incidents mentioned and described; that said story represents plaintiff as describing himself in an absurd and improbable adventure, and exposes him to the natural inference, suspicion, and belief that he was guilty of sensationalism and bad taste and of falsifying and fabricating facts, incidents, names, places, and situations. This article contains a half page illustration and is headed:

"Stopping a Congo Cannibal Feast. The adventures in the African Forest wherein a young and courageous American is rescued just as he is about to be killed and eaten by savages."

It then gives a short biography of the writer, and states that:

"The young American whom d'Altomonte and his party rescued from the cannibals is John Harris Walton, still living in San Paolo di Loendo, serving as manager of the Hatton & Cookson Company concessions."

It is subheaded, "By Baron Antonio d'Altomonte," and is written in the first person, "The affair I am about to detail occurred," etc.

I think the publication ascribing the authorship of such an article to a man of the standing and reputation which plaintiff claims for himself admitted by the demurrer, if false, and a forgery, is calculated to

hold him up to ridicule and contempt, and to destroy his influence as a writer and lecturer, and is susceptible of the construction and the consequences placed upon it by the complaint. I think it comes within the spirit of the decisions in the Triggs Case, 179 N. Y. 144, 71 N. E. 739, 66 L. R. A. 612, 103 Am. St. Rep. 841, 1 Ann. Cas. 326, and Holm v. Holm, 146 App. Div. 75, 130 N. Y. Supp. 670.

The order appealed from should be affirmed, with \$10 costs and disbursements to the respondent, with leave to the defendant to withdraw the demurrer, and to answer within 20 days on payment of costs in this court and in the court below.

McLAUGHLIN and DOWLING, JJ., concur.

SCOTT, J. Plaintiff sues upon two causes of action—one for damages for libel, and one for damages under section 51 of the Civil Rights Law, known as the Right of Privacy Act. See Laws 1903, c. 132. The defendant has demurred separately to each count for general insufficiency, and has also demurred to the complaint as improperly joining causes of action. Both causes of action are founded upon the publication by defendant of an article introduced by a short biography of plaintiff and consisting of what purports to be a short story written by him in the first person, and recounting in vivid language an adventure in which he took a leading part, and which resulted in the rescue of a white man who was about to be killed by African cannibals. The story is vividly told, and, while its literary style may not be of the highest class, it contains nothing reflecting in the slightest degree upon the courage, resourcefulness, or conduct of plaintiff. Indeed, his objection to it seems to be founded upon the fact that it extols him so highly that he may be accused of undue self-laudation. He alleges that the story is untrue in every particular, that he did not write it, and that the incidents described therein never occurred. He therefore claims to have been libeled by it, and seeks damages for its publication. He alleges no special damage. If, therefore, he can sustain the first count in his complaint, it must be because the article is libelous per se. Mere falsity in a writing concerning a person does not constitute a libel. It must go further, and tend to disgrace the person written about, or bring him into ridicule or contempt. *Martin v. Press Publishing Co.*, 93 App. Div. 531, 87 N. Y. Supp. 859. There is no ambiguity about the article complained of, and we agree with the learned justice at Special Term that "it contains no reflection upon plaintiff's honor or integrity, nor does it portray him in any ridiculous situation." The question whether the article is libelous or not is therefore one for the court. *Moore v. Francis*, 121 N. Y. 199, 23 N. E. 1127, 8 L. R. A. 214, 18 Am. St. Rep. 810. We cannot find in the article anything tending in any wise to injure the plaintiff's reputation, except perhaps as a skillful writer of fiction, but no case has yet gone so far as to hold that it is libelous per se to attribute to a writer an inelegant literary style. Nor does it hold him up to ridicule in the sense in which the articles complained of in *Triggs v. Sun Printing & Pub. Ass'n*, 179 N. Y. 144, 71 N. E. 739, 66 L. R. A. 612, 103 Am. St. Rep.

841, 1 Ann. Cas. 326, were deemed by the Court of Appeals to have held up the plaintiff in that action to ridicule. Those articles were avowedly written in jest with a view to amusing the readers of the newspaper at the expense of Prof. Triggs. The article complained of in plaintiff's first cause of action is written in a perfectly serious vein, and is, if anything, complimentary, rather than derogatory, to plaintiff's character. Doubtless it would be libelous to falsely attribute to an author an obscene or profane article, or one which expressed sentiments abhorrent to right-thinking people, for such an article would hold the putative author up to scorn and contumely, but the article complained of here is not such a one. As to this cause of action, the demurrer should have been sustained.

[2] As to the second cause of action I think that the demurrer was rightly overruled. Section 51 of the Civil Rights Law reads, in part, as follows:

"Any person whose name, portrait or picture is used within the state for advertising purposes or for the purposes of trade, without the written consent first obtained as above provided, may maintain an equitable action * * * and may also sue and recover damages for any injuries sustained by reason of such use. * * *"

The question is whether the use of the plaintiff's name as the author of the article complained of was a use "for advertising purposes or for the purposes of trade." I think it was. The article was not a news article in any proper sense, but purported to be a story of adventure, and was attributed to plaintiff as a person of such experience and character that an article by him would be calculated to attract readers to the paper. The story would have been just as good (or bad) a one as a literary production if plaintiff's name had been omitted, and if no author's name had been appended. The obvious purpose of using plaintiff's name was to give to the story an attribute of verisimilitude and authenticity. This, as I consider, was using the name for the purposes of trade.

[3] As to the joinder of the causes of action. It is apparent that both causes of action arise out of the same transaction, to wit, the publication of the article complained of. All the damages the plaintiff suffered in consequence of the publication must be recovered in the same action. *Binns v. Vitagraph Co.*, 147 App. Div. 783, 132 N. Y. Supp. 237.

INGRAHAM, P. J., concurs.

In re NYCE.

(Supreme Court, Special Term, Orange County. December 20, 1912.)

1. CONSTITUTIONAL LAW (§ 278*)—INTOXICATING LIQUORS (§ 23*)—CONSTITUTIONALITY OF ACTS—LICENSING AND REGULATION.

Liquor Tax Law (Laws 1911, c. 298) § 8, subd. 9, under which a tenant holding a liquor tax certificate may abandon the right to use the premises for saloon purposes without the consent of or notice to the owner, does

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not deprive the owner of her property without due process of law, even though such property was used for liquor purposes and duly licensed prior to 1896, since the right to use property for liquor purposes because of such use prior to 1896 is a right given by the legislative power of the state, and can be taken away by the same power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 763, 765, 767-770, 772-777, 779-806, 808-810, 816-824, 907-924, 942; Dec. Dig. § 278;* Intoxicating Liquors, Cent. Dig. § 29; Dec. Dig. § 23.*]

2. **INTOXICATING LIQUORS (§ 6*)—POWER TO CONTROL TRAFFIC.**

The state, in the exercise of its police powers, may absolutely prohibit the sale of intoxicating liquors, or impose any limitation or restriction on the use of property for that purpose, if such exercise of the police power is reasonable, and affects alike all persons of the same class.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 4; Dec. Dig. § 6.*]

3. **CONSTITUTIONAL LAW (§ 240*)—CONSTITUTIONALITY OF ACTS—LICENSING AND REGULATION.**

Liquor Tax Law (Laws 1911, c. 298) § 8, subd. 9, providing that in the case of a hotel, other than a hotel containing less than 50 bedrooms, in cities of the first class, the notice of abandonment of premises for liquor purposes shall be executed and acknowledged by the certificate holder, the owner or owners of the premises, and the assignee of the certificate, and in all other cases by the certificate holder or his attorney and any assignee of the certificate, does not make an unlawful discrimination between the owners of property used for different purposes.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688, 692, 693, 697-699; Dec. Dig. § 240.*]

Application by Mary M. Nyce for a writ of certiorari to review the action of Robert Johnson, County Treasurer of Orange County, in refusing to issue to relator a liquor tax certificate. Writ denied.

Frank Lybolt, of Port Jervis, for relator.

A. M. Sperry, of Albany, for respondents County Treasurer and State Excise Com'r.

TOMPKINS, J. This is an application by Mary M. Nyce, the owner of real property in the city of Port Jervis, for a writ of certiorari, under the Liquor Tax Law, to review the action of the county treasurer of Orange county in refusing to issue to the relator a liquor tax certificate for her premises, known as No. 9 New Jersey avenue, Port Jervis, N. Y. The county treasurer refused to issue the certificate asked for, upon the ground that the right to traffic in liquors in the relator's said premises had been abandoned on the 1st day of April, 1912, by the then tenant of said premises, who held a saloon license under subdivision 1 of the Liquor Tax Law.

[1] It is admitted that the number of certificates now in force in the city of Port Jervis in relation to the population is largely in excess of one certificate for 750 inhabitants of said city. The question presented upon this application is as to the constitutionality of that portion of subdivision 9 of section 8 of the Liquor Tax Law (Laws 1911, c. 298) which provides as follows:

"In the case of a hotel other than a hotel containing less than fifty such bedrooms in cities of the first class, such notice shall be in writing and executed and acknowledged by the certificate holder and the owner or owners

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the certificated premises and by any person to whom such certificate may have been transferred or assigned as collateral security for moneys loaned or any other obligation incurred; and in all other cases such notice shall be in writing and executed and acknowledged by the certificate holder or by his duly authorized attorney, and by any person to whom such certificate may have been transferred or assigned as collateral security for moneys loaned or any other obligation incurred."

The relator's property was used for liquor purposes and was duly licensed prior to 1896; and her claim is that the right to use the premises for that purpose is a property right which attaches to her premises, and cannot be taken away from her without due process of law, and that the provision of the law above quoted, which gives the tenant, without the consent of or notice to the owner, the power to abandon the premises for liquor purposes, is unconstitutional. Whatever right the relator had to use her premises for the liquor traffic was given by the legislative power of the state, and that same power can take it away. When the owner of real property rents it for saloon purposes, he knows, or is presumed to know, that under the liquor tax law the tenant and holder of the liquor tax certificate may at any time abandon it under subdivision 9 of section 8. The attribute that attached to the relator's property by reason of its having been used for liquor purposes prior to 1896 was subject to limitations and conditions; i. e., the right of the state to regulate it or take it away entirely.

[2] Because of its influence and effect upon the morals and health of the people, the state, in the exercise of its police powers, may absolutely prohibit the sale of intoxicating liquors. A constitutional amendment is not necessary, as some suppose, to accomplish that end. The right to traffic in liquors is not incident to property, or a vested right in the nature of property, and the state may not only regulate it, but may stop it completely, and it must follow that the state has power to impose any limitation or restriction upon the use of property for that purpose, and may subject the owner to the risk of losing the right to use his property for that purpose by the act or neglect of his tenant. Of course, any such exercise of the police power must be reasonable, and affect all persons of the same class substantially alike.

[3] I have not overlooked the claim of the relator that the provision of subdivision 9 of section 8 makes unjust discrimination between the owners of property used for hotel and saloon purposes. I have considered that question, and reached the conclusion that the discrimination is not unreasonable or unjust. Subdivision 9 of section 8 affects all premises alike, except hotels in cities of the first class containing 50 or more bedrooms, and under the decisions seems to be within the power of the Legislature—citing *Hering v. Clement*, 196 N. Y. 218, 89 N. E. 450; *People ex rel. Bernard v. McKee*, 59 Misc. Rep. 369, 112 N. Y. Supp. 385; *In re Clement*, 141 App. Div. 139, 126 N. Y. Supp. 227; *People ex rel. Einsfeld v. Murray*, 149 N. Y. 367, 44 N. E. 146, 32 L. R. A. 344; *Matter of Lyman*, 59 App. Div. 217, 69 N. Y. Supp. 309; *People v. Seeley*, 105 App. Div. 149, 93 N. Y. Supp. 982.

Application denied.

TITLE GUARANTEE & TRUST CO. v. HAVEN et al.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. APPEAL AND ERROR (§ 1195*)—REVERSAL—NEW TRIAL.

Where a judgment appealed from is reversed by the Court of Appeals and remanded for a retrial before a referee, the decision of the Court of Appeals is the law of the case, unless the facts established on a retrial are such as to show that the premise on which the conclusion of the Court of Appeals was based is untrue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

2. SUBROGATION (§ 11*)—FORGED CHECK—TRUSTS.

Certain real property being subject to the lien of certain assessments, and the owner, since deceased, being advised thereof by G., who was her agent, she sent G. a check for the amount, and he drew his check to the order of the collector for like amount, and sent it to his servant, A., to deliver to the collector in payment of the assessments. A., being a defaulter, used the check to cover his defalcations with reference to the estate of the landowner's husband, of which G. had charge, and subsequently forged a check on plaintiff bank, drawn against funds belonging to G.'s estate, with which the assessments were paid to the collector. *Held* that, since it was not the intent of the landowner to pass the land to her distributees charged with the assessments, but rather to pay the same out of her personal estate, and she having deposited the money with G. to be used in paying the assessments, the forged check was not without consideration, and the money so deposited with G. would be regarded as impressed with the trust, and hence plaintiff was not entitled to the subrogation to the city's lien, in order to enforce its claim for reimbursement, on having credited G.'s estate with the amount of the forged check.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 4; Dec. Dig. § 11.*]

Appeal from Judgment on Report of Referee.

Action by the Title Guarantee & Trust Company against Fanny Arnot Haven and others, as executors of Matthias H. Arnot, deceased. From a judgment entered on a referee's report, dismissing the complaint on the merits, plaintiff appeals. Affirmed, on the opinion of the referee.

See, also, 126 App. Div. 802, 907, 111 N. Y. Supp. 305, 309; 196 N. Y. 487, 89 N. E. 1082, 25 L. R. A. (N. S.) 1308, 17 Ann. Cas. 1131.

The opinion of Referee Morgan J. O'Brien is as follows:

This is the second trial of this action. After the action was begun, one of the original defendants died, and his personal representatives were substituted. For the sake of brevity, I shall ignore this change of parties. The defendants were the devisees of a piece of land situated in the city of New York, under the will of Marianna A. Ogden, who died September 28, 1904. At the time of her death the property so devised to the defendants was subject to the lien of certain assessments (not taxes) to the amount of \$9,953.83. Thereafter the defendants contracted to sell the land in question, and there is some evidence that these assessments were disclosed upon a title company's search, and so brought to the notice of a representative of the defendants. There is no proof that the defendants themselves had any knowledge of the assessments or of their payment. While the closing of the title was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pending, the assessments were paid. This payment was made by a person whose identity was not known at the time of the previous trial, by means of a check for the above-mentioned amount, which was drawn upon plaintiff (in its capacity of a banking institution) against an account of the estate of Andrew H. Green, and signed, "William O. Green, Trustee." This check was a forgery; but it was paid in good faith by the plaintiff to the payee, the collector of assessments and arrears of the city of New York, and the lien of the assessments was discharged prior to the conveyance by the defendants of the land pursuant to their contract. Thereafter, upon being advised of the forgery, the plaintiff credited back to the account of the estate of Andrew H. Green the amount of this check, and then brought this action against these defendants alone, to recover the amount which it had so paid, upon the theory that by discharging the assessments the plaintiff became subrogated to the lien of the city, and that such lien continued in force as between the plaintiff and the defendants, and upon the sale attached to the proceeds. Upon the trial the complaint was dismissed, and upon an appeal upon the judgment roll alone the judgment was affirmed by the Appellate Division. 126 App. Div. 802, 111 N. Y. Supp. 305. Upon a further appeal to the Court of Appeals the judgment was reversed, and this trial was ordered. 196 N. Y. 487, 89 N. E. 1082, 25 L. R. A. (N. S.) 1308, 17 Ann. Cas. 1131.

Upon this trial the decision of the Court of Appeals constitutes the law of the case, which I must follow. Judge Bartlett, in his opinion, referred to the facts above recited, and also to the answer, which sets up the devise to the defendants by Marianna A. Ogden, subject to the assessments, and the further facts that the said Andrew H. Green was for many years her agent and representative in the care of her real estate, that she had sent him the amount of these assessments, but that he had never paid the same, and that all these facts were known to the plaintiff at the time it repaid to the Green estate the amount of the forged check. Judge Bartlett then pointed out that the facts were found by the referee substantially as pleaded, "except that there is no finding of the receipt of any money by Andrew H. Green from Marianna A. Ogden with which to pay the assessments." He then pointed out that both the referee and the majority of the Appellate Division considered that the case was controlled by section 112 of the Negotiable Instruments Law, and stated that the rule there codified applied only to a holder for value. He then said: "The rule, therefore, that he who accepts a negotiable instrument to which the drawer's name is forged is bound by the act, and can neither repudiate the acceptance nor recover the money paid, has no application in behalf of one who has acquired the paper, in the absence of any consideration therefor either present or past. Such was the case here according to the finding of the referee. So far as appears, the check of the Green estate, which proved to be forged, was not given in payment of any existing or antecedent indebtedness, either on the part of that estate or even of the forger. For these reasons we agree with the learned judge who wrote for the minority in the Appellate Division, saying: 'Section 112 of the Negotiable Instruments Law (Consol. Laws 1909, c. 38), upon which the referee based his decision, has nothing to do with the question.'"

[1] Thereupon, differing from the courts below, the learned judge, starting with the premise that, "upon the facts as found by the referee, we have here the case of a purely gratuitous payment of assessments, constituting at the time a lien in favor of the city of New York, upon lands owned by the defendants, which payment was clearly induced by the fraud or forgery of some party unknown," showed that the plaintiff was entitled equitably to be subrogated to the lien of the city and to recover the amount paid by it. If the facts, as they appear before me, were the same as stated in this premise, I should be bound to direct judgment for the plaintiff; but otherwise not. This conclusion is further supported by Judge Bartlett's saying: "It must be distinctly understood that this view is predicated upon the assumption that the payment of the assessments was purely gratuitous, and is nowise in discharge of any real or supposed obligation upon the part of the estate of Andrew H. Green, or of the unknown forger, but was brought about solely

by mistake induced by the forgery. Upon this assumption, we think that the plaintiff, on proof of the facts stated in the complaint, would be entitled to be subrogated to the lien of the city as against the proceeds of the sale of the land in the hands of the defendants. If, however, it should be made to appear that the payment was not thus gratuitous, we are of opinion that the right of subrogation could not successfully be asserted."

Upon the trial before me there can be no doubt that it has been made to appear that the payment was not "thus" gratuitous. The fact that was pleaded, but which, as Judge Bartlett specifically pointed out, was not found upon the former trial, is now fully established. Mrs. Ogden, in July, 1903, upon being advised by Mr. Green of the amount of these assessments as finally fixed, transmitted to Mr. Green a check for the amount thereof, \$9,953.83, for the express purpose of making payment of said assessments. The proceeds of this check were collected by Mr. Green. Subsequently Mr. Green again asked her for this check, and she reminded him of having already sent it, which he then found to be so, and wrote her to that effect. There can be no doubt, then, that Mrs. Ogden fully understood that the assessments had been paid. There is, too, no doubt that Mr. Green was provided with funds to pay the assessments for which he was chargeable. Moreover, the identity of the forger and the reason for the forgery now fully appear. The forger is shown to be one Lyman S. Andrews, who was an employé of Mr. Green, and of the estate of William B. Ogden, and who kept their books. Andrews was a defaulter. Upon the receipt of Mrs. Ogden's check in July, 1903, to pay these assessments, Mr. Green drew his check to the order of the collector for a like amount, and sent it to Andrews, so that he might make the payment. Andrews, to cover some of his defalcations, used this check to pay some arrears upon property belonging to the estate of William B. Ogden. Subsequently, when the sale of the property in question was pending, he forged the check which was paid by the plaintiff to discharge the assessments upon the property in question, and which then had passed to the defendants.

The appeal to the Court of Appeals after the previous trial having been heard upon the judgment roll alone, the only thing before that court which could have suggested the line of reasoning which is found in the opinion was the allegation in the answer of the defendants that the money to pay these assessments had been transmitted to Mr. Green by Mrs. Ogden in her lifetime. The court was obviously unable to determine whether the failure so to find was due to a failure of proof, an exclusion of evidence, or the inadvertence of counsel, who might have been misled as to the necessity therefor by the referee's ruling in their favor, independently thereof. The Court of Appeals knew that Mrs. Ogden was dead, that her estate was necessarily represented by executors or administrators, and that the defendants were devisees. All of the circumstances upon which the plaintiff now rests its argument were before that court. All that was lacking was a finding that Mr. Green received the money. I cannot believe that the Court of Appeals would have expressed itself as it did, if it had meant that an obligation in the nature of a debt on the part of the Green estate to the defendants must be shown, because it was evident that such would not be established, nor can I believe that this consideration, now so earnestly advanced by the plaintiff, was overlooked by the Court of Appeals. The opinion of the Court of Appeals, as I read it, is a direct intimation that if the receipt by Mr. Green of the money to pay the assessments is now found as a fact, as it must be upon the proof, then judgment is to be given for the defendants. But, even if I am in error in so construing the opinion of the Court of Appeals, and that court did not intend thus to define the proof which was necessary and the effect to be given to it, I am still of the opinion that judgment must be for the defendants.

[2] The plaintiff's present position, apparently, is that the Court of Appeals declared that the right of subrogation existed upon the assumption that the payment of the assessments was not "in discharge of any real or supposed obligation upon the part of the estate of Andrew H. Green or of the unknown

forger," and that the present record does not show any such obligation. Its contentions are that there was not shown any real or supposed obligation on the part of the Green estate or of the forger to these defendants; that as devisees of the property, subject to an assessment, they took it cum onere, and could not call upon the executors of Mrs. Ogden's estate to discharge the assessments; that Green received the money remitted by Mrs. Ogden as her agent; that upon her death his authority was revoked, and he could not thereafter pay the money to the city to discharge the assessments; that an obligation to account for the money and to pay over the same to Mrs. Ogden's executors at once arose; and that such obligation could not be discharged either by paying the money to the city or to the defendants. It is also contended that there was no obligation, real or supposed, on the part of the forger to the defendants. To these contentions I cannot assent.

It will be noticed upon a reading of the quotation from the Court of Appeals that that court did not in terms refer to an obligation "to these defendants." It said simply obligation. There can be no doubt that the check was given to discharge an obligation. Green had received the money to pay the assessments, and was therefore under an obligation to some one. Andrews' motive in drawing the check was doubtless to prevent the discovery of his wrongdoing; but his intent was to discharge that obligation, because it was only by so doing that he could cover up his misapplication of the check which Mr. Green had delivered to him. The possible effect of the death of Mrs. Ogden upon the character of this obligation probably never occurred to him. He applied the forged check to the purpose for which the money was originally placed in Mr. Green's hands, and doubtless fully believed that in so doing he had adopted the proper method to discharge that obligation.

But can it not be said that there was an obligation on the part of the Green estate to these defendants? Mrs. Ogden made her will shortly prior to the time when these assessments were placed upon the property, devising it to these defendants. It is obvious, from the fact that, immediately upon being advised of the assessments, she sent the money to pay the same, that she intended the defendant to take the property free and clear of this incumbrance. She was advised that a certain portion of the value of this piece of realty had been cut off, and for the purpose of restoring that realty to its former condition she set apart a portion of her personal estate in the hands of Mr. Green to make whole the realty. If, now, these defendants are required to pay the amount claimed in this action, her wishes and intentions will be thwarted. The defendants will get less than she intended them to have, and if the Green estate pays the executors the amount which Mr. Green received the legatees of her personal estate will obtain property she did not intend them to have. In my opinion, the money so deposited with Mr. Green should be regarded, in equity, at least—and it is only in equity that the plaintiff can assert any claim, and certainly if the plaintiff can appeal to equity to enforce a claim the defendants may resist it by the same means—as converted into the land and to be impressed with a trust for whosoever owned the land and to which the defendants succeeded by reason of the devise to them of the land.

There is nothing in *Matter of Hun*, 144 N. Y. 472, 39 N. E. 376, inconsistent with this view. That was a case of a devise of property which was subject to assessments, and it was held that the devisee took cum onere. In this case there was a devise of property which the testatrix intended should be, and which she believed was, free and clear of the lien of these assessments; and the question here is, not whether a devisee of real property can have assessments which are liens thereon discharged out of the general personal estate, but whether these devisees could have the fund which the testatrix set apart to pay these assessments, and which she believed had been so used, applied for that purpose.

The plaintiff alleges that the transmission to Mr. Green of the money to pay the assessments did not constitute a trust, but only a revocable agency, and cites numerous cases. I do not find anything in any of the cases which are cited which conflicts with my view. It may be that Mrs. Ogden could,

at any time before the assessments were paid, have demanded a return of the money, and that the city of New York could not have enforced the payment by Mr. Green of the assessments. This is not, however, like a case of an agent binding his principal by virtue of a power of attorney, which, of course, becomes inoperative upon the death of the principal, nor it is like the case of a check which had not been presented at the time of the drawer's death. This case is analogous to those in which a trust is created by the deposit of moneys in a savings bank in trust for another.

In *Matter of Totten*, 179 N. Y. 112, at page 125, 71 N. E. 748, at page 752 (70 L. R. A. 711), it was said: "A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or demonstration, such as delivery of the passbook or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." Here there was a setting apart out of the general assets of Mrs. Ogden of a specific fund for a purpose which was declared. There was a depository, and there was an intended beneficiary, who, although not named in the declaration, was identifiable. To hold that, upon the failure of Mr. Green to apply these moneys to the purpose for which they were sent to him and the subsequent death of Mrs. Ogden, a trust arose in favor of the defendant, is in accordance with equity and does not offend any provision of law. If Mrs. Ogden had, by her will, directed her executors to pay these assessments, whereby their payment would have been an obligation of her estate, the plaintiff could not have recovered under the decision in action No. 1. 196 N. Y. 487, at page 497, 89 N. E. 1082, 25 L. R. A. (N. S.) 1308, 17 Ann. Cas. 1131. In equity, it seems to me that the same effect should be given to her direction, as shown by her remittance of the money for that purpose.

I cannot fail to be impressed by the fact that, prior to the reimbursements by the plaintiff to the Green estate of the amount of the forged check, the parties stood in the position which justice assigned to them. The plaintiffs had suffered no prejudice. The executors of the Ogden estate had received everything which Mrs. Ogden intended that they should receive. The defendants had received nothing which they should not have received. The Green estate had merely paid out the amount of money which it had previously received from Mrs. Ogden. To be sure, Mr. Green had attempted prior thereto to make this payment, but his effort was defeated by the crime of Andrews; but Andrews was Mr. Green's employé, and his crime was directed against Mr. Green, and the loss due to that crime should fall upon Mr. Green and his estate.

We have here the case of two parties, both innocent. The plaintiff has suffered a loss, but the defendants have not profited thereby. They have received only what this testatrix intended them to have. The act of the forger simply restored to them what his prior wrong had taken from them. Surely, if the forger had drawn this money in cash and had then paid the assessment, the plaintiff could not have recovered from these defendants. There should be no different result. Equitably the plaintiff should be reimbursed for the amount it paid out. Equitably the defendants are entitled to retain all which they have received. The legal title is, however, with the defendants, and it is well settled that, where the equities are equal, the legal title must prevail.

At the present time the plaintiff has disbursed \$9,953.83, which it ought to receive back. The Green estate received from the plaintiff \$9,953.83, which it was not justly entitled to, because the forged check was used to pay a charge for which it had received the money and unless the plaintiff can find some means of reaching that sum it must bear the consequences of its error. Equity as surely forbids a recovery from these defendants upon this record as it authorized it upon the former record.

Judgment should accordingly be entered in favor of the defendants, dismissing the complaint upon the merits, with costs.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, SCOTT, MILLER, and DOWLING, JJ.

B. N. Cardozo, of New York City, for appellant.

J. V. Bouvier, of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs, on opinion of referee. Order filed.

PEOPLE ex rel. RODENBERG v. WARDEN.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. CRIMINAL LAW (§ 1206*)—PUNISHMENT.

A sentence to the penitentiary of the county of New York after conviction of receiving stolen goods was authorized under New York City Consolidated Act (Laws 1882, c. 410) § 1453, providing that any person convicted of such an offense in the city of New York may be sentenced in the discretion of the court to imprisonment in the city penitentiary for the same term as he may be sentenced to imprisonment in a state prison: such statute being in harmony with the Penal Code, and not repealed by Penal Law (Consol. Laws 1909, c. 40) § 1308, providing that the crime of receiving stolen property is punishable by imprisonment in the state prison for not more than five years or in the county jail for not more than six months.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3271–3277, 3279, 3280; Dec. Dig. § 1206.*]

2. CRIMINAL LAW (§ 1217*)—PUNISHMENT—UNIFORMITY.

The uniform administration of criminal laws throughout the state does not require that all sentences to imprisonment should be carried out in similar institutions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3269; Dec. Dig. § 1217.*]

3. CRIMINAL LAW (§ 1206*)—"PENITENTIARY"—"COUNTY JAIL."

The "penitentiary" of the county of New York is not the county jail of that county in the sense in which the phrase "county jail" is used in the Penal Laws.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3271–3277, 3279, 3280; Dec. Dig. § 1206.*]

For other definitions, see Words and Phrases, vol. 2, p. 1063; vol. 6, pp. 5279–5280.]

Appeal from Special Term, New York County.

Application for writ of habeas corpus by the People, on the relation of Philip Rodenberg, against the Warden, etc. From an order (75 Misc. Rep. 77, 132 N. Y. Supp. 577) sustaining the writ and discharging relator, the People appeal. Reversed, writ dismissed, and relator remanded.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Robert S. Johnstone, of New York City, for the People.

Louis Levy, of New York City, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SCOTT, J. The relator was convicted in the Court of General Sessions of the crime of criminally receiving stolen goods, and was sentenced to imprisonment in the penitentiary of the county of New York for the term of one year. At the expiration of six months' imprisonment, he sued out a writ of habeas corpus claiming that he could not legally be sentenced to the penitentiary for the offense whereof he had been convicted for more than six months, that as to the excess of imprisonment over that term his sentence was void, and that having served six months he was entitled to be discharged. The Court at Special Term acceded to this view, and discharged him.

[1] The crime whereof the relator was convicted is defined by section 1308 of the Penal Law (Consol. Laws 1909, c. 40). The definition is not important here, but the provisions as to the punishment are. It is provided that a person convicted of the crime "is punishable (1) by imprisonment in a state prison for not more than five years, or (2) in a county jail for not more than six months, or by a fine of not more than two hundred and fifty dollars, or by both such fine and imprisonment." There were thus two distinct punishments prescribed, either of which might be imposed by the court. It is quite clear that in the case of this relator the court did not undertake to impose the milder sentence of six months' imprisonment in the county jail. The sentence, if it can be upheld at all in its entirety, must be upheld under the authority to impose a sentence of imprisonment in a state prison. The validity of relator's sentence is sought to be sustained under the provisions of section 1453 of the New York City Consolidation Act (Laws 1882, c. 410), which, unless repealed by implication by the enactment of the Penal Code, remains in force. It reads as follows:

"Whenever a conviction shall be had in any criminal court in the city of New York, of any person for buying or receiving any personal property feloniously stolen from another, knowing the same to have been stolen, such person may be sentenced, in the discretion of the court, to imprisonment in the penitentiary of the said city for the same term of time for which such person may by law be sentenced to imprisonment in a state prison."

The learned justice who made the order appealed from was of the opinion that the above-quoted section of the Consolidation Act had been repealed by the Penal Code, relying as an authority for that conclusion upon *People v. Jaehne*, 103 N. Y. 182, 8 N. E. 374. That case involved the question whether section 58 of the Consolidation Act defining the crime of bribery of a member of the common council or an officer of the corporation of the city of New York, and fixing a punishment of not more than two years in the penitentiary for the specific offense defined by that section, was superseded and impliedly repealed by section 72 of the Penal Code, which defined the crime of bribery, and embraced within its provisions the officers mentioned in, and hence the offense defined in, section 58 of the Consolidation Act and prescribed a maximum punishment of 10 years in the state prison. Precisely what the court held was that the Penal Code superseded the Consolidation Act "whenever the two statutes are in conflict" and that any penal provision of the Consolidation Act "in conflict with the Penal Code" was so superseded. 103 N. Y. 189, 8 N. E. 375. The

Court of Appeals was led to the adoption of this view by a consideration of the reasons which led to the adoption of the Penal Code. As Judge Andrews said:

"The Penal Code, as its title implies, is an institution of criminal justice of general application, and was enacted in harmony with the tendency of recent legislation for the purpose of embodying in a single statute the system of criminal law applicable to the state, and substituting the statute so enacted in place of the great number of statutes and amendments of statutes which together, before the enactment of the Code, constituted the body of the criminal law. * * * It is the plain inference from these provisions that the Penal Code was intended as a revision of the prior laws in respect to crimes and their punishment, and as a substitute for the scattered and fragmentary legislation which preceded it. The Penal Code contains no general clause repealing prior statutes covering the subjects embraced in its provisions. It, however, defines and prescribes the punishment for murder, larceny, burglary, and all the generally recognized offenses, and it cannot be doubted that its provisions on those subjects were intended as a substitute for similar provisions in prior laws." 103 N. Y. 192, 193, 8 N. E. 377, 378.

That decision is ample and unquestioned authority for the proposition that, in so far as concerns the definition of crimes and their punishment, the Penal Code repealed, by implication, all prior special statutes inconsistent with it.

In the *Jaehne Case* the Court of Appeals, for the reasons stated, departed from the general rule that a special statute providing for a particular case or applicable to a particular locality is not repealed by a general statute. The exception to the rule is where the intent to repeal or alter the special law is manifest, as the court found that it was with respect to the definition of, and the punishment for, the crime of bribing a public officer. We can see no reason for pushing the doctrine of the *Jaehne Case* any further than is justified by the reasons given for its decision. The arguments in favor of finding an implied repeal of section 58 of the Consolidation Act by section 72 of the Penal Code are unanswerable, but they have no application to the case of a local and special provision of the Consolidation Act respecting the place in which the punishment of imprisonment shall be endured.

[2] The essential features of the Penal Code respecting crime are to afford a definition, and to prescribe the extent of the punishment to be inflicted. In these particulars it is most desirable that a uniform law should extend over the entire state. No such reason demands that all sentences to imprisonment should be carried out in similar institutions, for in the nature of things it will not be convenient, nor does any law require, that precisely similar institutions shall be maintained in every county. The uses to which county jails are to be put under section 90 of the County Law (Consol. Laws 1909, c. 11) are (1) for the detention of persons duly committed to secure their attendance as witnesses in any criminal case; (2) for the detention of persons charged with crime, and committed for trial or examination; (3) for the confinement of persons duly committed for any contempt or upon civil process; (4) for the confinement of any persons convicted of any offense other than a felony and sentenced to imprisonment therein or awaiting transportation under sentence to imprisonment in another county. In the city of New York there is no one prison fulfilling all

these requirements, and for the very sufficient reason that owing to the great size of the city, and the consequently large number of persons who have to be incarcerated from time to time, it would be impracticable to provide a county jail such as can be and is maintained in less populous counties. This fact furnishes an amply sufficient reason for the enactment of a special law for the city of New York that a person convicted of receiving stolen goods in that city may be sentenced to the penitentiary instead of a state prison, and there is no reason resting upon the supposed desirability of uniform legislation which requires that, as to this detail of local administration, the special law should be deemed to have been impliedly repealed by the general law. Indeed, the framers of the Penal Code seem to have had in mind the preservation of the provisions of local and special statutes for the punishment of certain classes of offenders.

Thus section 704 of that act (now section 2183 of the Penal Law) provided as follows:

"Where a person is convicted of a crime, for which the punishment inflicted is imprisonment for a term exceeding one year, or is sentenced to imprisonment for such a term, the imprisonment must be inflicted by confinement at hard labor in a state prison. *But this and the two last sections shall not apply to a case where special provision is made by statute as to the punishment for any particular offense or class of offenses or offenders, nor to the cases specified in sections six hundred and ninety-eight, six hundred and ninety-nine, seven hundred, and seven hundred and one.*"

[3] The fundamental error of the relator's position lies in assuming that the penitentiary in the county of New York is the county jail of that county in the sense that the words "county jail" is used in the Penal Law. For certain purposes, it is used as a county jail is used in other counties, but it is something more. Penitentiaries are recognized by law as institutions quite distinct from county jails (see article 12, Prison Law [Consol. Laws 1909, c. 43]), and in many sections of the Penal Law county jails and penitentiaries are unmistakably referred to as separate and distinct institutions. Thus in section 2182, referring to sentences generally, it is provided that:

"Where a person is convicted of a crime for which the punishment *inflicted* is imprisonment for *one year*, he may be sentenced to, and the imprisonment may be inflicted by, confinement either in a county jail, or in a *penitentiary or state prison*. No person shall be sentenced to imprisonment in a state prison for less than one year."

It would seem to have been the purpose of the Legislature to establish penitentiaries as part of the state's system of prisons and as subsidiary or substitutional state prisons to relieve the latter from the care of short term convicts. Hence the provision of section 2182 of the Penal Law that no person may be sentenced to imprisonment in a state prison for less than a year.

Our conclusion is that the section of the Consolidation Act, quoted above, being a mere local regulation as to the place where the imprisonment is to be inflicted, rendered necessary by the peculiar conditions existing in a great city, is not inconsistent with and therefore was not repealed by the Penal Code, but, on the contrary, is in entire harmony with the general scheme of the Penal Code, and its successor, the

Penal Law, which contemplated the incarceration of long term offenders in state prisons, shorter term offenders convicted of serious crimes in penitentiaries, and of minor offenders sentenced for a term of a few months in county jails, where such institutions exist, or in penitentiaries. It follows that the relator's sentence as imposed was lawful and valid.

The order appealed from must therefore be reversed, the writ of habeas corpus dismissed, and the relator remanded to serve out the unexpired term of his sentence. All concur.

(78 Misc. Rep. 220.)

**MANHATTAN BRIDGE THREE CENT LINE v. BROOKLYN HEIGHTS
R. CO. et al.**

(Supreme Court, Special Term, Kings County. November, 1912.)

1. STREET RAILROADS (§ 22*)—CONSTRUCTION—CONDITIONS PRECEDENT.

A street railway, before constructing its road over a public highway, must obtain (1) the certificate of convenience and necessity from the Public Service Commission required by Railroad Law (Consol. Laws 1910, c. 49) § 9, or the consent of the Commission pursuant to Public Service Commission Law (Consol. Laws 1910, c. 48) § 53, or both, (2) the consent of the local authorities under Const. art. 3, § 18, and Railroad Law, § 171, and (3) the consent of abutting owners, or the determination of commissioners in favor of construction of the road, under the constitutional section cited and Railroad Law (Consol. Laws 1910, c. 49) §§ 171, 174.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 31, 37, 62, 73, 85; Dec. Dig. § 22.*]

2. STREET RAILROADS (§ 41*)—CONSTRUCTION—CONSENT OF ABUTTING OWNERS.

On the hearing of an application by a corporation duly authorized to construct a street railway over a certain route in the boroughs of Manhattan and Brooklyn, under Railroad Law (Consol. Laws 1910, c. 49) § 22, for the appointment of commissioners to determine the compensation for crossing the tracks of defendant railway at their intersection with Flatbush Avenue extension, and to have the lines, grades, and manners of intersection determined, where the petitioner shows the consents of abutting owners along Flatbush Avenue extension in an amount equal to one-half the value of adjoining property, as shown by the last assessment roll, the motion for appointment of commissioners will be granted.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 21, 114; Dec. Dig. § 41.*]

3. STREET RAILROADS (§ 41*)—CONSTRUCTION—ACQUISITION OF FRANCHISES.

The consent of existing railroads having trackage on streets, other than Flatbush Avenue extension, on routes coincident with those of plaintiff is not necessary to plaintiff's right of crossing defendant's tracks where they intersect that avenue.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 21, 114; Dec. Dig. § 41.*]

Proceedings by the Manhattan Bridge Three Cent Line against the Brooklyn Heights Railroad Company and others, under Railroad Law (Consol. Laws 1910, c. 49) § 22, for the appointment of commissioners to determine compensation, etc. Motion for appointment of commissioners granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Latson, Tamblin & Pickard, of New York City, for plaintiff.
George D. Yeomans, of Brooklyn, for defendants.

KELBY, J. The plaintiff makes application, under section 22 of the Railroad Law (Consol. Laws 1910, c. 49), for the appointment of commissioners to determine the amount of compensation to be paid by it for crossing the tracks of the defendants in Myrtle avenue and Willoughby street, at their intersection with Flatbush Avenue extension, and to have the commissioners determine the lines, grades, and manner of the intersections or connections of its tracks with those of the defendants at the streets above mentioned. The petition alleges the incorporation of the plaintiff and its authorization to construct, maintain, and operate a street surface railroad. The route described in its certificate of incorporation is as follows:

"Beginning at a point in the marginal way adjacent to the North river, in the borough of Manhattan, city of New York, at or near Desbrosses Street Ferry; thence on and over the marginal way and West street to Desbrosses street; thence upon and along Desbrosses street to Washington street; thence upon Washington street to Vestry street; thence upon Vestry street to Canal street; thence upon Canal street to and over the Manhattan Bridge and over and upon its approaches and plazas to Flatbush Avenue extension, in the borough of Brooklyn, city of New York; thence upon Flatbush Avenue extension to Fulton street; thence upon Fulton street to Rockwell place; thence upon Rockwell place to Flatbush avenue; thence on Flatbush avenue to Fourth avenue; thence on Fourth avenue to Atlantic avenue; thence on Atlantic avenue to Third avenue; thence on Third avenue to Flatbush avenue; thence on Flatbush avenue to Livingston street; thence on Livingston street to Hoyt street; thence on Hoyt street to and across Fulton street to Bridge street to said Flatbush Avenue extension, and crossing such streets and avenues, named and unnamed, as may be encountered in said route, with a branch line commencing in the route above described at the intersection of Washington street and Desbrosses street; thence upon Desbrosses street to Greenwich street; and thence upon Greenwich street to Vestry street, and there connecting with the route above described."

The contract between the city of New York and the Manhattan Bridge Three Cent Line, made July 10, 1912, was subsequently modified as follows:

"The rights hereby granted are for a continuous line, but it is expressly agreed that no forfeiture shall be claimed by the city in the event of the company being unable to secure the consents of the street surface railroads in the borough of Manhattan for operation over their tracks, provided through operation is had by the company over the balance of the route or routes hereby authorized."

The defendants contest the right of the plaintiff to maintain this proceeding on the following grounds: First. That a portion of plaintiff's route, namely, Flatbush avenue, Atlantic avenue, Third avenue, Livingston street, Fulton street, is coincident with some of the existing lines of the defendants; that plaintiff cannot acquire the right to operate over these existing tracks. Second. That plaintiff is without authority to lawfully construct and maintain a railroad upon any part of the route described in its articles of incorporation, because it cannot construct upon the whole of said route. Third. That plaintiff has failed to show either that it has obtained the consents of the abut-

ting property owners along the whole of its route, or in lieu thereof the determination of commissioners, as prescribed by the Railroad Law.

[1] It is clear that before a street railroad company may construct and operate its road in a public highway it must perform three conditions precedent: (a) It must obtain a certificate of convenience and necessity from the Public Service Commission, pursuant to either section 9 of the Railroad Law, or the consent of the Public Service Commission, pursuant to section 53 of the Public Service Commission Law (Consol. Laws 1910, c. 48), or both, as the case may be. (b) It must obtain the consent of the local authorities, pursuant to article 3, § 18, of the Constitution and section 171 of the Railroad Law. (c) It must obtain the consent of the abutting property owners, or in lieu thereof the determination of commissioners in favor of the construction of the road, pursuant to article 3, § 18, of the Constitution and sections 171 and 174 of the Railroad Law.

[2] The defendants cite *Matter of Thirty-Fourth St. R. R. Co.*, 102 N. Y. 343, 7 N. E. 172, as controlling and in favor of their contention. The judge writing the opinion in that case said:

"The right of the railroad company under the act of 1884 [c. 252] to construct and operate its road was subject, therefore, to three precedent conditions: The consent of the local authorities, the consent of property owners, or in lieu thereof the determination of commissioners in its favor, *and the consent of the companies having coincident routes*. It is clear that all these conditions must be performed before any right to proceed with the construction of the road or any part thereof can be exercised."

The same opinion further on is quoted by both sides as authority for their respective positions, namely:

"It may be granted that if it had been made to appear that an insurmountable difficulty stood in the way of the construction and operation of the road of the petitioner, and not a mere present obstacle in the exercise of the franchise, the court would not have been bound to grant the application: but the fact that the other companies had, prior to the application, refused to consent does not show that the appointment of commissioners would be a vain and useless proceeding."

Much of the opinion thus quoted to me was not really involved in the main issue decided in that case. The litigation of the Thirty-Fourth Street Company was long before the courts; the first proceeding being *Hilton v. Thirty-Fourth St. R. R. Co.*, 1 How. Prac. (N. S.) 453. In that case the plaintiff succeeded in enjoining the railroad company from constructing a surface railroad in Thirty-Fourth street; it being held that it was necessary for the railroad to have consents of abutting property owners of one-half in value of the property bounded on each of the several streets of the route, and not merely the consent of owners of one-half in value of the property upon the whole of the route over which it was proposed to build. The railroad company thereupon instituted a proceeding before the then General Term of the Supreme Court in the First Department for the appointment of commissioners to get the consent of commissioners in lieu of the property owners' consents. The court at General Term held that the statute which authorized them to appoint commissioners vested in them a

discretionary power, and held that, it appearing that the railroad company could not get the consent of the railroads operating the existing lines through Thirty-Fourth street, it would not appoint any commissioners. On appeal to the Court of Appeals this determination of the General Term was reversed; the only thing decided being that the court did not have such discretionary power, but that when the jurisdictional facts appeared in the petition it was obliged to exercise the power vested in it and appoint commissioners. I think, therefore, that the expressions in the opinion quoted to me were purely obiter. Upon the trial of this proceeding the plaintiff showed the consents of abutting owners along Flatbush Avenue extension only, in an amount equal to one-half in value of the adjoining property as shown by the last assessment rolls. The plaintiff did not offer the consents of any other property owners in evidence.

In the case of the Geneva & Waterloo R. Co. v. N. Y. C. & H. R. R. Co., 163 N. Y. 228, 57 N. E. 498, this question of property owners' consents came squarely before the court in a proceeding like the one at bar, involving the right of one railroad to cross the tracks of another. The route of the railroad in that case ran through the town of Waterloo and two villages. The only evidence produced on the trial of the proceeding before the referee as to property owners' consents was with reference to those in the town of Waterloo. The railroad ran along a highway which had different names in each of the villages and in the town itself. The consents of the property owners related solely to the town of Waterloo, and the consents of the property owners put in evidence, while they were equal to one-half in value, as prescribed by the statute, in the town alone, were not equal to one-half in value of the property along the whole of the route. The referee and the Appellate Division found that the consents of property owners were not sufficient, and therefore the proceeding could not be maintained. The Court of Appeals reversed the judgment of the referee and the Appellate Division, and held that there were sufficient property owners' consents, and refused to pass upon the question of the property owners' consents being a condition precedent to the maintenance of the special proceeding for crossing over the tracks of another railroad. While much may be said in favor of the proposition that the consents of the property owners along the whole of the line should be first obtained before construction and operation, and while such a construction would seem to be borne out by other sections of the Railroad Law, I am bound by the decision in this case, and therefore determine that the plaintiff, having obtained the necessary consents in the Flatbush Avenue extension, was not required to produce on the trial of this proceeding the consents of property owners on any other streets along their routes. *Geneva & W. R. Co. v. N. Y. C. & H. R. R. Co.*, supra. See, also, *Matter of People's R. R. Co.*, 112 N. Y. 578, 20 N. E. 367, and *People v. Broadway R. Co.*, 126 N. Y. 29, 26 N. E. 961.

This is not a condemnation proceeding. The act under which the proceeding is brought (section 12 of the Railroad Law) states, in substance, that if the corporations cannot agree as to crossovers commis-

sioners shall be appointed by the court, as is provided in the Condemnation Law. This means that the procedure only as to appointment of commissioners in condemnation proceedings shall be followed. The statute was designed to save delay in making crossings of intersecting railways when needed for the public use. The Manhattan Bridge Three Cent Line is doubtless bound to ultimately construct and operate the whole of its line as set forth in its charter. Upon the failure so to do the state may, by suit, compel forfeiture of its franchise. Or the Public Service Commission, knowing that it granted its certificate of convenience and necessity to the operation of the whole line and not part thereof, may compel the completion of construction and operation of the through line by mandamus. *Public Service Commission v. New York R. Co.*, 77 Misc. Rep. 487, 136 N. Y. Supp. 720. That question, however, does not properly come before me in this case.

Complaint as to the weight of rail used by the plaintiff is also urged as a ground of opposition to the motion. This matter can be disposed of by the commissioners, who have ample power to make the proposed crossing safe, even if it involves the character of track used by the plaintiff in the immediate approach to the crossing.

[3] I therefore determine that the plaintiff has shown the necessary consents of property owners, as required by law, to maintain this proceeding; that the present refusal of existing railroads having trackage on streets, other than Flatbush Avenue extension, on routes coincident with those of plaintiff is not necessary to the plaintiff's right of crossing the defendants' tracks at Myrtle avenue and Willoughby street. The motion for appointment of commissioners is therefore granted.

Motion granted.

FRIES v. PARR et al.

(Supreme Court, Equity Term, Erie County. October, 1912.)

1. CONTRACTS (§ 47*)—CONSIDERATION—NECESSITY.

A promise by a seller of a business not to engage in a similar business for a specified term within specified territory will not be enforced in equity at the suit of the buyer, where there was no consideration for the purchase of the business and the promise.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 220, 221, 256-258; Dec. Dig. § 47.*]

2. INJUNCTION (§ 61*)—CONTRACT—ENFORCEMENT—CONSIDERATION—ADEQUACY.

A bill of sale of the business of manufacturing and selling hardware specialties, which stipulates that the seller will not engage or compete in the manufacture or sale of hardware specialties in the city for 10 years, and a contemporaneous contract requiring the buyer to hire the seller for one year for a specified compensation, if construed to constitute one agreement, so that the sole consideration of the seller's promise is the buyer's promise to employ the seller for one year, will not be enforced by injunction at the suit of the buyer, seeking to restrain the seller from manufacturing articles, since the agreement to employ for a year is not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

adequate consideration for the agreement not to engage in business for 10 years, since a contract which is unfair and oppressive to one of the parties thereto will not be enforced against him by injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 120-123; Dec. Dig. § 61.*]

3. CONTRACTS (§ 117*)—IN RESTRAINT OF TRADE—ENFORCEMENT.

A contract whereby a seller of a business agrees not to engage in similar business is looked on by the courts with disfavor, and is not enforceable unless the restrictions are limited as to time and territory, and it is necessary to uphold the contract in order that the buyer of a growing business, acquiring the good will for a sufficient consideration, may obtain the benefit of his purchase.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554-569; Dec. Dig. § 117.*]

4. MASTER AND SERVANT (§ 70*)—CONTRACTS OF EMPLOYMENT—CONSTRUCTION —“CASH NET PROFITS.”

A buyer of a business, who contracts to employ the seller for a year at a weekly salary, payable out of the profits of the business, and who agrees that at the end of each six months' continuous employment a balance is to be struck, and a bonus paid of one-half of the "actual cash net profits" accruing from the business, must every six months strike a balance, ascertain the profits, and advise the seller thereof, and pay half of the profits: the term "cash net profits" being used in the sense of net profits at their actual cash valuation, whether invested in stock, machinery, or outstanding accounts.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 82-86; Dec. Dig. § 70.*]

5. INJUNCTION (§ 61*)—CONTRACTS ENFORCEABLE—BREACH OF CONTRACT.

A buyer of a business, who breaches his contract, may not sue to enjoin the seller from breaching his covenant not to engage in similar business during a specified period within specified territory.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 120-123; Dec. Dig. § 61.*]

6. INJUNCTION (§ 113*)—CONTRACTS ENFORCEABLE—LACHES.

Where a buyer of a business knew during two years that the seller, who contracted not to engage in similar business for ten years, engaged in such business and built up a profitable business, and did not protest against it, he was barred by laches from suing in equity to restrain the seller from violating his covenant.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 198-201; Dec. Dig. § 113.*]

Action by Arthur G. Fries against Frank Parr and another. Judgment of dismissal.

A. Glenni Bartholomew, of Buffalo, for plaintiff.

Frederick O. Bissell, of Buffalo, for defendants.

WHEELER, J. The defendants had, in a small way, manufactured some hardware specialties known as saw sets and saw tools, and had some unfilled orders from third parties for these articles. Frank Parr, one of the defendants, came into contact with the plaintiff, and had some preliminary negotiations with him looking toward the plaintiff advancing sufficient money to buy material and machines for making and marketing the articles in question. These negotiations resulted in the parties making the following agreement:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Bill of Sale.

"Agreement made and entered into this 1st day of April, 1907, by and between Edith E. Parr and Frank Parr, parties of the first part, and Arthur G. Fries, party of the second part, all of the city of Buffalo, N. Y., witnesseth:

"Whereas, the parties of the first part have heretofore conducted a business for the manufacture and sale of tools and hardware specialties in the city of Buffalo, under the assumed name of Monarch Hardware Co.;

"And whereas, said parties of the first part are desirous of disposing of their said business:

"Now, therefore, we, the said parties of the first part, for and in consideration of the sum of one dollar to us in hand paid and other valuable considerations by us received, do hereby sell, assign, transfer, and set over unto Arthur G. Fries, the party of the second part, all our right, title, and interest in and to the said business formerly conducted by us in the city of Buffalo, N. Y., and known under the assumed name of 'Monarch Hardware Co.,' and in and to its good will and assets of every name and nature, including all its patterns, tools, and property. And we do hereby also sell, assign and set over unto the said party of the second part the following unfilled orders for hardware specialties:

R. K. Carter & Co.,	Order dated October	6, 1906.
" " " " "	" " "	31, 1906.
" " " " "	" " January	14, 1907.
" " " " "	" " March	11, 1907.
" " " " "	" " "	22, 1907.
" " " " "	" " "	24, 1907.
Stanffer, Echelman & Co.	" " December	1, 1906.
Montgomery & Ward Co.	" " "	17, 1906.
Oliver Bros. Purchasing Co.	" " "	1, 1906.

"And the parties of the first part do hereby covenant that the above orders are bona fide unfilled and uncanceled orders; that there are no liens or incumbrances upon said properties now outstanding, or claims, debts, or liabilities due and owing by the parties of the first part which are a lien or incumbrance upon the property this day transferred and assigned to the party of the second part. And the parties of the first part, for a valuable consideration to them paid, do hereby covenant and agree not to engage or compete in the manufacture or sale of hardware specialties in the city of Buffalo, N. Y., for a period of ten years from the date hereof. And the parties of the first part do hereby covenant and agree that the second party shall not be liable for any acts or omissions of the Monarch Hardware Co., its owners, employes, or agents, prior to the date of these presents.

"In witness whereof, the parties hereto have hereunto set their hands and seals this 1st day of April, in the year of our Lord, One Thousand Nine Hundred and Seven.

[Signed] Edith E. Parr. [L. S.]

"Frank E. Parr. [L. S.]

"Arthur G. Fries. [L. S.]

"Witnesses: A. G. Bartholomew."

At the same time and on the same day the plaintiff and the defendant Frank Parr entered into a separate and additional agreement, viz.:

"Agreement made at Buffalo, N. Y., this 1st day of April, 1907, by and between Arthur G. Fries, party of the first part, and Frank Parr, party of the second part, both residing in said city:

"Whereas, the party of the first part has purchased the hardware specialty business conducted under the name of the Monarch Hardware Company;

"And whereas, the second party desires to enter the employment of the first party in connection with the conduct of said business:

"Now, this indenture witnesseth, for and in consideration of the mutual promises and agreements herein contained, and for other good and valuable

considerations had and received, the parties hereto do agree for and with each other as follows:

"First. The first party hereby employs and the second party hereby agrees to work for first party at and upon the manufacture of hardware specialties for a term of one year, unless terminated sooner, for the salary of fifteen dollars (\$15) per week, payable out of the profits of said business. At the end of each six months' continuous employment a balance is to be struck, and a further bonus or salary for faithful services shall be paid second party, consisting of one-half the actual cash net profits accruing by and through said business.

"Second. The second party shall in no way or manner obligate the first party or said business in or upon any contract, purchase, sale, lease, or pledge; the entire financial management of said business to be in the sole care and charge of first party.

"Third. The rent of the portion of premises No. 330 Washington St., Buffalo, N. Y., to be occupied by said hardware business, shall be fixed at \$10.00 per month. Said rent and any advances for tools, machinery, labor, or materials shall be a charge against the receipts of said business and shall be paid before any profits are reckoned or distributed.

"Fourth. The second party agrees to be temperate in habits and diligent in his work during the continuance of this agreement, and hereby agrees to forfeit all rights which have accrued or may accrue hereunder, in the event he becomes intemperate or intoxicated or negligent and careless while in the employ of first party.

"Fifth. The second party agrees to engage in no other business or occupation during the continuance of this agreement, and agrees to give to the first party any ideas or inventions and benefits hereunder in said hardware business which he may originate or develop or use during said period.

"In witness whereof, the parties have hereunto set their hands and seals on the day and year first above mentioned.

"[Signed]

Arthur G. Fries. [L. S.]
"Frank Parr. [L. S.]"

The plaintiff did take the business and advance money for its carrying on, and the defendant Parr continued to work for him in manufacturing the articles in question for about 18 months. He then left, and in the name of his wife, his codefendant, established a separate business, and proceeded to make and sell in a small way the same articles, in connection, however, with a "molasses gate," an entirely new article not manufactured before, which constitutes the bulk of the business done. The defendant Frank Parr has since acquired and conducts this business and is solely interested in it.

This action is brought to restrain the defendant from engaging, or competing with the plaintiff, in the manufacture or sale of hardware specialties for the period of 10 years from the date of the bill of sale of April 1, 1907. The entire question presented is whether the agreement of April 1, 1907, so far as it limits the defendant's business activities, is enforceable.

[1] An examination of the first of these agreements shows that it is simply a bill of sale of the business in question. The plaintiff, Fries, does not agree, on his part, to do a single thing. He agrees to advance no moneys. He does not agree to continue the business for a day. So far as Fries is concerned, he simply acquired, by virtue of the bill of sale, title to such property and orders as the defendant had. The evidence shows that the property transferred was worth from \$75 to \$100, and that Fries did not pay a cent for this transfer. So far

as this instrument and agreement is concerned, there was no mutuality—no consideration to support the promise and agreement on the part of the defendant not to engage in business again for ten years. If the first agreement were the only one between the parties, the contract prohibiting the defendant from again engaging in business must, from necessity, fail for want of mutuality.

[2] Having obtained by the bill of sale the defendant's business, the plaintiff, however, by a separate instrument, reciting that he had acquired the defendant's business, agreed to employ the defendant Frank Parr for the term of one year at a stated weekly salary, and an interest in the profits earned. Parr on his part agreed, during his employment, to engage in no other business or occupation. The very most that can be claimed for these two instruments on the part of the plaintiff is that they are to be regarded as parts of one agreement, and one the consideration for the other. We shall so regard these agreements, and they amount to this: That in consideration of the employment of the defendant Frank Parr for one year, both defendants promised and agreed not to engage in the manufacture of hardware specialties for 10 years. The agreement as framed forbids that they "engage *or* compete in the manufacture or sale of hardware specialties in the city of Buffalo for a period of ten years." The prohibition is in terms so broad that it covers every kind of hardware specialties, whether the articles manufactured and sold compete with the plaintiff or not.

The plaintiff, however, only asks on this trial for an injunction as to the particular articles manufactured at the time of the making of the bill of sale. The validity and enforceability of the contract, however, must be judged by the provisions as written, and not by the concessions of one of the parties to it. Studying its provisions in the light of the circumstances of the case, we are impressed with the view that it is a harsh and oppressive contract. The agreement to employ for a year is no adequate consideration for an agreement not to engage in the same business, for 10 years, especially when coupled with no other obligations on the part of plaintiff to prosecute the business in any way for the benefit of the defendants, or either of them, or to advance money in the business, especially where nothing was in fact paid as a consideration for its transfer. It is no legal answer to say that plaintiff has in fact invested nearly \$1,000 in the enterprise. The test is what duties and obligations the written agreements imposed. It seems to the court that it would be harsh and inequitable to tie the hands of the defendants under such circumstances. It is a rule that contracts unfair and oppressive to one of the parties will not be enforced against him by injunction. *Joyce on Injunctions*, § 435, citing *Pullman Car Co. v. Missouri R. R. Co.* (C. C.) 55 Fed. 138; *Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955; *Oil Creek Co. v. Atlantic R. R. Co.*, 57 Pa. 65; *Backus' Appeal*, 58 Pa. 186.

[3] Especially must this be true in contracts of this particular character, providing for restrictions upon the business activities of one of the parties to it. It is well understood that the courts look with disfavor on agreements of this kind. Originally all contracts in restraint

of trade were deemed illegal and void on ground of public policy. Subsequently the rule was somewhat relaxed, where the restrictions were limited as to time and territory, and it became necessary to uphold such agreements in order that the purchaser of a going business, who had acquired it, together with the good will, for a good and sufficient consideration, might get the benefit of his bargain. Such are the cases of *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; *Curtis v. Gokey*, 68 N. Y. 300; *Wood v. Whitehead Bros.*, 165 N. Y. 545, 59 N. E. 357; *Broadbookes v. Tolles*, 114 App. Div. 646, 99 N. Y. Supp. 996. Here, however, the plaintiff in fact paid nothing, and agreed to pay nothing. He never in terms obligated himself to the extent of one penny for the business or the good will. He acquired what there was to it, without advancing a cent to the defendants for it. All that can be claimed in any event was that by the second agreement he promised to employ the defendant Frank Parr for a year, and no longer.

To enforce by injunction an agreement against again engaging in business under these circumstances would be going, we think, a step further than the courts have heretofore gone, and we are not disposed to exercise the injunctive powers of the court in this case, where we feel that it would work not only hardship and injustice toward the defendant, but would deprive the public of the benefit of the defendant's labor and enterprise. The courts refuse to enforce such improvident agreements, not so much out of consideration of the parties themselves, perhaps, as from considerations of public policy and the interests of the public itself, which is interested in the labor, enterprise, and business activities of its citizens.

[4] These reasons become all the stronger and controlling when we come to consider the other facts and circumstances of this case. The second agreement, by which the plaintiff contracted to employ the defendant Frank Parr, among other things, provided as follows:

"First. The first party hereby employs and the second party hereby agrees to work for first party at and upon the manufacture of hardware specialties for a term of one year, unless sooner terminated, for the salary of fifteen dollars (\$15) per week, payable out of the profits of said business. At the end of each six months' continuous employment a balance is to be struck, and a further bonus or salary for faithful services shall be paid second party, consisting of one-half the actual cash net profits accruing by and through said business."

The evidence tends to show, and seems to be undisputed, that the business prospered, so long, at least, as Parr was employed in it. At least, it shows that profits were made, although the amount or extent of such profits remain undisclosed. The evidence also shows that these profits were not represented, to any extent, at least, by cash on hand, but were invested, and represented by material, stock, and machinery on hand, and accounts owing. The evidence also shows that the defendant Frank Parr, at different times, asked the plaintiff for a statement of the condition of the business, to the end that he might be paid his share of the profits; that the plaintiff never furnished him with any such statement, putting him off for one reason or another, contending, among other things, that he was unable to furnish it until proper in-

ventories had been completed, and referred the defendant to the books, saying he was at liberty to inspect them for himself, although the defendant Frank Parr testifies the plaintiff refused to permit him to have an accountant go over them for him. The defendant disclaimed any knowledge of bookkeeping which would enable him to understand the books.

The plaintiff contends that by the terms of the agreement he was not required to pay the defendant Frank Parr any share of the profits, unless there was cash on hand with which to make the payment, and that at no time during his employment did such a condition exist; but that, on the contrary, the demands of the business required constant advances by him, and therefore he was guilty of no breach of the agreement on his part, either by failure to strike a balance, furnish a statement, or pay any profits. It must be conceded the agreement might have been more explicit. Nevertheless, I am of the opinion that it was the duty of the plaintiff every six months to strike a balance, ascertain the profits, and advise the defendant of the result. The business was the plaintiff's. The defendant Parr was not his partner. He only had the right to share in profits by way of compensation for services. The books were kept by the plaintiff, or by his bookkeeper, not by the defendant. When, therefore, the agreement provided that a balance should be struck every six months, and one-half the profits paid Parr as "a further bonus or salary for services," the only fair inference is that the plaintiff was to strike and ascertain the balance and profits. This he never did, and in this he failed to keep his agreement with the defendant Frank Parr.

We think he also was in default in not paying Parr each six months one-half the profits, and that the contention that this one-half of the profits was only to be paid from cash in hand is not tenable. The words "cash net profits," we think, should be construed in the light of all the circumstances of the case. The third clause of the contract specifies how the profits are to be ascertained before distribution. It was the evident intention of the parties that the distribution should be made every six months; otherwise, it would have been within the power of the plaintiff to have indefinitely postponed any distribution whatever, by simply keeping the money received invested in stock, machinery, and other things. He might have expanded the business to thousands of dollars, representing all profits, in fact, without being in ready funds at any particular time. We cannot believe that the parties to the agreement contemplated the deferring of any distribution to any such extent. It would seem that they must have used the words "actual cash net profits" in the sense "net profits" at their actual "*cash*" valuation, where the increase of the business was represented by assets, whether invested in stock, machinery, or outstanding accounts. That is, in our opinion, the only possible working interpretation which can be given this language. If we are correct in these views, then the plaintiff has failed to live up to the terms of his agreement with Parr, either as to ascertaining balances or distributing profits.

[5] Being in default in these respects, can he come into equity and ask this court to enjoin the defendant for an alleged violation of the

agreement on his part not to engage, or compete with the plaintiff, in a like business? We think not, upon the commonest principles of law and equity. *N. Y. Chemical Co. v. Halleck* (Com. Pl.) 15 N. Y. Supp. 517; *Hill v. Haberkorn*, 6 N. Y. Supp. 474[†]; *Rubber Tip Pencil Co. v. Hovey*, 9 Abb. Prac. (N. S.) 74. We think the defendant Frank Parr was justified in abandoning the employment of the plaintiff and starting an enterprise of his own.

[6] It further appears from the evidence that the defendants not only started the business complained of, but continued it for two years before the plaintiff complained of their acts or took legal proceedings to enjoin them, and that during the two years the plaintiff was fully advised of what the defendants were doing and entered no protest against it. In the meantime the defendants have built up for themselves quite a successful and profitable business. We think the plaintiff has slept on his rights, if he had any, and that he was called on to act promptly, and could not delay proceedings without being charged with the consequences of his laches.

The plaintiff's complaint should be dismissed, with costs. Let findings be prepared in accordance with the views above expressed.

(78 Misc. Rep. 546.)

LEDDY v. CARLEY.

(Supreme Court, Trial Term, Kings County. December 21, 1912.)

1. TRIAL (§ 165*)—MOTION FOR NONSUIT—EVIDENCE—CONSIDERATION.

The court, on motion for nonsuit at the close of plaintiff's case, must give to plaintiff the most favorable inferences which the facts proved, assumed to be true, will justify.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

2. MASTER AND SERVANT (§ 103*)—INJURY TO SERVANT—OBLIGATION OF MASTER—SAFE PLACE TO WORK.

Where an employé prepares his own place in which to do his work, the employer is not liable for injuries resulting from the dangerous character of the place, because he is under no duty to provide the employé with a safe place.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.*]

3. MASTER AND SERVANT (§ 196*)—INJURY TO SERVANT—OBLIGATION OF MASTER—SAFE PLACE TO WORK.

Where a place in which an employé is to work is prepared by a fellow employé, and the progress of the work creates a danger, and the employés are engaged in the prosecution of the same enterprise, the employer is not liable for injuries to the employé resulting from the dangerous character of the place, because the employer is under no duty to use reasonable care to provide a safe place.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 375–378, 486–488; Dec. Dig. § 196.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 53 Hun, 637.

4. MASTER AND SERVANT (§ 199*)—FELLOW SERVANTS—WHO ARE.

One set of employes preparing and finishing a trench for the laying of sewer pipe are not fellow servants of employes sent into the trench to lay the pipe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 491; Dec. Dig. § 199.*]

5. MASTER AND SERVANT (§ 118*)—INJURY TO SERVANT—NEGLIGENCE—SAFE PLACE TO WORK.

Where an employe to dig a sewer trench and lay the pipe completed the trench and then asked the employer to have it shored up, but the employer, with knowledge of the conditions from personal observation and from the employe's statements, refused to grant the request, and directed the employe to lay the pipe, without having the trench shored up, the rule that an employer must use reasonable care to provide a safe place in which to work applied, and he was liable for the death of the employe caused by the caving in of the trench while laying the pipe, provided the employe did not assume the risk and was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.*]

6. MASTER AND SERVANT (§ 217*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

An employe who continues his work with knowledge of a danger assumes the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

7. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—ASSUMPTION OF RISK—BURDEN OF PROOF.

The burden of proving that an employe assumed a risk is on the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

8. MASTER AND SERVANT (§ 280*)—INJURY TO SERVANT—ASSURANCE OF SAFETY BY MASTER—EVIDENCE.

In an action for the death of an employe digging a sewer trench and laying pipe, caused by the caving in of the trench while laying pipe, evidence held to justify a finding that the employer ordered the employe to lay the pipe without shoring the trench and assured him that it was safe to do so.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 981-986; Dec. Dig. § 280.*]

9. MASTER AND SERVANT (§ 220*)—INJURY TO SERVANT—ASSURANCES OF SAFETY BY MASTER—EFFECT.

Where an employe has equal knowledge of a danger with the employer, the latter's assurance of safety will not relieve the employe of the assumption of risk; but, where the employer has superior knowledge on which the employe is entitled to rely, an assurance of safety may justify the employe in undertaking the work without assuming the risk, unless the danger is so imminent as to prevent a reasonably prudent man from risking it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 625-637, 641, 644-647; Dec. Dig. § 220.*]

10. MASTER AND SERVANT (§ 288*)—INJURY TO SERVANT—ASSUMPTION OF RISK—QUESTION FOR JURY.

Where an employe engaged in laying a sewer was assured by his employer, who was presented and directed the work, that it was unnecessary to shore up the trench because the work of laying the pipe would take

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

only a short time, the employé, relying on the assurance, did not assume as a matter of law, the risk of the trench caving in.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068–1088; Dec. Dig. § 288.*]

11. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

The employé relying on the assurance was not guilty as a matter of law of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092–1132; Dec. Dig. § 289.*]

12. MASTER AND SERVANT (§ 220*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

The courts should confine the doctrine of assumption of risk of obvious dangers within as narrow limits as possible without resorting to judicial legislation, and an employé will not be deemed to have waived the performance by the employer of a common-law duty, merely because he has some knowledge of the danger, where he has received the assurance of the employer that the place is safe, unless his knowledge and appreciation of the danger are equal to that of the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 625–637, 641, 644–647; Dec. Dig. § 220.*]

Action by Bridget Leddy, as administratrix of James Leddy, deceased, against Edward Carley. On motion by plaintiff for a new trial on the minutes, after a dismissal of the complaint at the close of plaintiff's evidence. Granted.

James P. Kohler, of Brooklyn, for plaintiff.

Elliot, Jones & Fanning, of Brooklyn, for defendant.

BENEDICT, J. This action is a common-law action for negligence claimed to have resulted in the death of plaintiff's intestate, who was in the employ of the defendant at the time of the accident which caused his death. The proof was, in substance, that plaintiff's intestate, James Leddy, was employed by defendant, who was in the plumbing business in the borough of Brooklyn, and that, on July 6, 1911, James Leddy was engaged in the course of his employment in laying a connecting drain from the sewer in Milton street to a dwelling. James Leddy's son, John M. Leddy, was assisting him. They made the excavation, a trench about 12 feet deep at its greatest depth, and from 1 to 2 feet wide at top and bottom. The character of the soil was, generally speaking, a friable sandy soil with some loose stones in it. In addition to digging this trench up to the sidewalk, they tunneled part way under the sidewalk. While working in this part of the excavation, the earth caved in, and a boulder struck James Leddy, who then was lying prone at the bottom of the trench, and that blow or suffocation from the smothering sand, or both combined, had caused his death by the time his body was taken out.

The excavation had been finished about 12 o'clock, and the accident occurred after James Leddy and his son had returned from dinner, and while they were engaged in putting in the pipe. There was evidence that when the work of excavation was finished, or nearly finished, James Leddy had told Carley that the trench ought to be shored up, that the bank was caving in and falling on him, that Carley replied that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it was not necessary, that there were only a couple of lengths of pipe to be put in, and that then they would fill it up. There was also evidence that Carley had planks at his shop, which was near by, suitable for shoring, and that during a part of the time, at least, while the excavation was being made, Carley was present superintending, or, at any rate, supervising the work, and that he was present at the time of the accident. James Leddy was 57 years of age and was an experienced man in that sort of work. At the close of plaintiff's evidence defendant's motion for a nonsuit was granted.

[1] Under well-established rules the plaintiff was entitled to the most favorable inferences in support of his cause of action which the facts proved, if assumed to be true, would justify.

[2-4] The decedent himself prepared the trench, and hence there could be no recovery but for the fact that he complained to the defendant of the danger of a cave-in, and requested that the trench be shored up, which request defendant refused, assuring decedent that it was not necessary. The general rule is that, where the servant prepares his own place in which to do his work, the master is not liable for any injuries resulting from the dangerous character of such place, or, in other words, that the rule requiring the master to use reasonable care to provide his servant with a safe place in which to work does not apply in such cases, and a similar rule applies where the place is prepared by the fellow servants of the injured employé, if the progress of the work itself creates the danger, and all are engaged in the prosecution of the same enterprise. *Citrone v. O'Rourke Engineering Const. Co.*, 188 N. Y. 339, 80 N. E. 1092, 19 L. R. A. (N. S.) 340; *Mullin v. Genesee El. L. P. & G. Co.*, 202 N. Y. 275, 95 N. E. 689. Where, however, one set of servants prepares and finishes a trench for the laying of pipe, they are not fellow servants of those afterward sent into the trench to lay the pipe. *Kranz v. Long Island Ry. Co.*, 123 N. Y. 1, 25 N. E. 206, 20 Am. St. Rep. 716; *Schmit v. Gillen*, 41 App. Div. 302, 58 N. Y. Supp. 458.

[5] That the decedent in the case at bar, when the trench was complete or substantially complete, asked the defendant to have it shored up, and that the defendant knowing the condition of the trench, both from decedent's statement and from having been personally present, refused to grant this request and in substance directed decedent to lay the pipe therein without having it shored up—these facts, in my opinion, serve to take this case out of the rule announced in the *Citrone* and *Mullin* Cases, *supra*, and to leave the way open for the application of the rule that the master must use reasonable care to provide his servant with a safe place in which to work. These facts placed the master in practically the same position as if the decedent had had nothing to do with preparing the trench, and so bring the case within the doctrine of *Kranz v. Long Island Ry. Co.*, *supra*, and *Schmit v. Gillen*, *supra*. See, also, *Stuber v. McEntee*, 142 N. Y. 200, 36 N. E. 878.

[6, 7] It still remains, however, to consider the question whether the decedent assumed the risk of injury, or was guilty of contributory negligence, because he knew of the danger. The only evidence introduced by the plaintiff to take the case out of the doctrine of the many

authorities holding that an employé, who continues his work with knowledge of the danger, assumes the risk or is guilty of contributory negligence, was the interview between the decedent and defendant already referred to. But so far as the question of assumption of risk is concerned it must be remembered that the burden of proof was on the defendant (*Dowd v. N. Y. O. & W. R. Co.*, 170 N. Y. 459, 63 N. E. 541; *Jenks v. Thompson*, 179 N. Y. 20, 71 N. E. 266), and this case I regard as a case involving the question of assumption of risk rather than the question of contributory negligence, although some of the cases to which I shall refer use the latter term apparently interchangeably with assumption of risk.

[8] The witness John M. Leddy testified as follows:

"He (decedent) told Carley that the bank was caving in and was falling in on him; and then he asked Carley was he going to shore up the bank, and Carley answered—that is all he said. And Carley answered him back that it was not necessary, 'You only got a couple more lengths of pipe to put in, and then we will fill it in.'"

The witness Gleason also testified to the same conversation, as follows:

"I heard Leddy say to Carley: 'Boss, do you think it will be all right to shore that up?' And he says: 'Go ahead, Jimmy, I don't think it will be necessary. There is only a couple of lengths to go in.'"

"Q. Say that again so the jury can hear you. A. He says, 'Do you think it will be all right to shore this up?' And he says, Carley says: 'No, I don't think it will be necessary. We only got a couple of lengths to go in, and then we will fill in.'"

This testimony would, I think, have justified the jury in inferring that the defendant ordered James Leddy to work in the trench as it was, and assured him that it was safe to do so; that is, the jury might have inferred that the decedent so understood the defendant, and was justified in so doing. We are then brought to a consideration of the question whether an assurance of safety by the master under the circumstances of this case would relieve the employé of assumption of risk, or make that question a question for the jury rather than for the court.

[9] While the authorities are not wholly harmonious on this question, they support in general the conclusions ably stated by Shiras, J., in *Haas v. Balch*, 56 Fed. 984, 6 C. C. A. 201, where, after observing that "the fact that the assurance of safety has been given is one to be weighed in each case," continued as follows:

"If, in a given instance, the servant, being of mature age and of ordinary intelligence, has equal knowledge with the master of the dangers to be apprehended, and he voluntarily subjects himself thereto, knowing of their existence, the mere fact that he had received an assurance that there was no risk to be dreaded or avoided might be of little avail in relieving him from the charge of contributory negligence. On the other hand, if the master or his representative has superior knowledge or means of knowledge of a given situation and of its safety or the contrary, and he assures the servant that he can safely undertake a given work, such an assurance may justify the servant in undertaking the work in reliance upon the superior knowledge of the master, and without being liable to the charge of negligence in so doing, unless the danger, in the language of the Supreme Court in *District of Colum-*

bla v. McElligott, 117 U. S. 621, 633 [6 Sup. Ct. 884, 20 L. Ed. 946], is 'so imminent or manifest as to prevent a reasonably prudent man from risking it.' "

In that case plaintiff was one of a gang of men engaged in grading down a street; it being his duty to shovel dirt in cars. In so doing, he was required to go underneath an overhanging bank. He inquired of the foreman if it was safe to work there, and the foreman assured him that it was. Plaintiff was injured by the falling of the bank, and it was held that it was for the jury to say whether plaintiff had assumed the risk; for the foreman had superior knowledge, on which plaintiff was entitled to rely. This decision is in line with authorities in many states. *L. & H. R. Co. v. Handley* (Ala.) 56 South. 539; *Walter v. Fisher*, 96 Ill. App. 590; *Chicago, etc., Coal Co. v. Moran*, 110 Ill. App. 664, affirmed 210 Ill. 9, 13-14, 71 N. E. 38; *Keen's Adm'r v. Keystone Crescent Lumber Co.* (Ky.) 118 S. W. 355, 356; *Haley v. Case*, 142 Mass. 316, 7 N. E. 877; *McKee v. Tourtelotte*, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542; *Sanders v. N. Y. Central & H. R. R. Co.* (Mass.) 98 N. E. 927; *Burnside v. Novelty Mfg. Co.*, 121 Mich. 115, 79 N. W. 1108; *Duerst v. St. Louis Stamping Co.*, 163 Mo. 607, 614, 621-622, 63 S. W. 827; *Burkard v. Leschen & Sons Rope Co.*, 217 Mo. 466, 117 S. W. 35.

On the other hand, where the servant has equal knowledge of the danger with the master, the latter's assurance of safety will not relieve the servant of the assumption of risk. *Kenney v. Bingham Cordage Co.*, 168 Mass. 278, 47 N. E. 117; *Toomey v. Eureka Iron & Steel Works*, 89 Mich. 249, 50 N. W. 850; *Rohrabacher v. Woodward*, 124 Mich. 125, 82 N. W. 797.

In New York the authorities seem to be in accord with the doctrine stated in *Haas v. Balch*, supra. Thus in *Hawley v. Northern Central Railway Co.*, 82 N. Y. 370, it was held that a locomotive engineer was not chargeable with contributory negligence as matter of law because he knew that the road was in a defective condition, when he had been ordered by the defendant to run his engine over it as he did. The court said:

"We must take into account the plaintiff's position. His business was that of an engineer, and unless he obeyed orders and ran his engine he would have been obliged to abandon defendant's service. Of one thus situated the law should not be too exacting. We must assume that the officers of defendant, who had charge of the road, and must have known its condition, deemed it safe; and the plaintiff had the right to rely somewhat upon their judgment. Other employes of the road, and hundreds of passengers, were daily trusting their lives upon the road, and on the day of the accident he was ordered to and did precede a passenger train. Under such circumstances, was the plaintiff bound to set up his judgment against that of all others and determine for himself that the road was absolutely unsafe for the passage of his engine, and abandon his position as engineer, or take upon himself the risk caused by defendant's negligence?"

In *Daley v. Schaaf*, 28 Hun, 314, it appeared that plaintiff's intestate was engaged with others in carrying bricks from the street to an elevator used to convey them to the upper floors of a building under construction. The elevator was a primitive affair, and bricks had fallen

from above in the course of removing them from the elevator. Two of the men afterward attempted to put up some planks to shield the men below, but were stopped by one of the defendants, who made them take down the planks already placed in position, saying that they did not need it, that it was all secure above, and there was no danger. It was held that the question of contributory negligence was properly submitted to the jury. The court, among other things, said:

"Whatever may be the rules of law governing the relations of master and servant, strictly construed with reference to the adjudged cases, none of them have gone so far as to hold the master free from responsibility where the work undertaken is apparently dangerous, but as to which he gives assurances to his workmen that there is no danger. Under such circumstances he assumes the risk, and not the workmen. *If that is not the law, it ought to be.*" (Italics are mine.)

The court further remarked:

"It would be very extraordinary for the courts to declare, after an assurance given to an employé by the employer like that which was given to the deceased, that he should be held unaccountable if there was in fact danger and an injury was sustained in consequence without fault on the part of the employé. If there had been no such declaration made, the rule to be applied to the facts might be very different. When there is apparent danger in the calling or employment, and notwithstanding the exhibition of it by the facts and circumstances the employer assures the employé that there is no danger, and an injury results, the most liberal rule that the employer can expect is to have the question of contributory negligence submitted to the jury."

To these views I unhesitatingly subscribe.

In *Doyle v. Baird*, 6 N. Y. Supp. 517, the plaintiff was injured by the caving in of the sides of a trench in made ground, in which he had been ordered to work by the defendant's foreman. The court held that it was error to dismiss the complaint, saying on the question of contributory negligence:

"Nor do we think contributory negligence is to be imputed to the appellant because he obeyed the foreman's command, and went to work at the bottom of the trench, although he had the same opportunity for observing any apparent insecurity which said foreman, or even the master, had. * * * Whether the banks of a deep trench will or will not cave in involves a question in civil engineering. A workman of ordinary intelligence cannot be required at his peril to solve a problem fitted only for specially educated experts."

In *Chadwick v. Brewsher*, 15 N. Y. Supp. 598, the plaintiff, a journeyman house painter, was injured because of the fall of a painter's scaffold which was suspended from planks laid on the roof and projecting over. On the first day the plaintiff had fastened the planks at the inner end by tying them; but his employer, the defendant, said it was not necessary, that they would hold without tying all that could be placed on the scaffold. Subsequently the defendant moved the scaffold to other places without tying or otherwise securing the inner ends of the planks. Plaintiff knew of this condition. The cause of the falling of the scaffold was the failure to secure the planks. It was held that plaintiff did not assume the risk. The court said:

"Here we may assume that the plaintiff knew as much about how the planks were placed as his master did, but that he did not know as well as

his master did the danger which was latent in such an adjustment of them. It is one thing to know the visible conditions, and may be quite another to know what they indicate. In the present case the master assumed to know, and by virtue of his assumed superiority of knowledge he dispelled his servant's apprehension."

In this case it appeared that the plaintiff had been a painter for about 50 years and the defendant for about 38 years.

See, also, *Kain v. Smith*, 89 N. Y. 375, and *McGovern v. Central Vermont Ry. Co.*, 123 N. Y. 280, 25 N. E. 373.

The doctrine of the foregoing cases has been recognized and approved even in cases where it was held that the employé was not entitled to recover because for some reason it was not applicable. *Marsh v. Chickering*, 101 N. Y. 396, 399, 5 N. E. 56; *Sweeney v. Berlin & Jones Envelope Co.*, 101 N. Y. 520, 524-525, 5 N. E. 358, 54 Am. Rep. 722; *Caciatore v. Transit Const. Co.*, 147 App. Div. 676, 132 N. Y. Supp. 572 (2d Dept.). In the case last cited the trial judge charged the following request:

"In determining the question of plaintiff's contributory negligence and also the question of plaintiff's assumption of the risks, that the plaintiff was entitled to rely upon the assurance of safety given by defendant, if one was given, and was also entitled to rely upon the superior knowledge and experience of defendant in such work."

This was held error upon the ground, it would appear, that it was an instruction to the jury that they must find the plaintiff free from contributory negligence if they believed that an assurance of safety had been given; whereas, that was merely a fact to be taken into consideration in considering the questions of contributory negligence and assumption of risk. The court expressly recognized the doctrine of *Kain v. Smith*, *supra*, *McGovern v. Central Vermont R. Co.*, *supra*, and *Chadwick v. Brewsher*, *supra*, and quoted with apparent approval the language of Mr. Justice Holmes, while a justice of the Supreme Court of Massachusetts, in *McKee v. Tourtellotte*, 167 Mass. 70, 44 N. E. 1072, 48 L. R. A. 542, as follows:

"When we say that a man appreciates a danger, we mean that he forms a judgment as to the future, and that his judgment is right. But if against this judgment is set the judgment of a superior, one, too, who from the nature of the callings of the two men, and of the superior's duty, seems likely to make the more accurate forecast, and if to this is added a command to go on with his work and to run the risk, it becomes a complex question on the particular circumstances whether the inferior is not justified as a prudent man in surrendering his own opinion and obeying the command. The nature and the degree of the danger, the extent of the plaintiff's appreciation of it, and the exigency of the work, all enter into consideration, and no universal rule can be laid down."

[10] Applying these principles to the case at bar, we find that plaintiff's intestate was directed to work in the trench, and was assured that it was unnecessary to shore it up, apparently on the ground that the work would take only a short time. Although the decedent was a man of experience, he could not, as a common laborer, be expected to know fully the danger of the trench caving in (*Doyle v. Baird*, *supra*), and the defendant, if he did not have superior knowledge, at least assumed to have it (*Chadwick v. Brewsher*, *supra*).

[11] The defendant was present, saw the trench, and directed decedent to work there without its being shored up, told decedent, in answer to the latter's request that it be shored up, that this was unnecessary as there were only a couple of lengths of pipe to be put in. Was decedent obliged to set his judgment against the judgment of his employer and throw up his job, or as an alternative assume the risk of injury from his employer's negligence? I think not. I think that he was entitled to rely upon his employer's presumably superior knowledge, and hence that he was not chargeable with assumption of risk or contributory negligence as matter of law.

[12] The Court of Appeals, in the recent cases of *Fitzwater v. Warren*, 206 N. Y. 355, 99 N. E. 1042, and *Welch v. Waterbury Co.*, 100 N. E. 426, has repudiated the doctrine of assumption of obvious risks in cases where the master has neglected the performance of a statutory duty. These cases are not, of course, directly applicable to the case at bar, for here the duty claimed to have been neglected was not a statutory duty. But they indicate a salutary tendency on the part of the Court of Appeals—to which the lower courts should and well may give heed—to confine the doctrine of assumption of obvious risks within as narrow limits as is possible without resorting to judicial legislation. If public policy requires that the employé shall not be permitted to waive the performance of a statutory duty on the part of the master by continuing to work with knowledge that it has not been performed, it likewise requires that he shall not be deemed to have waived the performance of a common-law duty because he has some knowledge of the danger, if he has received the assurance of his employer that the place where he is directed to work is safe or that further precautions are unnecessary, unless it clearly appears that his knowledge and appreciation of the danger is fully equal to that which the master has or ought to have if he performs his duty.

For these reasons I now think that the complaint should not have been dismissed. There was sufficient evidence to go to the jury on the question of the defendant's negligence, and I think the plaintiff was entitled to have the questions of contributory negligence and assumption of risk also submitted to the jury.

The motion for a new trial is therefore granted; but, as it is for an error of law, no costs are imposed.

(153 App. Div. 697.)

GODLEY v. CRANDALL & GODLEY CO. et al.

(Supreme Court, Appellate Division, First Department. December 13, 1912.)

1. CORPORATIONS (§ 151*)—DISTRIBUTION OF PROFITS—STOCKHOLDERS.

Where business is operated by the persons interested through a corporation, in order to avoid individual liability for debts and to prevent dissolution on the death of one of the parties in interest, all stockholders holding the same character of stock must receive the same treatment in the distribution of profits.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 555-559; Dec. Dig. § 151.*]

2. CORPORATIONS (§ 320*)—DIRECTORS—MISCONDUCT—MINORITY STOCKHOLDERS.

Where directors of a corporation are guilty of misconduct or dishonorable dealing for their own benefit, they may be compelled to account at the suit of a minority stockholder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1431, 1433-1439; Dec. Dig. § 320.*]

3. CORPORATIONS (§ 155*)—DISTRIBUTION OF PROFITS—MISAPPROPRIATION OF FUNDS—DISCRIMINATORY DIVIDENDS.

Where directors of a private corporation, in voting extra dividends among employes, did not recognize length or faithfulness of service, but apportioned such dividends according to stockholdings, resulting in an arbitrary and unjust discrimination between the holders of the same class of stock, such distribution could not be sustained on the ground that it was in pursuance of a custom set by the original corporation in carrying out a scheme of profit-sharing with stockholding employes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 560-563, 568, 576-578, 593-603; Dec. Dig. § 155.*]

4. CORPORATIONS (§ 153*)—FUNDS—DISCRIMINATING DIVIDENDS—MINORITY STOCKHOLDER—REPRESENTATIVE ACTION.

Where excessive and discriminating dividends have been voted and paid to certain stockholding employes of a corporation, they could not be recovered by a minority stockholder in a representative action for the benefit of the corporation, since the corporation cannot recover dividends it has paid, if earned, because it did not pay equal dividends to all the stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 579, 580; Dec. Dig. § 153.*]

5. CORPORATIONS (§ 308*)—OFFICERS—DIRECTORS—ADDITIONAL SALARIES—VALIDITY.

Payment of a part of the profits of a corporation to directors, who were officers of the corporation, as additional salary, which such directors voted to themselves, constituted a misappropriation of the corporation's funds, recoverable from them in a representative suit by a minority stockholder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.*]

6. CORPORATIONS (§ 312*)—DIRECTORS—SALARIES TO EMPLOYÉS—ACCOUNTING.

Directors of a corporation were not accountable for sums voted to employes, not directors, as additional salary in a representative suit by a minority stockholder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1376-1386, 1388-1392; Dec. Dig. § 312.*]

7. CORPORATIONS (§ 320*)—MISCONDUCT OF DIRECTORS—ADDITIONAL SALARY.

Where, in a representative suit by a minority stockholder to recover money voted by directors to themselves as additional salary, the court

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

found that such sums were not measured by the services performed, but were determined by the amount of stock held by the directors, and expressly refused to find that such additional payments were reasonable and proper compensation, it was not material to a judgment for plaintiff that the court failed to find that the additional salaries were excessive.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1431, 1433-1439; Dec. Dig. § 320.*]

8. CORPORATIONS (§ 320*)—DIRECTORS—ADDITIONAL SALARY—BURDEN OF PROOF.

Where directors of a private corporation voted various sums to themselves as alleged additional salary, the burden was on them to justify the payment by establishing the value of their services.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1431, 1433-1439; Dec. Dig. § 320.*]

9. CORPORATIONS (§ 308*)—DIRECTORS—SALARIES AS OFFICERS—VOTE AS DIRECTORS.

A director of a corporation is disqualified to vote on a resolution fixing his salary as an officer.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.*]

10. CORPORATIONS (§ 308*)—DIRECTORS—SALARIES TO OFFICERS—ILLEGAL INCREASE.

Where a resolution passed by the directors of a corporation voting additional salary to themselves as officers was invalid, but in a minority stockholder's representative action for an accounting it was proved that the services rendered by the officers were reasonably worth to the corporation at least what they had previously received as regular salaries, they were only required to account for the amount added pursuant to such resolution.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.*]

11. CORPORATIONS (§ 312*)—GOOD WILL—TRANSFER.

Since the directors of a corporation may not dispose of its tangible property without accounting therefor, and its good will is an asset which must be accounted for on dissolution, where the majority stockholders of a corporation, after being unable to purchase the shares of the minority at par when they were worth much more, on the business being temporarily disabled by fire, organized a new corporation and appropriated the business and good will of the old, in order to "freeze out" the minority stockholders, they were accountable in a representative suit by the minority stockholders for the reasonable value of such good will.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1376-1386, 1388-1392; Dec. Dig. § 312.*]

12. CORPORATIONS (§ 320*)—PERSONS LIABLE—PARTIES.

Where directors of a corporation, by their illegal efforts to freeze out the minority stockholders, made necessary a representative suit by the minority interest for an accounting, they were bound to account for legal fees and expenses paid out in and about the defense of the action, together with the amount paid for premium on a bond to discharge a receiver therein, in order to prevent the improper imposition of such expenses on the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1431, 1433-1439; Dec. Dig. § 320.*]

Ingraham, P. J., and McLaughlin, J., dissenting in part.

Appeal from Special Term, New York County.

Suit by Elizabeth McM. Godley against the Crandall & Godley Company, the Crandall-Pettee Company, and others. Judgment for complainant, and defendants appeal. Affirmed.

See, also, 137 App. Div. 923, 122 N. Y. Supp. 1129; 143 App. Div. 908, 127 N. Y. Supp. 1121.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Decker, Allen & Storm, of New York City (Edgar T. Brackett, of Saratoga Springs, of counsel, and James J. Allen, of New York City, on the brief), for appellants.

King & Osborn, of New York City (W. Russell Osborn, of New York City, of counsel, and David Bennett King, on the brief), for respondent.

CLARKE, J. This is a representative action, brought by a stockholder of the Crandall & Godley Company to compel certain of the defendants to pay back to the corporation: (1) Moneys fraudulently paid out to themselves and others under the guise of additional salaries; (2) money paid out as salaries illegally voted to themselves as directors, under resolution of November 14, 1906, under the guise of increased salaries; (3) the value of the good will of defendant Crandall & Godley Company, fraudulently transferred by the defendants to the defendant Crandall-Pettee Company.

In 1871 a copartnership was formed between the late William Ziegler, Allan B. Crandall, and William D. Godley, under the name of Crandall & Co., to carry on in New York and elsewhere the business of dealing in grocers', confectioners', and bakers' fixtures, utensils, and supplies; each of said parties having a one-third interest. In 1878 Ziegler sold his one-third interest to Crandall, and the business was continued as Crandall & Co. In 1887 Crandall died. Godley and Lyman F. Pettee formed a copartnership and continued the business under the name of Crandall & Godley. Pettee having purchased the interest of Crandall, Godley had a two-thirds and Pettee a one-third interest therein. Said copartnership continued until 1892, at which time they were equal partners, when they obtained the incorporation of the Crandall & Godley Company under the laws of the state of New Jersey. The capital stock was \$300,000; \$200,000 common, and \$100,000 8 per cent. cumulative preferred, stock. Godley and Pettee each received one-half of each issue of preferred and common stock, except 40 shares held by one Isaac Karlsruher. Godley was elected president, with a salary of \$5,000 per year, and Pettee vice president and treasurer, at a salary of \$3,000 a year, which salary, pursuant to agreement, was equalized by Godley giving to Pettee the sum of \$1,000 per annum, making the salary received by each \$4,000. The Crandall & Godley Company of New Jersey purchased the good will of Crandall & Godley, the copartnership, for the sum of \$132,354.54, which amount was thereafter carried upon the books of the defendant Crandall & Godley Company as "franchise account" until the time of the discontinuance of its business.

In 1895 the defendant the Crandall & Godley Company was organized under the laws of New York by Godley, Pettee, and Karlsruher, who subscribed for the entire capital stock—Godley, 1,410 shares; Pettee, 1,380 shares; and Karlsruher, 40 shares. Upon its organization the new company took over the assets and good will of the Crandall & Godley Company of New Jersey and delivered to the trustees of said corporation its entire capital stock, consisting of 2,000 shares of common and 1,000 shares of 8 per cent. cumulative preferred stock, which was transferred and delivered to the stockholders of the New Jersey corporation according to their interests therein, and the said New Jersey corporation was thereupon dissolved. Godley became ill and incapacitated during the month of May, 1895, and the remaining members of the board of directors, Pettee and Karlsruher, on August 13, 1895, adopted a resolution discontinuing the salary of Godley as president and voting the same to Pettee, who was then the vice president, thereby increasing his salary as such for so long as he performed the duties of the president. At a stockholders' meeting held on the 2d of March, 1896, Pettee, Karlsruher, and Eugene Cookingham were elected directors.

During the existence of the New Jersey corporation, Godley and Pettee entered into an agreement with certain of the company's employes whereby they each sold an equal amount, 255 shares, of their common stock, agreeing that the purchasers pay for the same out of the dividends alone which might be declared upon the same, together with 6 per cent. interest upon the unpaid balance of the purchase price, until said stock was fully paid for. While the purchase price remained unpaid, Godley and Pettee, respectively, continued to hold the same as collateral security, with the power to vote the same. Upon the organization of the New York company, the said purchasers received an equal number of shares in said company, which shares were held by said Godley and Pettee under the same form of agreement. Godley died in December, 1897, leaving the plaintiff his widow, and a last will and testament making her his sole legatee and executrix, and she is now the owner of all his stock—615 shares of the common and 430 shares of preferred stock.

The directors of the New Jersey corporation declared a dividend of 15 per cent. on the common stock for the year 1892, also a dividend of 5 per cent. for the year 1893; but the holders of the common stock each received an amount which in the aggregate was equal to the sum of 15 per cent. upon the common capital stock. They did not declare a dividend for the year 1894, but the holders of the common stock received a sum equal to 13 per cent. The dividend of 15 per cent. declared in 1892, and the additional salary of \$10,000 to Godley and Pettee voted for 1893, were credited on the company's books to "stock account." The amounts equal to 15 per cent. for 1892, 15 per cent. for 1893, and 13 per cent. for 1894 were paid to and received by all the holders of the common stock in accordance with their respective holdings thereof, under the name of dividends for the same years. There is no evidence that it was the custom of and during the existence of the New Jersey corporation to exclude any holder of common stock

from an equal share in the distribution of the profits in accordance with their holdings.

On the 8th of July, 1896, the board of directors of the New York company, consisting of Pettee, Karlsruher, and Cookingham, adopted the following resolution:

"In order to show due appreciation to some of our best and trusted employés, be it resolved, that we make to those an increase in salary for the year 1895 an amount that we can agree upon to those we deem worthy according to their ability and service to the company, as has been the custom heretofore."

The said directors declared a dividend of 6 per cent. for the year 1895, and, claiming as their authority the above resolution, an additional amount equal to 9 per cent. per annum to themselves and all other holders of the common stock, save and except Godley. The court found specifically:

"That the action of the board of directors under the resolution of July 8, 1896, was the first in either the New Jersey or New York companies where the holders of the common stock did not all share equally in the annual distribution made to them by the directors of the company."

On the 1st of March, 1897, the said directors adopted the following resolution:

"Be it resolved, that in order to show due appreciation to some of our best and trusted employés, we make to those an annual increase in salary, to continue until revoked by the board of directors."

Claiming authority under said resolution, the directors, at the direction or under control of Pettee, from the year 1895 to the year 1905, inclusive, paid to themselves and all holders of common stock, who were employés, a sum equal to 9 per cent. per annum on account of such holdings, which payments were continued and made to said stockholding employés, who were neither officers nor directors, for the years 1906, 1907, and 1908; but neither William D. Godley, nor the plaintiff, nor any person similarly situated, participated therein. The additional amounts of 9 per cent. per annum paid to certain holders of common stock employed in the business of the company, and called by the directors "additional salaries," were not measured by the services performed by such shareholders, but were determined by the amount of the stock so held by them, and said employés who held no stock got no so-called "additional salary." The stock which had been sold to certain employés was not allotted to them in amounts measured by the importance of their services nor by their ability.

The defendant Lyman F. Pettee planned and schemed, and declared his purpose to, and did, exclude William D. Godley and this plaintiff from all participation in the profits in excess of 6 per cent. dividends on the common stock, except in the year 1907, when 7 per cent. thereon was paid.

The board of directors, consisting of Lyman F. Pettee, Charles Finckenstadt, and William Pfeiffer, at a meeting held November 14, 1906, voted to themselves increases in salary for the year 1906 as follows: Pettee, as president, from \$5,200 to \$15,000; Pfeiffer, as

vice president, from \$2,590 to \$4,500; Finckenstadt, as secretary, from \$2,600 to \$5,000—and increased the salary of William C. Pettee, a son of Lyman F., as treasurer, from \$1,200 to \$3,000, and in and by said resolution directed that the payment of the increased salaries continue until further action^o of the board of directors. Pursuant thereto the directors paid to themselves and to the said William C. Pettee said salaries as thus increased for the years 1906, 1907, and 1908. Said resolution was by its terms retroactive, in so far as it voted salaries for the year 1906. After the adoption of said resolution, said directors and officers discontinued the payment to themselves of the aforesaid additional and annual payments of 9 per cent. on their respective holdings of common stock.

Lyman F. Pettee, after the Crandall & Godley Company discontinued its business on January 7, 1909, received the sum of \$11,000 as salary for the year 1909, and the sum of \$2,500 for the quarter ending May 1, 1910. The board of directors voted to Pettee, as member of said board, on May 1, 1910, salary at the rate of \$15,000 per annum for the period from January 1, 1909, to July 1, 1909, and caused to be paid to him therefor the sum of \$7,500. Pettee, controlling the majority of the capital stock, refused representation on the board to plaintiff, holding upwards of one-third of the capital stock, though demanded, and at all times refused a statement of the financial condition of the company, save and except for the year 1906. He endeavored from time to time to purchase the plaintiff's stock, at the same time refusing information as to the financial condition of said company. About May 5, 1905, he advised plaintiff to sell her common stock at par, when for the year ending September 31, 1904, the total net earnings, exclusive of said additional amounts of 9 per cent. were \$100,246.97, and the company had a surplus of \$242,509.76 over and above the company's indebtedness, including its capital stock. Pettee in the summer of 1908 sought to purchase plaintiff's stock, advising her that his purpose was to acquire plaintiff's interest for the purpose of turning over the entire business to his sons, and at the same time refused all information as to the financial condition of the corporation. Prior to said offer to purchase, he had caused a dividend to be passed for the year 1907, on the common stock, though the net earnings for the year 1907 were upwards of \$40,000, and the corporation had a surplus of \$243,276.47.

On January 7, 1909, the premises of the Crandall & Godley Company were substantially destroyed by fire. At that time the board of directors consisted of Lyman F. Pettee, holding 1,348 shares, William Pfeiffer, holding 225 shares, and Charles Finckenstadt, holding 1 share, making in all 1,574, a majority of the capital stock. The directors made no effort to continue the business, although they could have done so, and there was no good reason why they should have abandoned the old corporation. On the 31st of December, 1908, the Crandall & Godley Company had (exclusive of good will and franchise account, carried on the books at \$132,000) assets of \$534,439.13, which amount included merchandise at \$195,682.30, and liabilities (exclusive of capital stock) of \$54,326.31, and the sum of \$19,314.40 owed to

defendants L. F. Pettee, Finckenstadt, Pfeiffer, and W. C. Pettee, amounting in all to \$73,640.71. Immediately after the fire, and at the time of the discontinuance of its business, the said company was possessed of substantially all the aforesaid assets, except its merchandise, which was claimed as a total loss against the insurance companies, and allowed by them at the amount of \$195,000, which was duly paid and received by the company between the 20th of January and May 1, 1909.

The defendants William Pfeiffer and William C. Pettee, shortly after the fire, and on the 14th day of January, 1909, organized a new corporation, the Crandall-Pettee Company, for the purpose of continuing, and they did so continue, the business of the Crandall & Godley Company, under the name of and by the defendant Crandall-Pettee Company, and the defendant Finckenstadt joined them in the capacity of credit man. The defendants Lyman F. Pettee and Finckenstadt continued as officers and directors of the Crandall & Godley Company after the fire, and the defendant William C. Pettee continued as treasurer of the Crandall & Godley Company, and at the same time as president and general manager of the Crandall-Pettee Company. Pfeiffer on the 13th of January, 1909, resigned as a director of the Crandall & Godley Company, and became one of the incorporators of the Crandall-Pettee Company. Finckenstadt was elected vice president of the Crandall & Godley Company on the 13th of January upon the resignation of Pfeiffer, and upon the organization of the Crandall-Pettee Company entered its employment and continued as vice president of the Crandall & Godley Company. The defendants Lyman F. Pettee and Finckenstadt, as directors of the Crandall & Godley Company, permitted the Crandall-Pettee Company to take over its business and good will. Pettee and Finckenstadt permitted the Crandall-Pettee Company to hold itself out as successor to the Crandall & Godley Company, and use all of its brands, trade-names, and trade-marks, giving it full access to the books of account of the Crandall & Godley Company, permitting it to use its horses, trucks, and automobiles. They made no effort to sell its brands, trade-marks, good will, and business. They permitted the Crandall-Pettee Company full access to correspondence, permitted it to take and fill orders for merchandise sent by mail to the Crandall & Godley Company by its customers, and to take, use, and appropriate to its own use, and without compensation, the good will and business of said company. They did in bad faith conspire with Pfeiffer and William C. Pettee to turn over and deliver to the Crandall-Pettee Company the business and good will of the Crandall & Godley Company, for the purpose of having the business continued and enjoyed to the Crandall-Pettee Company, and for the purpose of excluding plaintiff and all other stockholders similarly situated from further participation in said business and the good will thereof, without compensation, to the said Crandall & Godley Company. Lyman F. Pettee, Finckenstadt, and Pfeiffer procured the reduction of the capital stock of the Crandall & Godley Company from \$300,000 to \$15,000, and by said reduction the capital became and is wholly inadequate for the continuance of its business. By reason thereof, and the ap-

propriation of its business by the Crandall-Pettee Company, the Crandall & Godley Company is now unable to continue its said business; and the board of directors in bad faith discontinued the business.

The court found that the Crandall-Pettee Company, with a capitalization of \$50,000, took over and successfully continued the business of the Crandall & Godley Company, and that the value of the good will of the Crandall & Godley Company was \$90,000; that it paid for legal services in defense of this action, and since the commencement thereof, the sum of \$6,991.71.

The judgment directs: That the executors of Lyman F. Pettee pay the Crandall & Godley Company moneys paid out of the funds and treasury of said defendant during the period when he was a director and president: (1) All moneys so paid from December 31, 1895, to January 1, 1909, under the name of "additional salaries," to himself and certain officers and directors and employes holding common stock, amounting to the sum of \$207,821.39; (2) all moneys paid under resolution of November 14, 1906, as salary to himself, Finckenstadt, and Pfeiffer, amounting to the sum of \$91,507.50; (3) all moneys paid to himself under the resolution of May 1, 1910, as salary, amounting to the further sum of \$15,418.75; (4) the value of the good will, amounting to \$90,000; (5) legal fees and expenses paid out in and about the defense of this action, \$7,760.80; (6) amount paid as a premium on a bond to discharge a receiver herein, amounting to \$1,100—the said sums amounting in all to the sum of \$413,608.44. That the defendant Finckenstadt account and pay to the company all moneys paid out of the funds and treasury during the period when he was a director from March 1, 1903: (1) All moneys so paid from December 31, 1903, to January 1, 1909, under the name of "additional salaries," to himself and certain officers and directors and employes holding common stock, \$51,628.04; (2) moneys paid under a resolution of November 14, 1906, as salary to himself, Pettee, and Pfeiffer, \$91,750; (3) moneys paid to Pettee as salary under the resolution of May 1, 1910, \$15,418.75; (4) good will, \$90,000; (5) legal expenses, \$7,760.80; (6) premium on bond, \$1,100—in all \$257,415.09. That the defendant Pfeiffer account for and pay to the company all moneys paid during the period when he was a director: (1) All moneys so paid under the name of "additional salaries," from March 1, 1906, to January 12, 1909, amounting to \$7,049.02; (2) paid under the resolution of November 14, 1906, as salary to himself, Pettee, and Finckenstadt, \$91,570.50; (3) the good will, \$90,000—amounting in all to \$188,556.52. That the defendant William C. Pettee account for and pay to Crandall & Godley Company the value of the good will, \$90,000. That the Crandall-Pettee Company account and pay for the good will, \$90,000. That the defendants Crandall-Pettee Company, Finckenstadt, Pfeiffer, William C. Pettee, and the executors of Lyman F. Pettee pay the sum of \$1,000 as extra allowance, and \$738.90 costs.

[1, 2] The basic reason of the corporate disputes which have produced the crop of representative actions, similar to the case at bar, is this: The original members of a joint enterprise or partnership en-

gaged in trade, business, or manufacturing, seeing certain real advantages in incorporation—the two most important being (1) a limitation of personal liability for the debts of the business to the amount invested therein, and (2) freedom from dissolution by reason of the death of a partner—transform the trading partnership into a business corporation, the partners receiving stock in proportion to their interests. So long as they all live, and agree, they treat it as a partnership, and, whether they distribute the surplus profits among themselves as dividends or by way of salaries, the financial result is precisely the same, and there is no one to complain. But when a partner (that is, such a stockholder) dies, or, by reason of disagreement with the majority, is ousted from the management, the majority refuse to regard the stock of that deceased or ousted partner as entitled to the treatment that he was when alive or in agreement. They think that, as they do the work and have the responsibility, they are entitled to keep to themselves, and divide among themselves, all, or the substantial part, of the profits or gains of the business, thus losing sight of the fact that the very form of the enterprise which they have created, to wit, a corporation, which has conferred upon them the benefits of a limitation of liability and a survival notwithstanding the death of a member, couples with those advantages the equality of all the stock, irrespective of ownership, whether original or recent, and irrespective of the participation in the affairs of the company or of the work or labor for it. All the stock is on the same basis of partnership interest, and the right of the majority, or the surviving original partners, to still treat the enterprise as their own and as they will, has ceased. That is the penalty, or payment, which they have to make for the original advantage which they have received by incorporating. It is for this reason that, chafing under the legal necessity of treating all the stock alike, and of dividing the profits pro rata to the holders thereof, they become ingenious in devising methods to evade and avoid their corporate responsibilities. The only safeguard lies in strict adherence to the equitable principle that the directors are fiduciaries, and may not, therefore, deal with themselves. The court is still the refuge and the support of the minority. Whenever a minority stockholder can show that the directors, his fiduciaries, have deviated from the path of square and honorable dealing for their own benefit, the court will exercise its power to right the wrong.

So long as William D. Godley was alive and in good health, Lyman F. Pettee and he conducted the affairs of the successive corporations upon the practical basis of a copartnership. During the existence of the New Jersey corporation, all the common stock was treated alike. Godley's illness and incapacity occurred at about the time of the formation of the New York corporation. Immediately thereafter Godley was deprived of a participation in the profits of the business in excess of the regularly declared dividends. His salary ceased, and was appropriated by Pettee during the short remainder of his life. After his death all the holders of the common stock, with the exception of Mrs. Godley, received a sum equal to 9 per cent. upon their stock holdings in addition to the regularly declared dividends; the result being that from 1895 down to and including 1905 Lyman F. Pettee re-

ceived, upon the basis of his holdings of common stock, in excess of the regular dividends which were paid to plaintiff and upon the basis of 9 per cent. thereof, the sum of \$65,943. During all of this time he was a director of the company, in receipt of a regular salary, and voted for and directed said additional payment to himself. Cookingham, who was a director from 1896 to 1902, received \$5,400; Washburn, who was a director from 1898 to 1906, received \$3,800; and Finckenstadt, who was a director from March 1, 1903, received to and inclusive of the year 1905 \$2,700 under the same conditions. These payments were either extra dividends upon stock or were additional salaries voted and paid by directors to themselves.

[3] 1. Considering them as dividends: The only justification alleged for discrimination among stockholders of the same class of stock is that the New York corporation followed the custom set by the New Jersey corporation, and that this was a justifiable scheme of profit-sharing with stockholding employes. The court found there was no such custom. The basis of recognizing faithful services is one thing. If the board of directors had recognized length and faithfulness of service by increased salary, no minority stockholder, in a representative action, would have the right to complain, for the internal management of the affairs of a corporation is intrusted to the directors and officers. But the distribution of the common stock was not made among the employes upon any proportional basis of length or ability of service, nor were the increased amounts paid to them gauged by any such rule. The amounts were arrived at as dividends are arrived at and paid, not in accordance with services, but in accordance with stock holdings, resulting in an arbitrary and unjust discrimination between the holders of the same class of stock, which stock represents in law investment in the company, and not payment for services.

[4] Considered as dividends, there can be no justification for such discrimination. *Jones v. Terre Haute & Richmond R. R. Co.*, 57 N. Y. 196. But if this be so, and these sums paid to the directors, as well as to all the other stockholders who were employes of the company, are to be considered as improper and discriminating dividends declared and paid, I do not think they can be recovered in this action. It is a representative action. In such an action the plaintiff is asserting the right of the corporation. In such an action the complaint should set forth but two things: First, the cause of action in favor of the corporation; and, second, the facts which entitle the plaintiff to maintain the action in place of the corporation. *Kavanaugh v. Commonwealth Trust Co.*, 181 N. Y. 121, 73 N. E. 562. The corporation cannot recover dividends it has paid, if earned, because it did not pay all the stockholders. The stockholder may have an individual action against the corporation to recover dividends which should have been paid to her. *Peckham v. Van Wagener*, 83 N. Y. 40, 38 Am. Rep. 392. But this is not that action. She sues, not in her own right, but that of the corporation.

[5] 2. The appellants strenuously contend that these payments were not dividends, but were additional salaries. They point out that they were credited at the end of each year, while the regular dividends were

declared at a meeting of the board of directors in March of each year for the preceding year; that they ceased to be paid when an employé died or left the employ of the company. They assert, as the authority for the payment thereof, the resolutions of July 8, 1895, and March 1, 1897; the latter reading:

"Be it resolved, that in order to show due appreciation to some of our best and trusted employés, we make to those an annual increase in salary, to continue until revoked by the board of directors."

In neither of the resolutions is there an allusion to any stock, or to any percentage thereon, as the basis of the increase in salary. In the letter of Washburn of April 17, 1906, a former director and a witness for the plaintiff, he says:

"I particularly refer to my special salary account, on which there is due me, I believe, \$112.65. * * * The special salary is reckoned at \$450 per annum, or 9 per cent. on \$5,000 stock holdings."

And Finckenstadt, a director and the secretary of the corporation, testified:

"The resolution to make payments to our best and trusted employés included Pettee. He was a director. Q. Can you state whether it was determined which of your employés, officers, and directors came within the class described by the resolution? A. My instructions from Lyman F. Pettee. Q. In other words, Mr. Pettee determined those questions? A. I suppose, with the directors. After I became a director, acting under the resolution of March, 1897, I received the same directions from Pettee."

Accepting the claim of the appellants, there seems no escape from the conclusion that the defendant directors are accountable for the sums thus paid to directors during their several terms of office. The validity of payments made to themselves by directors has been carefully considered by this court in the case of *Carr v. Kimball*, 139 N. Y. Supp. 253, handed down at the present term of the court, and the above proposition is fully supported by the cases there cited. *Butts v. Wood*, 37 N. Y. 317; *Kelsey v. Sargent*, 40 Hun, 150; *Copeland v. Johnson Mfg. Co.*, 47 Hun, 235; *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513; *Bosworth v. Allen*, 168 N. Y. 157, 61 N. E. 163, 55 L. R. A. 751, 85 Am. St. Rep. 667; *Jacobson v. Brooklyn Lumber Co.*, 184 N. Y. 152, 76 N. E. 1075; *Miller v. Crown Perfumery Co.*, 57 Misc. Rep. 383, 109 N. Y. Supp. 760, affirmed 125 App. Div. 881, 110 N. Y. Supp. 806; *Davids v. Davids*, 135 App. Div. 206, 120 N. Y. Supp. 350; *Fitchett v. Murphy*, 46 App. Div. 181, 61 N. Y. Supp. 182.

[6] We do not think, treating these payments as salaries, that the directors are accountable for the sums paid to other employés, not directors, for the reasons stated in *Carr v. Kimball*, *supra*.

[7] The appellants claim that there is no finding of the court that the additional salaries so paid by the directors to themselves were excessive. But the court refused to find, at the request of the appellants, that the sums thus severally paid as additional salaries were reasonable, and a proper sum to be paid for the services rendered by them, respectively; and the court did find that the additional salaries were not measured by the services performed in the service of the company,

but were determined by the amount of stock held, and said employes who held no stock got no so-called "additional salary."

[8] It having been established that these additional salaries were paid by the directors to themselves, the burden was upon them of justifying the payment by establishing the value of their services. We are satisfied that a recovery of these amounts is right, and that Pettee should be charged with \$65,943 paid to himself, \$3,600 paid to Washburn while he was a director, \$5,400 paid to Cookingham while he was a director, and \$2,700 paid to Finckenstadt while he was a director, making in all the sum of \$77,643, and that Finckenstadt should be charged with \$2,700 paid to himself, \$1,350 paid to Washburn, and \$17,955 paid to Pettee during his directorate, amounting in all to \$22,005. No additional salaries to directors appear to have been paid during the period that Pfeiffer was a director.

[9] 3. On the 14th of November, 1906, the board of directors, consisting of Pettee, Finckenstadt, and Pfeiffer, voted to themselves increases of salary for the year 1906 as follows: Pettee, as president, from \$5,200 to \$15,000; Pfeiffer, as vice president, from \$2,590 to \$4,500; and Finckenstadt, as secretary, from \$2,600 to \$5,000; and these salaries were continued to 1909. After said resolution, none of the said directors received anything on account of so-called "additional salaries" upon the basis of 9 per cent. of their stock holdings.

These increases come precisely within the condemnation of the cases heretofore alluded to, prohibiting directors from voting salaries to themselves as officers. The court refused to find, at the request of the appellants, that the salaries paid pursuant to the resolution of November 14, 1906, were reasonable and proper sums to be paid for the services rendered therefor, and it did find that the services rendered by said officers were substantially the same after the passage of said resolution as prior thereto; that the resolution by its terms was retroactive, in so far as it voted salaries for the year 1906; that at the time of the increase under said resolution the volume of business transacted by the company was substantially the same as in its preceding year, and not so large as in the year 1902; and as a conclusion of law that the resolutions providing for the payment of said salaries were and are illegal and invalid, and the judgment requires the full amount to be accounted for.

[10] This latter conclusion we think erroneous. The evidence established that the services rendered by such officers were reasonably worth to the corporation at least what had theretofore been paid to them as regular salaries, and they should have been allowed those amounts.

[11] 4. When we come to consider the transactions connected with the discontinuance of the business of the Crandall & Godley Company, and the formation of the Crandall-Pettee Company, it would seem to present a case of consummation of the long-cherished design to get rid of the Godley interests, in which the Pettee interests took advantage of the fortuitous circumstance of the fire to "freeze" Mrs. Godley out and to turn the whole business of this long-existing and successful concern over to a new corporation, formed by practically the

same interests, with the single exception of the plaintiff. The business was a going concern. Its good will, when formed, was valued at \$132,000, and so carried on its books. It had been prosperous. It was completely insured. The new company went right on with all the existing paraphernalia and plant which had not been wiped out by the fire—the old customers, the old trade-marks, the old horses and wagons, with the old employes. Everything was continued, with the exception of a name and the extermination of the Godley interest. The Crandall & Godley Company has not been dissolved. It still exists as a legal entity; but it has practically ceased to exist as a business concern. Its capital has been reduced to a nominal sum. This condition was brought about deliberately by its directors. In *People v. Ballard*, 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737, Judge Vann said:

"All the authorities in this state are uniform in holding that the trustees of a corporation cannot so dispose of its property as to virtually end its existence and prevent it from carrying on the business for which it was incorporated" (citing cases).

It is true that Lyman F. Pettie did not take any stock in the new company; but his son did, and the father promised him his backing. Of course, the court cannot compel the continuance in business of the Crandall & Godley corporation, nor undo the acts by which its capital stock was reduced. But it can say that the successor company shall not appropriate, without payment, the good will of a business which had been in existence in one form or another for 41 years, and that those perpetrating such a transaction, and the beneficiary thereof, shall pay to the despoiled company the fair value of that which it has so taken. There is no complaint made of the method of ascertaining the value of the good will and the amount thereof, provided that the plaintiff is entitled to have that item considered and the value thereof accounted for and paid to the Crandall & Godley Company. It was that used in *Von Au v. Magenheimer*, 126 App. Div. 257, 110 N. Y. Supp. 629, affirmed 196 N. Y. 510, 89 N. E. 1114.

The tangible property of the Crandall & Godley Company could not have been disposed of by its directors and appropriated by the Crandall-Pettie Company without an accounting therefor. The good will was property. It is an asset of a copartnership, which on dissolution must be sold and accounted for. *Slater v. Slater*, 78 App. Div. 449, 80 N. Y. Supp. 363; *Id.*, 175 N. Y. 143, 67 N. E. 224, 61 L. R. A. 796, 96 Am. St. Rep. 605; *Matter of Silkman*, 121 App. Div. 202, 105 N. Y. Supp. 872, affirmed 190 N. Y. 560, 83 N. E. 1131. It is an assignable asset of a bankrupt copartnership, which passes to the trustee in bankruptcy, and upon a sale by the trustee passes to the purchaser. *Freeman v. Freeman*, 86 App. Div. 110, 83 N. Y. Supp. 478.

In *White, Corbin & Co. v. Jones*, 79 App. Div. 373, 79 N. Y. Supp. 583, an action upon a stockholder's liability, on the claim that the property which made up the assets of the corporation had been knowingly overvalued, and that the capital stock had not been fully paid up, it was held that the good will of two firms, whose property had

become vested in the corporation, whose name was in no way derived from or suggested either of said firms or any of their members, must be taken into the account and estimated as property in the same manner as the machinery and tangible property was appraised.

If these decisions represent the law of the state, it follows, upon the findings of the Special Term, that this good will, permitted to be appropriated by the scheme and device adopted, must be accounted for by the unfaithful directors, who permitted, and the individual and corporate defendants, who profited thereby.

If modern business is to continue to be conducted by these artificial entities known as corporations, which are incapable of doing anything in and of themselves, but must be guided, controlled, and governed by directors and managers, the courts, when appealed to, must see to it that those directors and officers act honestly, straightforwardly, and with a regard to the principles of equity which have been so often laid down.

[12] 5. The appellants object to the provision of the judgment requiring the payment of the legal fees and expenses paid out in and about the defense of this action and the amount paid as a premium on a bond to discharge a receiver herein. It would seem as if the directors of the company, who were responsible for the conditions which required the action, should pay such expenses, instead of the corporation itself.

The judgment appealed from should be modified as indicated, and, as modified, affirmed, without costs to either party on this appeal. The amounts stated therein will be materially changed, and many of the findings will have to be modified. Our conclusions, however, are sufficiently supported by the facts as found, and we are of opinion that under the recent amendment of section 1317 of the Code of Civil Procedure an order can be made doing justice to all parties and thereby avoiding the necessity of a new trial, which, in view of the voluminous record, would be unfortunate.

INGRAHAM, P. J. I concur with Mr. Justice CLARKE in his opinion so far as it affects the additional sums of money which the trustees voted to themselves over and above the regular salaries that had been paid prior to the time that the increases were allowed, but I do not concur in the conclusion at which he arrives in regard to the good will of the Crandall & Godley Company.

After William D. Godley became ill and incapacitated in May, 1895, the entire management and control of the company devolved upon Lyman F. Pettee, who seemed to have been the controlling manager of the corporation from that time until the company discontinued business in consequence of the destruction of its plant by fire. Before that time Lyman F. Pettee had become seriously ill, and for some time prior to the fire had been unable to devote very much time to the business of the company. So far as appears, there was no one representing the plaintiff's interest in the company who had the capacity or was able to take charge of rehabilitating the company and continuing its business after its plant and property had been destroyed. Ly-

man F. Pettee was unable, by reason of the condition of his health, to continue the business, and he died about a year afterwards. There was no obligation upon his sons, who would succeed to his property after his death, as they were not officers of the company, and were under no obligation as trustees or otherwise to continue the business. The company had a large amount of assets, which included the insurance on the property destroyed by the fire. But it appeared that after Lyman F. Pettee had been unable to devote his time and ability to the service of the company the business had ceased to be profitable, and the year before the fire the business was considered at a loss of upwards of \$8,000, instead of the large profit that had been made prior to that time. I do not think that the determination of the directors of this company to discontinue the business was fraudulent, or imposed upon them any liability. In fact, as I read this record, they neither had the ability nor the means to reconstruct the plant and continue the business. It was their duty, however, to wind up the affairs of the company to the best interest of the stockholders, and undoubtedly the good will of the business was an asset that should have been disposed of for the benefit of the stockholders.

Nor do I think that the act of the son of Lyman F. Pettee and his associates, who organized the Crandall-Pettee Company and started the business, made them liable to the plaintiff or to the Crandall & Godley Company for the organization of that company, or for their acts in obtaining so far as they could the customers of the Crandall & Godley Company. They were under no fiduciary obligation to the plaintiff, or to the Crandall & Godley Company, and I do not think the evidence sustains the conclusion that Lyman F. Pettee, considering the condition of his health at the time, was an actual participant in the organization of that company, or was guilty of any fraud which would impose upon his estate a liability for whatever of the good will of the Crandall & Godley Company as was secured by the Crandall-Pettee Company. The charge is that the directors of the Crandall & Godley Company permitted the Crandall-Pettee Company to conduct this business in such a way that it secured a large portion of the business of the Crandall & Godley Company. Just what this "permitting" means, or why it should impose a liability upon the directors of the Crandall & Godley Company, I do not understand. What else could these directors do? They certainly could not prevent the Crandall-Pettee Company from doing business, or from selling to the customers of the Crandall & Godley Company who wished to deal with the new corporation. The situation was peculiar. Lyman F. Pettee had been the controlling influence in the management of the Crandall & Godley Company, and it was under his management and control that the company for years had been able to conduct a profitable business. He was incapacitated from further work. The fire had destroyed the business of the company as a going business, and it could not continue without a reconstruction of its plant and a reorganization of its business. It seems to me that it had nothing to do but to discontinue business. It is true that the directors could have applied to have the corporation dissolved, have a receiver appointed, and it may be sell

the good will of the business conducted by the corporation with its other assets which did not consist of money; but these directors represented a very small portion of the capital stock of the corporation, and, if the plaintiff had wished to accomplish such a result, she could have commenced at once the proper action for that purpose; but there is nothing in the record, as I view it, to show that the Crandall-Petree Company actually acquired the good will of the Crandall & Godley Company. It did not purport to have acquired such good will, and while it seems to have appropriated or used certain of the trade-marks of the company, and for a short time property that had been saved from destruction by the fire, the good will of the business as a going business was never, as I read this testimony, actually appropriated by the Crandall & Godley Company, and I think it entirely unjust to charge the directors of the Crandall & Godley Company, or the Crandall-Petree Company and its organizers, with the value of the good will of the Crandall & Godley Company as a going concern.

I therefore dissent from the determination to affirm so much of the judgment as in this action imposes upon any of the defendants a liability for what the court finds was the value of the good will of the Crandall & Godley Company.

McLAUGHLIN, J., concurs.

SCOTT, J. I concur entirely with Mr. Justice CLARKE so far as he goes; but in my opinion we should go further, and hold the defendants who were directors of the Crandall & Godley Company liable to the company, not only for the moneys fraudulently paid out to themselves under the guise of increased or additional salaries, but also for the moneys paid out in like manner and under the same guise to those favored stockholders who were employes, though not directors, of the corporation.

The basis upon which the directors are held liable at all is that they unlawfully diverted the money of the corporation to themselves and other favored stockholders, ostensibly as salaries or compensation for services, but really with a view to dividing up the surplus among themselves and those whom they favored, thus undertaking to "freeze out" the stockholders with whom they were not friendly. In effect they are found guilty of having paid the moneys of the corporation to themselves and others without consideration or equivalent flowing to the corporation. This was an unlawful diversion of the funds of the corporation, and a fraud upon the minority stockholders. The reason why the directors are required to pay back what they illegally received under this scheme is that they were actors in it, and in so acting violated their fiduciary relation to the corporation and its stockholders. I think that they are liable for all that was thus illegally paid out as a result of their wrongful acts. In *Latimer v. Veader*, 20 App. Div. 418, 46 N. Y. Supp. 823, an officer of a bank who had embezzled its funds was held liable, not only for what he had stolen himself, but for all that had been stolen by his subordinates through his connivance or negligence. The same rule I think is applicable to the present case.

I am therefore of the opinion that the judgment should be affirmed, without modification.

While entertaining the views above expressed, I am not disposed to insist upon them, if by so doing the disposition of the appeal will be delayed. The case is an important one, involving a large amount of money, and will, I assume, be taken to the Court of Appeals. If so, we should not unnecessarily delay its progress. The case was carefully tried, and it is wholly improbable that any new facts would be developed upon a new trial. The appeal was fully and ably argued, and it is not probable that a reargument would throw any further light upon the questions as to which the members of this court are divided in opinion. I am therefore prepared, in order that the case may be disposed of, so far as this court is concerned, to concur in the opinion of my Brother CLARKE, merely expressing my own opinion as above stated.

LAUGHLIN, J. I concur in the views expressed by Mr. Justice CLARKE, excepting on one point. I am of opinion that the directors were guilty of a breach of their trust in authorizing the disbursement of moneys of the corporation in the form of salaries or bonuses to employés, based solely upon the stock ownership of such employés, by which, in effect, dividends were given to such stockholders in the form of salaries, for the purpose of depriving the plaintiff from participating in dividends. It was shown by the evidence, and found by the trial court, that such payments, in so far as they purported to be increases of salary or bonuses, were not based upon services rendered.

The principle upon which directors are accountable to the stockholders of a corporation is that they owe to them a trust duty to exercise reasonable care in the management of the property and affairs of the corporation; and on that theory they are, I think, equally accountable for moneys which they negligently, and without consideration to the corporation, allow to be disbursed to *employés*, as for funds which they appropriate to themselves. *Mutual Life Ins. Co. v. McCurdy*, 118 App. Div. 815, 103 N. Y. Supp. 829; *Id.*, 118 App. Div. 827, 103 N. Y. Supp. 837; *Id.*, 118 App. Div. 822, 103 N. Y. Supp. 840; *People v. Equitable Life Assurance Society*, 124 App. Div. 714, 109 N. Y. Supp. 453.

The judgment, however, instead of requiring the directors to account for the *increase* of salaries, payment of which they thus authorized, requires them to account for the *entire amount* of the salaries thereafter paid. This, I agree with my Associates, was erroneous, because, but for such action, the salaries would have continued as previously lawfully fixed.

I therefore vote to modify the judgment by confining the accounting concerning salaries received by the directors, or paid out pursuant to the resolution of November 14, 1906, to the *increase* of salaries received or paid out under said resolution, and for its affirmance as so modified.

(153 App. Div. 825.)

CARR et al. v. KIMBALL et al.

(Supreme Court, Appellate Division, First Department. December 13, 1912.)

1. CORPORATIONS (§ 308*)—DIRECTORS—MALFEASANCE—DISTRIBUTION OF PROFITS—EXCESSIVE SALARIES—ADDITIONAL COMPENSATION.

Since directors of a private corporation are trustees of the corporation and for all the stockholders, and may not deal with themselves for their own benefit to the detriment of the corporation and the minority, where the majority first elected themselves directors, then officers, and then, instead of treating all the stockholders alike in the distribution of profits, distributed a large portion to themselves by voting to themselves excessive salaries, additional compensation, etc., the minority stockholders were entitled to sue in a representative action, for the benefit of the corporation, and cause the money so improperly taken from the corporation to be returned to its treasury.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.*]

2. CORPORATIONS (§ 308*)—DIRECTORS—TRUSTEES—CONTRACT WITH THEMSELVES.

Directors of a corporation, being trustees for the stockholders, are incapable of contracting with themselves in fixing their own salaries, and such purported contracts, if made, are voidable at the suit of the corporation, or minority stockholders, suing in a representative capacity, though the officer, under such circumstances, if he has performed work under a voidable contract that has benefited the corporation, is entitled to receive pay therefor on the theory of a quantum meruit; the burden being on him to show the fair and reasonable value of the services.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.*]

3. CORPORATIONS (§ 308*)—OFFICERS AND DIRECTORS—SALARIES—BY-LAWS—RIGHT TO VOTE—DISQUALIFICATION.

A by-law of a business corporation, that the compensation of all officers, employes, or agents of the corporation appointed by the board of directors should be fixed by the board, did not validate a resolution fixing the salary of a member of the board, whose vote was necessary to constitute a quorum.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.*]

4. CORPORATIONS (§ 308*)—DIRECTORS—MISCONDUCT—MISAPPROPRIATION OF FUNDS.

Where directors of a corporation improperly voted profits to certain of their number, who were officers, under the guise of additional compensation, a member of the board, who was not an officer, and did not himself draw a salary or benefit by his vote, was not bound to refund any part of the money taken from the treasury under such resolutions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.*]

5. CORPORATIONS (§ 308*)—DIRECTORS—MISCONDUCT—SUIT BY MINORITY STOCKHOLDER.

Where the directors of a corporation, in the exercise of their powers to manage its affairs, fixed the salary of the corporation's treasurer, who was not a director, and whose relation to the company was entirely contractual, a minority stockholder could not recover from the directors money voted to the treasurer out of such funds, on the ground that it was an illegal increase of the treasurer's salary.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.*]

Scott and Laughlin, JJ., dissenting.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Special Term, New York County.

Action by Walter C. Carr and Lucretia M. Carr, suing on behalf of themselves and all others similarly situated, against Horatio G. Kimball, the Broun-Green Company, and others, to compel an accounting by defendants as directors of the corporation. Judgment for plaintiffs, and defendants Kimball and Lawton and the corporation appeal. Modified and affirmed.

See, also, 151 App. Div. 928, 136 N. Y. Supp. 347.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Clarke, Breckinridge & Caffey, of New York City (Samuel B. Clarke, of New York City, of counsel, and Francis G. Caffey, of New York City, on the brief), for appellants.

William F. McCombs, of New York City (Abram I. Elkus, of New York City, of counsel, and Alexander Gordon and Carlisle Gleason, both of New York City, on the brief), for respondents.

CLARKE, J. This is a representative action brought by minority stockholders. The complaint charged a fraudulent conspiracy, prior to January 20, 1908, to oust plaintiff W. C. Carr from the directorate and from the service of the company, and thereafter to waste the net assets of the company in payment of excessive salaries and wages, and sought recovery from the directors of alleged excesses of salaries and wages paid to officers and employes of the company in 1908 and 1909, after Carr's ouster.

The judgment of June 30, 1911, which this court in a former opinion (151 App. Div. 928, 136 N. Y. Supp. 347) declared to be interlocutory, provided that the certain resolutions of the board of directors in 1908, 1909, and 1910, fixing salaries, be rescinded; that the defendants Kimball, Winnemore, and Lawton pay to the company the sum of \$12,180, being the difference between the sum of \$28,580.30, paid to Kimball as president, Winnemore as vice president and secretary, and Ward as treasurer, from January, 1908, to December 31, 1909, and the sum of \$16,400, the fair and reasonable value of their services at \$5,000, \$2,200, and \$2,000 a year, respectively; that said defendants account for the difference between the sums paid to Kimball, Winnemore, and Ward from January 1, 1910, to the date of the judgment, and the said salaries so fixed as fair and reasonable; and that a referee be appointed to take said account. Leave was granted to apply at the foot of the judgment for further direction. A perpetual injunction was also included in said judgment, restraining the company and said defendant directors from paying any salaries or other compensation exceeding the fair and reasonable value to the corporation of the services theretofore rendered or thereafter to be rendered by Kimball, Winnemore, and Ward.

A referee was appointed, an accounting had, and, by the judgment of March 28, 1912, the report of the referee was confirmed, and it was adjudged that Kimball, Winnemore, and Lawton pay to the corporation the further sum of \$9,005, with interest. From these judgments, Kimball, Lawton, and the corporation appeal. The action was

discontinued as to Ryan before the trial, and Winnemore does not appeal.

The following facts were found by the learned Special Term:

Prior to the year 1894 a partnership known as Broun, Green & Adams was engaged in the stationery business in the city of New York. In said year the corporation Broun-Green Company was formed under the laws of the state of New York, which succeeded to the business of said partnership. Its capital stock was \$50,000, divided into 500 shares, of the par value of \$100 each. In 1895 the defendant Horatio G. Kimball acquired, and has ever since owned, a majority of the stock. On July 1, 1895, Kimball was elected secretary and treasurer, and became the executive head of the corporation, having been president and a director from 1896 to the present time. In 1897 the plaintiff Walter C. Carr entered the employment of the corporation, and thereafter and until January 20, 1908, remained in its employ and devoted his time solely to its business and interests. In 1899 he was elected a director and secretary and treasurer, and continued so until January 20, 1908. Said Carr devised and built up a very successful and profitable branch of business, namely, furnishing corporation outfits and supplies. This was an entirely new line in the defendant company's business, and for many years past has constituted over 50 per cent. thereof. On January 2, 1900, Kimball and Carr entered into a written agreement for the purchase by Carr and the sale by Kimball of 200 shares of the capital stock of the defendant corporation. Said agreement provided that for a period of three years they would vote for the election of each other as members of the board of directors and use their power as directors to vote Kimball a salary of \$7,500 and Carr a salary of \$5,000 for the term of three years, to increase their respective salaries in proportion to said salary, in the event that the profits of the business permitted such increase, and to decrease said salaries in similar proportion should a decrease in profits make it necessary, and to divide between themselves as salary, proportionate to the amount of their salaries of \$7,500 and \$5,000, respectively, any profits of the business which might accrue after a fund of \$10,000 should have been accumulated in its treasury. After the sale of said 200 shares to Carr, Kimball and he owned together 97 per cent. of the capital stock, said Kimball owning substantially three-fifths and Carr two-fifths thereof, and their said salaries provided for in the agreement were intentionally proportioned by them to their respective stock holdings, and were intended to be a distribution of profits in the guise of salaries, and not merely compensation for their services.

From 1900 to 1906 the only other stockholders were defendant Ryan, who held 3 shares, defendant Winnemore, who held 12 shares, and Richard Lawton, Sr., who held 5 shares of Kimball's stock to qualify him as a director, but which were beneficially owned by Kimball. Carr acquired 1 additional share to the 200 bought from Kimball. From 1900 to 1906 all of the stockholders, except Lawton, were employés of the company. The terms of the said agreement of January 2, 1900, were observed during the three-year term provided therein,

except that the profits other than the salaries of \$7,500 and \$5,000 were distributed as "extra compensation." Such salaries were not based upon services rendered, and were not designed to equal the fair and reasonable value of their services as officers and employes, but were much in excess thereof. In 1903 and 1904, after the termination of the agreement, on account of prolonged absences of Kimball, the salaries of Kimball and Carr were equalized, to wit, at \$6,250 in 1903 and \$4,800 in 1904. In 1905, 1906, and 1907 the salaries of Kimball and Carr were respectively \$7,500 and \$5,000, \$9,000 and \$6,000, \$9,000 and \$6,000.

These salaries were in substantial proportion to their stock holdings, were distributions of profits in the guise of salaries, and were not designed to be, and were not, the fair and reasonable compensation for their services. During the period from 1900 to 1907 the corporation made distributions of its profits to its stockholders on their stock under the name of "extra compensation," in lieu of dividends; but said extra compensation was based on stock ownership, precisely as dividends are based. During those years no dividends were distributed, except that in 1906 and 1907 dividends of 6 per cent. were declared to avoid making a report to the state comptroller. These dividends, in addition to "extra compensation," were distributed to its stockholders. From 1900 to 1907, inclusive, the board of three directors consisted of Kimball, Carr, and Lawton, Sr. Lawton held the 5 qualifying shares alluded to, but he never attended a directors' meeting, or took any part in the affairs of the corporation, and was never consulted as to the salaries to be voted, or drew dividends on the shares standing in his name, which were drawn by Kimball. During said period Kimball completely controlled and determined the amounts to be drawn by the officers and employes as salaries. During said period the corporation was in effect conducted in respect to the distribution of profits and salaries to Kimball and Carr as a partnership, in which the former held a three-fifths interest and the latter a two-fifths interest.

In 1906 Carr sold to defendant Ryan 21 shares of his stock, and Kimball sold to him 26 shares of his. In January, 1907, Lucretia M. Carr, wife of Walter C. Carr, acquired 5 shares. Plaintiff W. C. Carr now owns 175 shares, plaintiff Lucretia Carr 5 shares, defendant Kimball owns 253 shares, defendant Winnemore 12 shares, Lawton 5 shares, and Ryan 50 shares. In January, 1905, Kimball attempted to reduce Carr's salary, and to raise his own to \$9,000 a year. Carr refused to consent, and did not sign the minutes purporting to authorize such increase until after Kimball consented that his salary and that of Carr should be, for 1905, \$7,500 and \$5,000, respectively. In January, 1906, Kimball insisted that his salary should be fixed at \$9,000. Carr protested against any increase, and only consented to increase to \$9,000 and \$6,000, respectively, when Kimball threatened him with expulsion from the employment of the defendant corporation unless he consented to the increase in Kimball's salary. In 1907 Kimball again fixed his own salary at \$9,000 and Carr's at \$6,000. Said increases were not commensurate with any increase in the duties or services of Kimball or Carr.

The court specifically found:

"That in or about the year 1905 said Kimball wrongfully and fraudulently formed the plan of depriving plaintiff Walter C. Carr of all connection with defendant corporation, of obtaining complete control thereof and voting himself as its president a grossly excessive salary, or of a much greater salary than he had previously drawn."

It was further found that defendant Richard M. Lawton is a relative and close personal friend of defendant Kimball, and is the holder of 5 shares of stock, which he acquired shortly before January 20, 1908, from said Kimball as a gift to qualify as director. Said shares were held theretofore by Richard Lawton, Sr., the father of said Richard M. Lawton, who had been a director from 1900 to 1907, inclusive. Prior to January 20, 1908, defendants Kimball, Winnemore, Lawton, and Ryan, owners of record of 320 shares of the capital stock of the defendant company, conspired to use their control of the majority of its stock to exclude Carr from the employ thereof, and the plaintiffs from representation on its board of directors, from influence in its management, and from information as to its assets, business, and affairs, and thereafter to waste and dissipate the net assets and profits of the company, and to defraud the said company by diverting the same to the payment to defendants Kimball, Winnemore, and Ryan, and to other employes of said corporation, of salaries greater than the fair and reasonable value of the services of such persons to be rendered to said corporation. By the unanimous vote of the stock held by said Kimball, Winnemore, Ryan, and Lawton, defendants Kimball, Winnemore, and Lawton were elected on the 20th of January, 1908, re-elected in 1909 and 1910, and composed the whole board of directors. At a meeting of the board attended by defendants Kimball, Winnemore, and Lawton on January 20, 1908, said directors elected defendant Kimball president, defendant Winnemore vice president and secretary, and Terence A. G. Ward treasurer, thereof, and failed to elect plaintiff W. C. Carr to any office of said company, and failed to continue him as an employe thereof; that said defendants Kimball, Winnemore, and Ward were re-elected to said offices in 1909 and 1910, and served as such officers until the trial of this action. Defendant Kimball has since January 20, 1908, dominated the other members of the board of directors, and the votes and the actions of said board were always thereafter the result of his dictation. Said directors excluded Carr from the employment of said company, from access to its place of business, books, and records, and ever since have deprived plaintiffs, so far as in their power, of all knowledge of its affairs and business. In January, 1908, defendants Kimball, Winnemore, and Lawton authorized payment to Kimball of a salary of \$9,000 a year as president, and to defendant Winnemore a salary of \$2,600 a year as vice president and secretary, of which \$520 was so-called extra or additional compensation. On April 21, 1909, defendants Kimball, Winnemore, and Lawton authorized the payment to defendants Kimball and Winnemore, and to Terence A. G. Ward, J. F. Townsend, C. F. Trafton, and A. W. Gill of the sums of \$11,400, \$2,340, \$1,560, \$1,248, \$1,170, and \$1,144, respectively, per year as salaries from the 18th of January, 1909, as

president, vice president, and secretary, treasurer, and employés of the defendant corporation, respectively, and further authorized the payment to said Winnemore, Ward, Townsend, Trafton, and Gill, in lieu of all previous forms of additional compensation of amounts equivalent to dividends on 30, 15, 10, 5, and 5 shares of stock, respectively, whenever dividends should be declared and paid by the defendant company, including all dividends declared and paid since January 18, 1909. Said Trafton, Townsend, and Gill are not and never have been stockholders.

In and by the said resolution, defendants Kimball, Lawton, and Winnemore authorized the payments of the increased salaries, including increased additional compensation, to the said Kimball and Winnemore for the period from January 18, 1909, to April 21, 1909, although the services rendered by defendants Kimball and Winnemore, for which said resolution purported to authorize such increased and additional compensation, had been already paid for by the defendant corporation as salaries paid under the resolutions adopted on January 20, 1908, and June 11, 1908. The increased salaries, including the increased extra compensation, amounted to somewhat more than the salary of \$6,000 a year which the plaintiff Carr had drawn prior to January 20, 1908. Said increases were without any corresponding increases in the value of their services rendered to the corporation as its officers and employés, and were without any increase in their duties and responsibilities. Defendants Kimball and Winnemore have continued since January 20, 1908, to perform substantially the same duties that they were performing before that date. Defendants Kimball and Winnemore made use of their positions as directors to promote their own interests, by increasing the said salaries without regard to the interests of the defendant corporation, and to its detriment, and the detriment of the plaintiffs. On January 24, 1910, defendants Kimball, Winnemore, and Lawton authorized the payments of salaries during 1910 at the same rates as the previous year, and such salaries include the payment of the so-called extra or additional compensation. Said salaries paid by, and authorized to be paid to, Kimball and Winnemore during the years 1908, 1909, 1910, and 1911, and to said Ward during the year 1909, under the terms salaries, and the terms extra or additional compensation, were and are extravagant and largely in excess of the fair and reasonable compensation for their services rendered to the corporation as its employés and officers. Said salaries and extra compensation were paid wholly out of the assets and net profits of the defendant corporation, and were without consideration or return in value therefor. The fair and reasonable value of the services as officers and employés of defendants Kimball and Winnemore and of Ward during the years 1908, 1909, 1910, and 1911 was and is the sums, respectively, of \$5,000, \$2,200, and \$2,000 a year. Defendants Kimball, Winnemore, and Lawton did not authorize payments of the salaries, including extra compensation, paid Kimball, Winnemore, and Ward, since January 20, 1908, in good faith, or with regard to the best interests of the defendant corporation, and to promote its interests, or with regard to the services to be returned therefor by their recipients,

and did not honestly regard such salaries and extra compensation as the fair and reasonable compensation for the services to be rendered therefor. The defendant directors had never since the exclusion of plaintiff W. C. Carr from the company considered the question of salaries in good faith, but have knowingly acted in fraud of the corporation and of the plaintiffs herein, and knew that said salaries were extravagant and in excess of the value of their services. They purposed and intended, by authorizing and making such payments of salaries, to waste and dissipate the assets and net profits of the defendant corporation, and to appropriate its profits fraudulently in the guise of excessive salaries, and the authorization and payment of such salaries during the years 1908 to 1911, inclusive, was in pursuance and in consummation of the scheme of said Kimball and of his conspiracy with said defendants Lawton, Ryan, and Winnemore to pay to himself and other officers and employes excessive and extravagant salaries after he should have excluded the plaintiff W. C. Carr from the employ of the defendant corporation. Such payments over the fair and reasonable compensation constituted waste of the assets of the defendant corporation, and were a fraud upon the defendant corporation and a breach of trust on the part of the defendants Kimball, Winnemore, and Lawton. The defendants Kimball, Winnemore, Lawton, and Ryan have since the 20th day of January, 1908, exclusively controlled the defendant corporation, and a demand by the plaintiffs upon them, or any of them, to bring this action, or to take any action to reduce the salaries authorized by defendants Kimball, Winnemore, or Lawton, or to procure the same to be refunded, would have been useless. Defendants Kimball, Winnemore, and Lawton intend to continue to waste and dissipate the assets of the defendant corporation by paying extravagant and unreasonable salaries to its officers and employes, and that such corporation will sustain irreparable damage thereby, unless said defendants are restrained from so doing.

[1] The case presents an illustration of that form of industrial development where a business partnership is transformed into a small and close business corporation, and, so long as harmony exists among its members, is conducted practically as a copartnership; but, when dissension and disagreement arise, the majority attempts to oust the minority, not only of control, but of a fair return upon the investment. Instead of treating all the stock alike, and distributing the profits fairly and proportionately by way of dividends, the majority first elect themselves directors, then as directors elect themselves officers, and then distribute among themselves a substantial part of the profits in the way of excessive salaries, additional compensation, and other devices. The legal difficulty to the final accomplishment of these purposes lies in the well-settled proposition that the directors are trustees of the corporation and for all the stockholders, and may not deal with themselves for their own benefit, to the detriment of the corporation and the minority, who, by a representative action, may cause the sums improperly taken to be returned to the treasury. The following cases sufficiently establish the trustee doctrine in this state:

In *Butts v. Wood*, 37 N. Y. 317, the action was brought to set aside

the proceedings of the defendants as directors in voting to the defendant Wood extraordinary compensation for his alleged services as secretary and otherwise. At the meeting of the board when the resolution was passed there were present three of the five directors; the three being the defendant, his father, and a kinsman. The court said:

"This board, as thus constituted, had no authority to entertain the bill in question, or to do anything in relation to it. * * * The claimant was disqualified from acting, because he could not deal with himself, and without him there was no quorum of the directors, and they had no authority to transact business. The relation existing between Daniel Wood and the corporation was that of trustee and cestui que trust. * * * The rule that one holding a position of trust cannot use it to promote his individual interests, by buying, selling, or in any way disposing of the trust property, is now rigidly administered in every enlightened nation, and its usefulness and necessity become more and more apparent. * * * To permit such a transaction to stand would be a reproach to the administration of justice."

In *Kelsey v. Sargent*, 40 Hun, 150, an action by stockholders to set aside notes made by officers of a company, who were also directors, in payment of salaries voted for by themselves, Mr. Justice Haight said:

"The question is thus sharply presented as to whether or not the directors of a corporation have the power to bind the stockholders to pay such salaries as they by resolution see fit to vote themselves. * * * In *Coleman v. Second Ave. R. R. Co.*, 38 N. Y. 201, the general rule was stated to the effect that directors, acting as directors and composing a majority of the board, could not make a bargain with themselves binding upon the company. * * * Without stopping to determine the question as to whether or not the board of directors have the power by resolution to vote salaries to one or more of their own body, we are clearly of the opinion that such salaries so voted are not binding upon the company, where the director in whose favor the salary is voted is present participating in the proceeding."

In *Copeland v. Johnson Mfg. Co.*, 47 Hun, 235, Daniels, J., in an action to recover an assigned claim for salary, said:

"A director or trustee of a corporation is disabled from stipulating or agreeing in behalf of the corporation and of himself for a benefit from it to himself. He acts in the capacity of trustee, * * * and as he sustained that relation to the company he could not bind it by agreements securing or obtaining those beneficial results for himself."

The rule is stated in *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513:

"Where it appears that the trustee or other officer has violated the moral obligation to refrain from placing himself in relations which ordinarily produce a conflict between self-interest and integrity, there is in equity a presumption against the transaction, which he is required to explain."

In *Bosworth v. Allen*, 168 N. Y. 157, 61 N. E. 163, 55 L. R. A. 751, 85 Am. St. Rep. 667, the court said:

"While courts of law generally treat the directors as agents, courts of equity treat them as trustees, and hold them to a strict account of any breach of the trust relation. For all practical purposes they are trustees, when called upon in equity to account for their official conduct. * * * Directors of a corporation are charged with the duties of trustees, and bound to care for its property and manage its affairs in good faith, and for a violation of that duty, resulting in a waste of its assets, injury to its property, or unlawful gain to themselves, they are liable to account in equity the same as ordinary trustees. * * * It is the peculiar province of courts of equity

supervise the execution of trusts, and to call trustees to an accounting for their management of trust estates, and especially for every violation of their primary duty not to deal with trust property to their own advantage."

Jacobson v. Brooklyn Lumber Co., 184 N. Y. 152, 76 N. E. 1075, presents many of the features of the case at bar. It was a representative action, brought by minority stockholders, to recover for the corporation from the individual defendants amounts received by them for salaries as officers of the corporation, and to cancel any and all resolutions purporting to authorize said individual defendants to credit themselves with certain amounts of accumulated or deferred salaries. When the corporation was organized there were five stockholders, all of whom became directors, and the salaries paid to the officers were moderate. Subsequently the board of directors was reduced from five to three, the plaintiff was ousted from his office, and the board consisted of Verity, who was made president, and Robertson, who was made vice president and treasurer, and a brother of said Robertson, who owned 5 shares. A resolution was thereupon adopted, fixing the salaries of the president and the vice president at \$8,000 a year each. Notwithstanding the trial court found as facts that Robertson and Verity had been officers since its organization, had devoted all their time to its business, and the company was in a prosperous condition as a result of their management, and that the increases in salary were legitimate and commensurate with the increase in business and resulting profit, the Court of Appeals said:

"The findings which it is claimed justify their acts in so taking and crediting to themselves increased salaries are in substance that the net assets of the corporation have not been depleted, but increased, and that the salaries are legitimate and commensurate with the increased business and resulting profits. The relation of an officer to a corporation is fiduciary, and he must at all times act in good faith and unselfishly towards the corporation. The relation is such that an officer of a corporation cannot make an agreement with himself, acting on the one part individually and for his own benefit, and on the other part in his fiduciary capacity as an officer of the corporation. It is said in 10 Am. & Eng. Enc. of Law, 790: 'A director cannot, with propriety, vote in the board of directors upon a matter affecting his own private interest, any more than a judge can sit in his own case; and any resolution passed at a meeting of the directors at which a director having a personal interest in the matter voted will be voidable at the instance of the corporation, or the shareholders, without regard to its fairness, provided the vote of such director was necessary to the result.' The courts in this state have frequently asserted the voidability of acts and votes of corporate officers when they are affected by private interests."

In *Miller v. Crown Perfumery Co.*, 57 Misc. Rep. 383, 109 N. Y. Supp. 760, modified and affirmed 125 App. Div. 881, 110 N. Y. Supp. 806, the plaintiff and the two defendants were originally incorporators of the company, each holding one-third of the shares of capital stock, and for a number of years each participated equally in the distribution of profits. Subsequently, by reason of a disagreement with the plaintiff, the two individual defendants sought to deprive the plaintiff of the equal participation in the profits to which his holdings of stock entitled him—the method adopted being, first, a refusal to re-elect him as a director and officer of the company; then, as directors, the two

defendants voted to themselves, by way of salaries, the profits made. The court rescinded the resolutions and directed the repayment of the amounts received thereunder to the corporation, saying:

"The defendants, * * * meeting as a majority of the board of directors, passed the resolution in which they were interested, voting to themselves the property of the corporation as salaries. They thereby dealt with themselves as trustees in respect of their trusts for their individual advantage and benefit. Such action has very properly been made the subject of judicial investigation and criticism, and the court will not permit an officer to trifle with the trust which his fiduciary relation imposes upon him, nor to use his position for personal gain to the detriment of the corporation. Corporate stability rests upon official honesty, which will guarantee such stability."

In *Davids v. Davids*, 135 App. Div. 206, 120 N. Y. Supp. 350, three directors owned all of the stock of the company, except the shares owned by the plaintiff. They elected themselves officers and fixed a salary of \$8,000 for each. For some years prior to the passage of the resolution the salaries had been very moderate. Mr. Justice McLaughlin said:

"It is difficult to see how plaintiff could have made out a stronger case of fraud. The capital of the company was * * * only \$30,000, and the three directors were the only stockholders, except the plaintiff, who held one-sixth of the stock. They met and voted themselves this large increase in salary by a single resolution, in which they all concurred. As directors they held a position of trust. It was their duty to manage the business and affairs of the corporation with honesty and fidelity, having in view, not only their own interests, but the interests of the plaintiff. Simply because they happened to hold a majority of the stock, which enabled them to elect themselves directors, and that they constituted all the directors, gave them no right to vote themselves salaries. * * * Salaries cannot be voted under such circumstances, and, when so voted and paid, the money can be recovered back for the corporation at the suit of an aggrieved stockholder. * * * It is urged on the part of the appellants that the plaintiff failed to prove the salaries voted were excessive, and that the bad faith of the directors cannot be presumed. The suggestion is based upon an erroneous assumption as to the precise relation in which the defendants, as directors, stood to the corporation. They occupied a position of trust, and when the fact appeared that they had voted themselves salaries by a resolution in which they all joined, then they were put in the position of trustees, dealing with themselves to their own advantage, with respect to their trust. In such case the presumption is that they acted in their own interest, to the prejudice of the corporation, and the burden was upon them to overcome the presumption. *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513. This they entirely failed to do. A minority stockholder in a corporation has nothing to say about the management of its business and affairs, because the directors are elected by a majority. Notwithstanding this fact, a minority stockholder has *some* rights which the directors are bound to respect, namely, that the property of the corporation shall not be stolen or misappropriated under the guise and pretense of salaries of officers; and whenever such attempt is made, and the action by which it is attempted to accomplish that result is reviewed by a court of equity, it will not hesitate to compel the directors to do what they ought to have done by way of restitution. The trial court here should have directed the return of all moneys withdrawn. It ought not to have permitted any of the defendants to retain an amount equivalent to the amount of salaries received before the passage of the resolution, because they had no legal right to such sums. The plaintiff, however, did not appeal. She *does* not complain of this allowance."

[2] There is another set of cases which, while fully sustaining the proposition that directors are trustees, incapable of contracting with themselves, and that such purported contracts are voidable at the suit of the corporation, or a minority stockholder suing in a representative capacity, nevertheless recognize a tendency in modern times towards the formation of those small business corporations, and, realizing that those most interested and holding practically all of the stock will in all probability become the directors and officers thereof, take the view that, while the contract is voidable, nevertheless the officer who has done the work by which the corporation has benefited is entitled to receive pay on the theory of quantum meruit. The rule is, however, that the burden is upon the director officer to show the fair and reasonable value of the services rendered.

In *McNaughton v. Osgood*, 41 Hun, 109, Landon, J., said:

"The corporation has received in consideration the valuable services of these officers. If these officers had not rendered these services, others would need to have been employed, and from the nature of the services it might not have been able to employ any one who could so efficiently perform them. Besides, there is a manifest propriety in a corporation employing those who are most interested in its success and are also best able to promote it; and hence follows the duty to render them reasonable compensation. * * * Hence the corporation, upon rescinding, ought to pay the reasonable value of the services of these officers, rendered in a department of labor beneficial to it, and outside of the duty of direction which the office of director implies."

Fitchett v. Murphy, 46 App. Div. 181, 61 N. Y. Supp. 182, was an action brought by a minority stockholder to restrain defendants from paying to themselves certain salaries claimed to be exorbitant. The trial court found as matter of fact that the salaries were voted and paid as a method of division of earnings, and not as compensation for services, and that under this method all the stockholders were paid in proportion to their holdings of stock, that these payments were not for services to be rendered, and that services were not rendered as an equivalent for them. Mr. Presiding Justice Goodrich, with whom Cullen, Bartlett, Hatch, and Woodward, JJ., concurred, said:

"This is one of those cases where the majority of stockholders have entered into a combination to control the affairs of the corporation for their own benefit and in fraud of the rights of the minority. Such a combination will always be rebuked by a court of equity. It is not necessary to restate well-settled principles upon this subject. * * * No action by the directors, and no combination among any of them, can be permitted to invade the rights of the plaintiff and the minority stockholders in the corporation. So long as all the parties in interest, incorporators, stockholders, directors, and officers, assented to the scheme for the distribution of assets by the payment of salaries, the plan was not objectionable. * * * It is not difficult to discover a plan to 'freeze out' Fitchett and exclude him from all benefits, except such as might be derived from the payment of dividends. * * * It does not appear that they [the defendants] rendered any services as officers sufficient to justify the large salaries paid them, and the payment of such salaries, voted by the defendants themselves, is not justified by any evidence of services rendered in their office."

The learned court in its opinion correctly held that:

"Directors of a corporation have no right to vote salaries to one another as mere incidents to their office, as was done here. They are not barred be-

coming employes of their corporation, and they are entitled to reasonable compensation for their services as such. But as, in fixing their compensation, they are in the position of trustees dealing with themselves in respect of their trusts, their action is subject to question by the stockholders, or to review by the court of equity at the suit of a stockholder."

See, also, *Bagley v. Carthage, W. & S. H. R. R. Co.*, 165 N. Y. 179, 58 N. E. 895; *Gaul v. Kiel & Arthe Co.*, 199 N. Y. 472, 92 N. E. 1069.

These cases flatly support the judgment at bar, in so far as it requires the repayment of the salaries voted by the directors to Kimball and Winnemore, themselves directors and officers. Indeed, the said appellants ought not to complain, because they have been permitted to retain what the court has determined was a fair and reasonable amount for the services rendered, and as in the *Davids Case*, supra, as the plaintiff has not appealed, that part of the judgment will not be disturbed.

[3] To avoid the effect of these authorities, the learned counsel for the appellants makes an elaborate argument upon what he calls the "jurisdiction principle." Stated tersely, it is that because the by-laws provide that "the salary or compensation of all officers, employes, or agents of the company appointed by the board of directors shall be fixed by the board," the courts have no authority to disturb the deliberate decisions of the board of directors, made in the exercise of its lawful powers. He cites a long line of cases as to the power to interfere with the discretionary powers of public officers and boards. Needless to say he cites no case holding that a court of equity is powerless to investigate the transactions of a trustee dealing with himself, or a board of directors voting salaries to its members. He says that in none of the cases cited by respondent was there any such by-law. He is mistaken. In the leading case of *Jacobson v. Brooklyn Lumber Co.*, 184 N. Y. 152, 76 N. E. 1075, there was a similar provision. In *McConnell v. Com. M. & M. Co.*, 31 Mont. 563, 568, 79 Pac. 248, 249, the court said:

"The directors had power to adopt a code of by-laws (Comp. Stat. 1887, div. 5, § 454); but they could not, even under such a by-law, vote a salary to one of their number, where the vote of such a director was necessary to make a quorum."

The laws of this state have always conferred upon corporations the power to appoint such officers and agents as its business shall require, to fix their compensation, and to make by-laws not inconsistent with any existing law. Yet, with such provisions in force, the courts have again and again said:

"It is against *public policy* to allow persons occupying fiduciary relations to be placed in such positions as that there will be constant danger of a betrayal of trust by the vigorous operation of selfish motives. The rules upon this subject are illustrated by many cases." *Earl, J.*, in *Barnes v. Brown*, 80 N. Y. 527, at page 535.

We cannot accept the proposition that, by the adoption of such a by-law, a corporation, its directors, and its affairs can be divorced from the well-established equity jurisdiction. We cannot believe that,

during all the years the courts have been elaborating and strengthening the fiduciary principle for the protection of stockholders, they were oblivious of the controlling jurisdictional principle propounded by appellants, which, if it exists, nullifies and destroys the fiduciary.

[4] We think, however, that the judgment should be modified. We see no ground for holding Lawton for the amounts found erroneously paid to Kimball and Winnemore. While he was a director, he was not an officer, and did not himself draw a salary or benefit by his own votes.

[5] There is also no reason why the defendants should be held responsible in this action for the increase of salary of the treasurer, Ward. He was not a director, and his connection with the company was contractual. It is the breach of duty as fiduciaries in dealing with themselves that receives the condemnation of the court. There is no such principle involved in fixing the salary of an employé of the company, not a director. We are of the opinion that the judgment should be modified, in so far as it holds the defendants responsible for the excess payment to Ward of \$190 a year, and that the injunction should also be modified in that regard. As we think this is a matter of law, there should be no difficulty in making a proper order of modification.

We have examined with care this voluminous record and the briefs. We are satisfied that the findings necessary to sustain so much of the judgment as is hereby affirmed are supported by the evidence. We regret to say that in the appellants' brief an attack is made upon the attorney for the respondent, claiming such collusion with one of the defendants as ought to vitiate this judgment. We think that there is no foundation for the charge, and that the claim is totally unwarranted.

The judgment, modified as indicated, should be affirmed, with costs and disbursements to the respondent.

INGRAHAM, P. J., and McLAUGHLIN, J., concur.

SCOTT, J. (dissenting). For the reasons stated by me in *Godley v. Crandall & Godley Co. and Others*, 139 N. Y. Supp. 236 (decided herewith), I am of opinion that the judgment appealed from should be affirmed in its entirety, and that the directors should be held liable, not only for the moneys illegally voted to themselves and received by them, but also for the moneys similarly paid to others, through their action. I am not disposed to limit the responsibilities of directors to liability to account only for moneys of the corporation which they have actually received themselves. It is not only the "breach of duty of fiduciaries in dealing with themselves that receives the condemnation of the court," but the breach of duty in dealing with the property and funds of the corporation. That they themselves profited by their own acts is only a circumstance going to establish the *mala fides* of the transaction.

LAUGHLIN, J., concurs.

ACME REALTY CO. v. SCHINASL

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. VENDOR AND PURCHASER (§ 130*)—ENCROACHMENTS ON STREET—MARKETABLE TITLE.

Show windows and a platform and steps giving access to a building, all of which may be easily removed, which extend some distance into the street, are not such encroachments thereon as to render the title unmarketable.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 245, 246; Dec. Dig. § 130.*]

2. MUNICIPAL CORPORATIONS (§ 671*)—BUILDING CODES—STATE LAWS.

New York City Charter (Laws 1901, c. 466) § 407, providing that the Building Code of New York City as existing on January 1, 1902, would be binding as to the alteration, construction, removal of buildings, etc., and section 5 providing that such act should not affect or impair any act done or right accruing prior to the going into effect of the act, did not affect the legality of provisions of the Building Code prior to January 1, 1902, and did not prevent the city from removing encroachments on the streets prior to the act taking effect, if it had such power, on account of the Building Code being contrary to state laws.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1447-1450; Dec. Dig. § 671.*]

3. VENDOR AND PURCHASER (§ 130*)—PROJECTIONS INTO STREET—MARKETABILITY.

The construction of a building with bay windows, consisting of masonry, and extending from the ground in several places, and several other places starting at the second floor and running to the top of the building, and projecting a foot into the street, renders the building in the city of New York unmarketable, and subject to rejection by a prospective buyer.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 245, 246; Dec. Dig. § 130.*]

4. MUNICIPAL CORPORATIONS (§§ 680, 681*)—OFFICERS—STREETS—ENCROACHMENTS.

No local authority whatsoever can authorize any private individual to encroach on a public street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1459-1466; Dec. Dig. §§ 680, 681.*]

Scott, J., dissenting.

Appeal from Judgment on Report of Referee.

Action by the Acme Realty Company against Solomon Schinasi. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Alfred F. Seligsberg, of New York City (Edmond E. Wise, of New York City, of counsel, and Harold Swain and Otto Horwitz, both of New York City, on the brief), for appellant.

Philip S. Dean, of New York City (David B. Ogden, of New York City, of counsel), for respondent.

CLARKE, J. This action was brought to compel the specific performance by the defendant of a contract for the purchase of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

premises known as 375 Manhattan avenue and Nos. 354-356 West 116th street, in the borough of Manhattan, city of New York. The agreement was entered into May 7, 1906. The purchase price was \$107,500, and a full covenant warranty deed conveying the premises free from all incumbrances except a mortgage and lease was to be delivered on the 29th day of May, 1906. Various adjournments were had until June 6, 1906, when the purchaser refused to accept the title on the ground that the same was unmarketable by reason of encroachments on both 116th street and on Manhattan avenue. These encroachments consist of two show windows below the second story on the 116th street side, extending beyond the street line one foot, and, beginning with the second story, two bay windows, called oriel windows, are corbelled out from the main wall, and extend to the top of the building. They are constructed of masonry, and extend one foot beyond the street line. Similarly two bay windows on the Manhattan avenue side, one of which begins in the basement, is of masonry construction, and extends to the top of this seven-story building, projecting one foot throughout. Excepting at the first story, where there are recessed stone slabs, there are two windows at each story of the bay. The other bay window is directly over the portico. About 20 feet from the southerly line of the lot this other bay window is corbelled out from the wall at the third story, and extends to the top of the building, projecting uniformly one foot. Beneath this bay window are the stoop and portico and main entrance of the building. The portico is of limestone construction, rises two stories above the street, and projects one foot. Above the top of the second story there is a stone balcony projecting an equal distance. The stoop connected with the portico extends four feet beyond the building line, and is fourteen feet long. This action was begun on July 25, 1906. The answer alleges the above-mentioned encroachments, and demands, by way of counterclaim, the return of the \$5,000 paid at the time of the signing of the contract and \$266.87, cost of searching of the title and survey. The case was duly referred, and upon the referee's report judgment in favor of the plaintiff for specific performance was entered, from which judgment defendant appeals.

There is no dispute about the encroachments, their extent, character, or construction. There is a conflict as to whether the defendant had actual or constructive notice of the existence of the encroachments, and there is a sharp conflict as to the cost of removal and subsequent damage to the rental value of the building, which, however, the referee resolved in favor of the plaintiff, holding that the cost of the removal of the projections and the restoration of the building to a condition in which there would be no encroachments would not exceed \$2,000, and that there would result no substantial rental loss or impairment of the fee value. The defendant claimed that the cost of removal would be upwards of \$5,000, that there would be a substantial loss of rental during the period of reconstruction, and a further permanent impairment of rental value in apartments where the bay windows were removed, and a consequent impairment of the fee value of the premises to the amount of \$5,000.

[1] I do not regard the show windows and the platform and steps giving access to the building under the front porch such encroachments as to render the title unmarketable. They may be easily removed or restricted within proper limits without seriously affecting the building. But the permanent so-called bay windows and projections running up from the foundations of the building, and forming an integral part of the street front thereof, and concededly projecting one foot beyond the building or street line, present a serious question. The argument of counsel for the respondent, in so far as it is based upon the proposition that the encroachments complained of were authorized is based upon the following findings of the learned referee:

"Seventh. The building erected upon the said premises is an apartment house, seven stories in height, which was begun and finished in the year 1901. * * *

"Eighth. Said building was erected pursuant to and under a permit of the building department of the city of New York after plans had been duly filed and approved for the construction thereof, and the said building was completed in November or December in the year 1901, in conformity with said plans.

"Ninth. The said plans fully disclosed that it was proposed to erect the said building with portions thereof encroaching over and upon the said avenue and street, as shown in said survey."

The argument upon the law is that in 1901, when said building was completed, an encroachment beyond the building line of bay or oriel windows to the extent of one foot was permitted by law. For that counsel relies upon the following matters: That section 647 of the Greater New York Charter of 1897 (chapter 378 of the laws of that year) provided that:

"The municipal assembly shall have power to establish and from time to time to amend a code of ordinances, to be known as the 'Building Code,' providing for all matters concerning, affecting, or relating to the construction, alteration, or removal of buildings or structures erected or to be erected in the city of New York, as constituted by this act, and for the purpose of preparing such code to appoint and employ a commission of experts. * * * The provisions of such 'Building Code' shall be in conformity with and be subject to all general laws of the state concerning, affecting, or relating to buildings, or classes of buildings, or other structures."

That in conformity with the provisions of said section a Building Code was adopted by the municipal assembly and approved by the mayor on October 24, 1899. That by section 73 of said Code it was provided:

"Bay windows, oriel windows and show windows, on the street front or side of any building may project not more than one foot beyond the building line and shall be constructed of such material and in such manner as will meet with the approval of the department of buildings."

But at the very time that said Code was adopted, section 49 of the charter, conferring power upon the municipal assembly to make ordinances "not inconsistent with this act, or with the Constitution or the laws of the United States, or of this state," provided in subdivision 3 thereof for the passage of such ordinances "to regulate the use of streets, highways, roads, public places and sidewalks by foot passengers, animals, vehicles, cars, motors and locomotives, and to

prevent encroachments upon and obstructions to the same, and to authorize and require their removal by the proper department; but they shall have no power to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk, except the temporary occupation thereof, during the erection or repairing of a building on a lot opposite the same. * * *” So that if the Building Code was, as it clearly was, an ordinance of the municipal assembly, and if it authorized a permanent encroachment upon the street, of which character the structures at bar clearly were, then said ordinance was in direct conflict with the law of the state which expressly provided that the municipal assembly should have no power to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk, except the temporary occupation thereof during the erection or repairing of a building on a lot opposite the same.

[2] But the learned counsel argues that by the revised charter (chapter 466 of the Laws of 1901) it was provided in section 407 thereof that:

“The Building Code which shall be in force in the city of New York on the first day of January, nineteen hundred and two, and all then existing provisions of law fixing the penalties for violation of said Code, and all then existing laws affecting or relating to the construction, alteration or removal of buildings or other structures within the city of New York are hereby declared to be binding and in force in the city of New York, and shall continue to be so binding and in force except as the same may from time to time be revised, altered, amended or repealed as herein provided.”

This he claims transforms the Building Code from a mere municipal ordinance to an act of the Legislature, and that whatever provisions said Code contained were as if they had been specifically enacted by the Legislature. The answer seems obvious that by section 5 it was provided that this act shall take effect on the 1st day of January in the year 1902, and that the section 407 alluded to itself referred to the Building Code which should be in effect on said date, and further provided that:

“No right or remedy of any character shall be lost or impaired or affected by reason of this chapter. This chapter shall not affect or impair any act done or right accruing, accrued or acquired or penalty, forfeiture or punishment incurred prior to the time when this act takes effect, or by virtue of any law repealed or modified by this chapter, but the same may be asserted, enforced, prosecuted or inflicted as fully and to the same extent as if this act had not been passed or said law had not been repealed or modified.”

As the building in question was commenced and completed in the year 1901, and as the act under consideration did not take effect until the 1st of January, 1902, it is obvious that if the encroachments complained of were illegal, and if the provision of the Building Code was without force and effect because ultra vires the municipal assembly, then the right existing to abate the nuisance by enforcing the removal of the unlawful private encroachment in the public street, then possessed by the city, was not in the slightest degree affected by the section of the charter of 1901 relied upon.

This court said in *City of New York v. Knickerbocker Trust Co.*, 104 App. Div., 223, 93 N. Y. Supp. 937:

"It is argued that by section 41 of the Revised Greater New York Charter ordinances not inconsistent with the charter and in full force on January 1, 1902, are 'continued in full force and effect.' But they are not continued as part of the statutory law incorporated in the provisions of the charter. They are simply continued in force as ordinances. They are given no higher sanction nor greater dignity than they had previously."

So that the question of whether the Legislature could authorize the permanent invasion of the public streets in the interests of a private owner is not in this case. No statute is called to our attention in which the Legislature has explicitly attempted so to do. It has, however, recognized the right of the city to institute proceedings to remove structures in the street by passing statutes of limitations in that regard. Chapter 610, Laws of 1896, amended section 471 of the Consolidation Act (chapter 410, Laws 1882), by providing that if the front or other exterior wall of any building now standing in the city of New York shall extend not more than four inches upon any street, and if a structure, part of a building now standing in said city, known as a bay window or oriel window, shall extend not more than twelve inches upon any street, the same should not be removable unless an action or proceeding shall be instituted by or in behalf of the mayor, aldermen, and commonalty within one year from the passage of the act. This section of the Consolidation Act was further amended by chapter 646 of the Laws of 1899, by substituting ten for four inches in the provision for the front or exterior wall encroachment. So far from authorizing such encroachments in the future, said acts recognized the unlawful character of the structures, notwithstanding the ordinances alluded to in the opinion of the learned referee limited the effect of the remedial statutes to buildings then standing, and simply provided a short statute of limitations as against the city as to such buildings.

We come, therefore, directly to the proposition whether any municipal body, administrative or legislative, had the power to authorize such encroachment, and the answer to that question seems to me to be conclusively found in adjudicated cases.

In *Ackerman v. True*, 175 N. Y. 353, 67 N. E. 629, although the respondent cited *Wormser v. Brown*, 149 N. Y. 163, 43 N. E. 524, and *Broadbelt v. Loew*, 15 App. Div. 343, 44 N. Y. Supp. 159, authorities here relied upon, the court said:

"It is well established by the decisions of this court that interferences with public and common rights create a public nuisance, and when accompanied with special damage to the owner of lands give also a right of private action to such owner, and that a public nuisance as to the person who is specially injured thereby in the enjoyment or value of his lands becomes also a private nuisance. That this encroachment upon the street was a public nuisance, and that as to the plaintiff it was a private nuisance, we have no doubt. * * * We have been referred to various statutes relating to this subject, upon which the defendant relies to sustain that contention, and from which he urges that the commissioners of parks are invested with power to permit such encroachments and erections as they shall see fit upon certain streets, of which Riverside Drive is one. These statutes we have carefully examined without finding any such authority conferred upon the

park board, or upon any member thereof, as would justify their granting to the owners of property abutting upon the line of such a street a permit or right to extend the main wall of a permanent and substantial structure three feet and six inches into and beyond the line of the street. If they possess any such power, it is unlimited, and they may authorize an extension into the streets a much greater distance, and the purpose for which such streets were laid out may be greatly impaired or entirely defeated. Any such construction of that statute would result in practically annulling that portion of the charter of Greater New York, which provides that streets and other public places in the city shall be inalienable. Section 71. Although it is true that the title of the streets of the city of New York is in the municipality, that title is held by it in trust for public use, and not even the municipal assembly has authority to permit permanent encroachments thereon. * * * When, however, that provision is considered in connection with the other provisions of the charter relating to the inalienability of the streets, and depriving even the municipal assembly of any power to authorize the erection or continuance of any encroachments upon the streets, it becomes quite manifest, we think, that the Legislature did not intend thereby to confer upon a member of the park board the right to permit an abutting owner upon any of the streets of the city, whether within any park or outside, to encroach upon the street by the erection of permanent and substantial structures thereon. Moreover, if that statute were to be thus construed, its constitutionality would be at least doubtful, for even the Legislature cannot authorize the condemnation of private property for other than public uses."

In *Deshong v. City of New York*, 176 N. Y. 475, at page 483, 68 N. E. 880, at page 882, Martin, J., said:

"The title to the streets being in the city as trustee for the public, no grant or permission can be legally given which will interfere with their public use. The right of the public to the use of the streets is absolute and paramount to any other. A presumption of consent, or even an actual consent by the authorities to their use for private purposes, is always subject and subordinate to the right of the public whenever required for public purposes, and such a grant or right cannot be presumed when it would have been unlawful. * * * In other words, there can be no rightful, permanent possession of any part of a public street for private purposes, unless by virtue of an authorized permission of the city, and no length of time will render legal a private interference with a street which is a nuisance, or give the person maintaining it any right to continue it as against the municipality."

In *City of New York v. Knickerbocker Trust Co.*, supra, Mr. Justice Patterson said:

"The city cannot give permission to an owner of property to erect any part of his building on the public highway."

In *McMillan v. Klaw & Erlanger Co.*, 107 App. Div. 407, 95 N. Y. Supp. 365, Mr. Justice O'Brien said:

"The municipality has an interest in the street by reason of its being vested with the fee thereof, but this fee is a qualified one, being held by it in trust for the public use and benefit, and that use cannot be departed from without violating an essential condition of the contract between it and the abutting property owners, as expressed by the adjudications in the street opening proceeding under which the land was obtained. * * * If the legality of the ordinance be sustained, it would permit individuals to appropriate from two to five feet of public property all along the streets of the city and under the guise of ornamental projections to devote the land to whatever uses their private interests might require. * * * Ordinances which thus devote public property to private uses are not looked upon with favor, and the courts will scan them closely with a desire to jealously guard the rights of the public from illegal invasion under the guise of municipal authority."

In *Williams v. Silverman Realty & Constr. Co.*, 111 App. Div. 679, 97 N. Y. Supp. 945, this court said:

"Whatever cases may be in the books which tend to support a different rule must be held to be overruled by the *Ackerman* and *McMillan* Cases until, at least, the Court of Appeals has again passed upon the question."

In *Hatfield v. Straus*, 117 App. Div. 671, 102 N. Y. Supp. 934, affirmed in 189 N. Y. 208, 82 N. E. 172, this court said:

"But the moment such a right is given for the exclusive use of a private individual there has been a taking of public property for private use which cannot be justified. The streets of the city of New York belonging to all the people have been subjected to many invasions for the benefit and use of private owners. Of late years it has been realized by the courts how dangerous such invasions have been, and in *Ackerman v. True*, 175 N. Y. 353 [67 N. E. 629], and in *McMillan v. Klaw & Erlanger Co.*, 107 App. Div. 407 [95 N. Y. Supp. 365], and in *Williams v. Silverman Realty & Constr. Co.*, 111 App. Div. 679 [97 N. Y. Supp. 945], the Court of Appeals and this court have announced the doctrine that the board of aldermen or other local authority having control over the streets for certain purposes had no power to permit invasion thereof for private use, and, if there was any local legislation which could be invoked as an authority in that regard, it would be unconstitutional as attempting to authorize the taking of private property for private use or the taking of public property for private use."

In *People ex rel. Cross Co. v. Ahearn*, 124 App. Div. 840, 109 N. Y. Supp. 249, Mr. Justice Ingraham concurring, said:

"I concur in the result upon the ground that the common council has no power to permit an abutting owner to encroach upon the public street, the fee of which is held by the municipality in trust for the public without express authority from the Legislature, and the Legislature has granted no such express authority as would justify the ordinance relied on to sustain this encroachment. I think such action by the common council unauthorized whatever its object. The public are entitled to the free and unrestricted use of the streets and avenues in the city of New York which have been acquired by the city and are held in trust for the public use, and which have been paid for by abutting owners by assessments imposed by operation of law upon the theory that the opening of the street or avenue would be a benefit to such abutting owner. To authorize any one to appropriate the streets to private use would be an appropriation of property thus acquired, and in which all the abutting owners have an interest, and certainly would require express legislative sanction."

In *Village of Oxford v. Willoughby*, 181 N. Y. 155, 73 N. E. 677, Gray, J., said:

"Plaintiff brought this action in equity to enjoin the defendant from encroaching upon one of its public streets by the erection of an addition to a building and to compel the removal of the encroachment. * * * The trial court found the structure to be an obstruction and a nuisance and rightly so, for that amounts in law to a public nuisance which obstructs the public highway. *Wakeman v. Wilbur*, 147 N. Y. 657, 663 [42 N. E. 341]."

In *City of New York v. Rice*, 198 N. Y. 124, 91 N. E. 283, 28 L. R. A. (N. S.) 375, the city sued to restrain defendant from maintaining and to compel him to remove a masonry well upon his property which, with its pillars, extended on Eighty-Ninth street six feet beyond the house or building line, and on Riverside Drive seven feet. Rice obtained permission by resolution of the municipal assembly, and further he obtained a permit from the commissioner of parks,

and the wall was erected in substantial compliance with the permission. Gray, J., said:

"It is a question simply of the existence of any power in the municipality to consent to a permanent use of any part of a street for private purposes. * * * The ownership by the city of the fee of the land in the streets is impressed with a trust to keep the same open and for use as such. The trust is *publici juris*—that is, for the whole people of the state—and is under the absolute control of the Legislature; in which body, as representing the people, is vested power to govern and to regulate the use of the streets. There is no right in the city to use its property therein as it might corporate property, nor otherwise than as the Legislature may authorize for some public use or benefit. * * * It follows from the nature of its title that the city cannot dispose of the streets, nor divert them to private uses. Whatever the power of control, or of regulation, possessed by the Legislature, it is restricted in the direction of what may be deemed to be a public use, having in view, of course, the demands of a progressive civilization. * * * The streets were opened for the unrestricted use of the public, and the assessments for the costs were levied upon the properties benefited, and were paid, upon the implied promise that they should be maintained, in all their integrity, as public highways. Any erection of permanent and substantial structures thereon not in a public use would constitute an encroachment or obstruction, and would therefore be a public nuisance. * * * Not only, therefore, does the nature of the title by which the municipality holds the streets forbid the inference of any implied power to grant permission relied upon in this case, but such a power was in express terms withdrawn by a provision of the charter in force at the time. It contains the provision that the municipal assembly shall have power to regulate the use of the streets and highways, but they shall have no power to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk except the temporary occupation thereof during the erection or repairing of a building on a lot opposite the same. Charter of 1897, § 49, subd. 3. This provision, as construed by this court, denies to the municipal authorities any power to consent to the private use of any part of the street as laid out."

Referring to *Ackerman v. True*, the court said:

"It was thought that the constitutionality of the statute, if construed to confer the power to permit such, would be very doubtful. * * * It may be further observed that in the present case it is the city which is invoking the aid of the courts in undoing that which has been illegally done. Our decision of *Ackerman v. True* has been followed in several well-considered opinions by the Appellate Division of the Supreme Court, and its authority should not now be questioned. See *City of New York v. Knickerbocker Trust Co.*, 104 App. Div. 223 [93 N. Y. Supp. 937]; *McMillan v. Klaw & Erlanger Constr. Co.*, 107 App. Div. 407 [95 N. Y. Supp. 365]; *Hatfield v. Straus*, 117 App. Div. 671 [102 N. Y. Supp. 934]; *People ex rel. Cross Co. v. Ahearn*, 124 App. Div. 840 [109 N. Y. Supp. 249]."

In *People ex rel. Browning, King & Co. v. Stover*, 145 App. Div. 259, 130 N. Y. Supp. 92, Mr. Justice Scott said:

"It cannot be questioned for a moment that the projections of which the plaintiff complains are unlawful obstructions upon the public highway, and constitute a public nuisance which it is the duty of the public authorities to abate. *Ackerman v. True*, 175 N. Y. 353 [67 N. E. 629]; *City of New York v. Rice*, 198 N. Y. 124 [91 N. E. 283, 28 L. R. A. (N. S.) 375]; *People ex rel. Cross Co. v. Ahearn*, 124 App. Div. 840 [109 N. Y. Supp. 249]; *City of New York v. Knickerbocker Trust Co.*, 104 App. Div. 223 [93 N. Y. Supp. 937]. And it is equally well settled that no permit from the park department or any other municipal body could legally authorize the erection and maintenance of such encroachments. What was said in *Wormser v. Brown*, 149 N. Y. 163 [43 N. E. 524], apparently recognizing the right of the park commissioner to

permit encroachments in certain cases, no longer expresses the law. *Ackerman v. True*, supra. * * * So also in an equitable action, when it appears that the obstruction has existed for more than 20 years, the court may infer a consent on the part of the adjoining owner that, so far as his private interest is concerned, the obstruction may remain. It was such an implied consent that this court had in mind in *556 & 558 Fifth Avenue Co. v. Lotus Club*, 129 App. Div. 339 [113 N. Y. Supp. 886]. The question there was whether or not a slight projection over the street, easily removable without injury to the building, served to render the title unmarketable. It had existed for many years and under a statute referred to in the opinion the city could not compel its removal. * * * But this is not such a case. It is an application to compel public officers to perform a duty which they owe to the public, which they could, and perhaps should, perform without the necessity for the prod of a mandamus. Their duty to act rests, not upon any private injury done to relator (*People ex rel. Pumpyansky v. Keating*, 168 N. Y. 390, 61 N. E. 637), but upon the respondents' infringement upon the property and rights of the public. Their duty to act is not lessened by the fact that some of the obstructions have been in existence for a long time, and that relator and its predecessors in interest have not complained, because no prescriptive right to occupy the streets can be gained as against the public, and no adjoining owner can legalize such an obstruction by acquiescence, even if he may debar himself from asserting his private right to have it removed."

Although the foregoing cases represent the present condition of the law of the state, the respondent relies on earlier cases which have in effect been overruled. And those cases, based upon the conditions existing at the time when rendered, contain expressions which demonstrate their present inapplicability.

[3] In *Broadbelt v. Loew*, 15 App. Div. 343, 44 N. Y. Supp. 159, decided in 1897 and cited by respondent, Mr. Justice Patterson said:

"In view of the ordinance of the common council of the city of New York, and after acquiescence of the authorities of the city in the allowance of constructions such as those connected with the plaintiff's houses, the possibility of the owner ever being molested is so exceedingly remote that the objections become technical only and not substantial."

And in *Levy v. Hill*, 50 App. Div. 294, 63 N. Y. Supp. 1002, decided in 1900, cited by respondent, Mr. Justice Ingraham said:

"This stoop has been in its present condition for upwards of thirty years without objection on the part of the municipality or any of the adjoining property owners. That any serious objection by any one could now be made to the continuance of this stoop in the condition it is in is such a remote contingency that it hardly could be considered a serious objection to the title."

Neither of those opinions could have been written at the present date. The tremendous growth of the city in the last decade, the hurrying throngs who press through its congested streets and avenues, have required the widening of the roadways and the clearing of the sidewalks. The action of the city authorities has not only had the approval of the courts, but they have compelled them to take action. *People ex rel. Cross Co. v. Ahearn*, 124 App. Div. 840, 109 N. Y. Supp. 249; *People ex rel. Ackerman v. Stover*, 138 App. Div. 237, 122 N. Y. Supp. 1030; *People ex rel. Browning, King & Co. v. Stover*, 145 App. Div. 259, 130 N. Y. Supp. 92. And there is submitted in the brief of counsel a table, which is not questioned, of the resolutions passed by the municipal authorities directing the removal of encroach-

ments in the public streets, 52 in number, passed between July 29, 1910, and March 7, 1912, covering all parts of the city. One of them affects 125th street—in the immediate neighborhood of the locus in quo.

With the illegality of the structures established by the courts, and with the power of removal by the city officials not only sustained but action compelled by the mandate thereof, and with the extensive operations of the civic authorities, looking to the clearing of the streets, covering a great portion of the borough of Manhattan, it can no longer be said that the contingency of interference on such thoroughfares as 116th street and Manhattan avenue is so remote that it should not be taken into consideration as affecting the marketability of the title to real estate.

The structure being without warrant of law, the power existing to compel its removal, the exercise of that power seriously affecting the property, its probability being no longer so remote as to be negligible, a purchaser ought not to be compelled against his will to take a title so burdened.

[4] If there is one thing thoroughly established by an unbroken line of cases in this court and in the Court of Appeals, it is this: That the streets of the city of New York, acquired under the doctrine of eminent domain for the use and benefit of all the people of the state as public highways, paid for by assessments upon private property upon the sole excuse that such property was assessed to pay for a public benefit, belong to all the people of the state for the sole purpose for which they could be lawfully acquired and so paid for. There exists no power in any local authority whatsoever to authorize any private individual to appropriate for his own benefit any portion of that public property by a permanent structure for his own use. The interests of the public are superior to those of the individual. The necessities of the public have required a gradual retaking of its own which it has carelessly or thoughtlessly, or because there was no necessity at the time, allowed to be filched from it. But the time has come when the city needs the full width of its streets, and before that public need private interests must bend. It follows that if any private individual in defiance of the law, and with or without any knowledge or consent, express or implied, of the local authorities, does so appropriate a portion of the public streets, he will not be protected in his aggression by the courts. He has himself put a cloud upon his title to his own land which will authorize the rejection thereof by a prospective buyer.

The fourth finding of fact should be reversed in so far as it finds that the plaintiff was ready and willing to fulfill and perform said agreement in all respects on its part and the fifth, sixth, and seventh proposed findings of defendant, refused to be found, are adopted.

The twelfth, fifteenth, and sixteenth findings are reversed. The seventeenth, eighteenth, nineteenth, and twenty-first of defendant's proposed findings of fact, refused by the referee, are adopted.

The judgment is reversed and judgment ordered dismissing the complaint on the merits and directing judgment for the defendant on the

counterclaim for \$5,266.87, with interest, with costs and disbursements to the appellant in this court and in the court below.

McLAUGHLIN and DOWLING, JJ., concur. SCOTT, J., dissents.

INGRAHAM, P. J. I concur in the result of Mr. Justice CLARKE'S opinion. The encroachments upon the public streets of the building upon the lot in question are of such a substantial character, and their removal would involve such a defacement of the building, that I do not think that a purchaser should be compelled to take a title to the property.

SCOTT, J. (dissenting). The facts of the case are so thoroughly discussed in the opinion of the referee and in the prevailing opinion in this court that I shall do no more than briefly indicate the grounds upon which I vote for an affirmance of the judgment appealed from.

I think that it is, at least, very doubtful whether any municipal body or officer has authority to consent to the occupation of any part of the public street for other than strictly street purposes, but, apart from the question of the legality of the projections complained of, I am of opinion that, even admitting that they are unlawful, they do not justify us in holding that the title is unmarketable. It is well settled that it is not every defect of the nature complained of here, which will justify a rejection of the title. If it were so, there would be very few marketable titles in the city of New York, except to vacant lots. The question in every case like the present is whether the encroachment is of a character which will probably invite attack.

There are two sources from which such an attack may be looked for. One is from the owners of adjoining or adjacent property who may find a private injury in the encroachment on a public street. That was the condition found in *Ackerman v. True*, 175 N. Y. 353, 67 N. E. 629. There the encroachment amounted to about 3½ feet, and it was distinctly found that it interfered with plaintiff's easements of light and air. Here it appears from the evidence and the findings that the encroachments complained of do not to any extent interfere with any easement of light, air, prospect, or access to any adjoining owner, or any easement appurtenant to any adjoining owner. It may be safely said, I think, that there is no appreciable danger of a successful attack from an adjoining owner. The second possible source of attack is from the city. This danger I think is negligible so far as concerns bay or oriel windows commencing at the second and third stories, respectively. They constitute no obstruction to the free use of the street for street purposes, and herein the case is distinguishable from *City of New York v. Rice*, 198 N. Y. 124, 91 N. E. 283, 28 L. R. A. (N. S.) 375, and similar cases where the encroachments complained of actually impeded the free use of the street by the public. I do not say that the city might not successfully compel the removal of the encroaching windows all the way up to the roof of the building, but the probability of such action by the municipal authorities is so remote that it need

not be considered. Not only has the city for more than a century authorized, so far as it could do so lawfully, bay windows projecting not more than a foot beyond the building line, but its efforts in the way of compelling the removal of obstructions in and encroachments upon the street have not heretofore been directed towards the removal of insignificant encroachments so far above the street surface as are the bay or oriel windows now under consideration. There remains to be considered only the one bay which is built up from the foundation, for even the prevailing opinion concedes that the portico steps, and the shop windows do not furnish a sufficient reason for rejecting the title.

The one bay, which begins at the foundation, may perhaps be the object of attack by the city, although I do not consider the danger of such attack as very imminent. Assuming, however, that it is attacked, the cost of removing so much of it as is below the second story could not be very great, and the doctrine of *de minimis* may well be applied. Furthermore, the encroachment of the window in question, as well as the portico, were open, visible, and notorious when the contract was made, and it therefore will be considered as having been made with knowledge. This is not a case where the vendor cannot convey all that it has contracted to sell, for concededly he can do that. The claim is that the property is subject to attack because of an unlawful encroachment on the street. The danger of such an attack is in my opinion so remote that it cannot affect the marketability of the title. *Broadbelt v. Loew*, 15 App. Div. 343, 44 N. Y. Supp. 159, affirmed on opinion below 162 N. Y. 642, 57 N. E. 1105; *Levy v. Hill*, 70 App. Div. 95, 75 N. Y. Supp. 19, affirmed on opinion below 174 N. Y. 536, 66 N. E. 1112; *Empire Realty Corporation v. Sayre*, 107 App. Div. 415, 95 N. Y. Supp. 371; *Webster v. Kings County Trust Co.*, 145 N. Y. 275, 39 N. E. 964; *Fifth Ave. Realty Company v. Lotus Club*, 129 App. Div. 339, 113 N. Y. Supp. 886.

In my opinion the judgment should be affirmed.

PEOPLE *ex rel.* DARLING *v.* WARDEN OF CITY PRISON.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. WEAPONS (§ 4*)—OFFENSES—POSSESSION—CONSTRUCTION OF STATUTES.

Penal Law (Consol. Laws 1909, c. 40) § 1897, makes one guilty of a felony who "carries or possesses" any weapon known as a slungshot, billy, or metal knuckles, and the second paragraph makes any person under 16 years of age guilty of a misdemeanor who shall "have, carry or have in his possession in any public place" any article described in the last section. The third paragraph makes any person over 16 years of age guilty of a misdemeanor who shall "have or carry concealed upon his person * * * any pistol" without a written license therefor issued by a police magistrate, etc. This section was amended by Laws 1911, c. 195, by inserting between the second and third paragraphs a provision making any person over 16 years of age guilty of a misdemeanor who shall "have in his possession in any city," etc., "any pistol * * * of a size which may be concealed upon the person, without a written license therefor" issued by a police magistrate. The same chapter also

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

added to article 172 a new section, section 1914, which required every person selling pistols, etc., of a size which may be concealed upon the person, to keep a register of such sales, giving the name of the purchaser, etc., and required him to produce a permit "for possessing or carrying the same, as required by law." *Held*, that the portion inserted by Laws 1911 prohibited a person over 16 years of age from having a pistol in his possession without a permit, at any time or place, whether in his residence or elsewhere.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 4; Dec. Dig. § 4.*]

2. STATUTES (§ 184*)—CONSTRUCTION.

Statutes must be construed in view of the existing condition of the law and the evil aimed at.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 262; Dec. Dig. § 184.*]

3. WEAPONS (§ 3*)—CONSTITUTIONAL AMENDMENTS—OPERATION ON STATES.

The first 10 amendments to the federal Constitution do not operate on the states, so that the second amendment thereto, providing that the right of the people to keep and bear arms shall not be infringed, merely restricted the federal government, and did not grant such right to the people of the state.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 3; Dec. Dig. § 3.*]

4. WEAPONS (§ 3*)—CONSTITUTIONALITY OF THE STATUTES.

The state statutes prohibiting the carrying of concealed weapons does not infringe the constitutional right of the citizen, being merely a police regulation.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 3; Dec. Dig. § 3.*]

5. CONSTITUTIONAL LAW (§ 39*)—BILL OF RIGHTS.

The rights enumerated in the Civil Rights Law (Laws 1909, c. 14 [Consol. Laws 1909, c. 6]) were not created by the statute, but pertain to the character of free men in a free state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 37; Dec. Dig. § 39.*]

6. CONSTITUTIONAL LAW (§ 39*)—BILL OF RIGHTS—INVALIDITY OF STATUTES.

In order to declare a statute void for violating the fundamental rights enumerated in Civil Rights Law (Laws 1909, c. 14 [Consol. Laws 1909, c. 6]), the statute should be clearly shown to directly violate such fundamental rights.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 37; Dec. Dig. § 39.*]

7. CONSTITUTIONAL LAW (§ 81*)—POLICE POWER.

Legislation for the public welfare and safety is valid as an exercise of the state's police power, though it imposes restraints and burdens upon individuals; the question being only whether the means employed are appropriate and reasonably necessary to accomplish the purpose, and not unduly oppressive.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.*]

8. WEAPONS (§ 3*)—OFFENSES—POSSESSION—VALIDITY OF STATUTE.

Laws 1911, c. 195, amending Penal Law (Consol. Laws 1909, c. 40) § 1897, so as to make any person over 16 years of age guilty of a misdemeanor who has "in his possession" any pistol of a size which may be concealed upon the person, without a written license, is a legitimate ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ercise of the state's police power, though construed to prohibit having a pistol in one's possession in his room, though not on his person.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 3; Dec. Dig. § 3.*]

9. CONSTITUTIONAL LAW (§ 70*)—CONSTITUTIONALITY OF STATUTES—WISDOM.

The courts are not concerned with the wisdom of a law, or whether it will accomplish its purpose, if it be constitutional.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.*]

10. CONSTITUTIONAL LAW (§ 46*)—CONSTITUTIONALITY OF STATUTES.

One seeking to have a statute declared invalid as beyond the legislative power must definitely and clearly point out the want of power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43-45; Dec. Dig. § 46.*]

Ingraham, P. J., and Scott, J., dissenting.

Appeal from Special Term, New York County.

Habeas corpus by the People, on the relation of Joseph F. Darling, against the Warden of the City Prison. From an order (74 Misc. Rep. 151, 134 N. Y. Supp. 335) discharging relator, defendant appeals. Reversed, and writ quashed, and relator remanded.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and MILLER, JJ.

Charles S. Whitman, Dist. Atty., of New York City (Robert S. Johnstone, of New York City, of counsel), for appellant.

Joseph F. Darling, of New York City, for respondent.

CLARKE, J. The relator notified the police that he had a pistol in his house without a permit. Thereupon a captain of police went to his house and found a loaded revolver and some loaded shells in a small cabinet in the bedroom adjoining the parlor. He asked the defendant why he kept the revolver there, and he said he preferred not to answer the question. He asked if he had a permit, to which he replied, "No." Whereupon the captain placed the relator under arrest and took him before a city magistrate, charging him with a violation of section 1897 of the Penal Law, as amended in 1911. Relator was held in \$500 bail for trial at Special Sessions. He thereupon sued out a writ of habeas corpus and was discharged; the court saying:

"The precise and only question here involved is as to whether the possession thereby made an offense is actual physical possession or a constructive possession. The word 'possession' means, depending on the connection in which it is used, physical possession or constructive possession. The act in question is a penal statute, and under well-settled principles is to be strictly construed. To hold that every possible kind of constructive possession is made a crime would be to give to the language a very broad significance. By limiting it to physical possession the necessary requirements of the language are met, and, in view of the rules governing the interpretation of penal statutes, I do not think it is proper to extend its meaning beyond the actual requirements of the language used. It would certainly be going very far to assume that the Legislature intended to make every constructive possession of such a weapon a crime; such construction would raise a very serious question as to whether so construed the act was not unconstitutional as without the police power, which every sovereign state possesses."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] In 1910, section 1897 of the Penal Law, founded in article 172 entitled "Public Safety," provided that:

"A person who attempts to use against another, or who carries, or possesses any instrument or weapon of the kind commonly known as a slungshot, billy, sand club or metal knuckles, or who with intent to use the same against another carries or possesses a dagger, dirk or dangerous knife is guilty of a felony. Any person under the age of sixteen years, who shall have, carry or have in his possession in any public place any of the articles named or described in the last section which it is forbidden therein to offer, sell, loan, lease or give to him, shall be guilty of a misdemeanor. Any person over the age of sixteen years, who shall have or carry concealed upon his person in any city, village or town of this state, any pistol, revolver or other firearm without a written license therefor, theretofore issued to him by a police magistrate of such city or village or by a justice of the peace of such town, or in such manner as may be prescribed by ordinance of such city, village or town shall be guilty of a misdemeanor. No person not a resident of the United States, shall have or carry firearms or dangerous weapons in any public place at any time. This section shall not apply to the regular and ordinary transportation of firearms as merchandise, nor to sheriffs, policemen or to other duly appointed peace officers, nor to duly authorized military or civil organizations when parading, nor to the members thereof when going to and from the places of meeting of their respective organizations."

This section was amended by chapter 195 of the Laws of 1911. The first paragraph was amended by adding to the weapons enumerated. The third and fourth paragraphs were amended by raising the offense from a misdemeanor to a felony in each case. There was inserted between the second and third paragraphs, as the section then existed, the following:

"Any person over the age of sixteen years, who shall have in his possession in any city, village or town of this state, any pistol, revolver or other firearm of a size which may be concealed upon the person, without a written license therefor, issued to him by a police magistrate of such city or village, or by a justice of the peace of such town, or in such manner as may be prescribed by ordinance in such city, village or town, shall be guilty of a misdemeanor."

Evidently the Legislature intended to define, and provide punishment for, a different offense from any that had theretofore been covered by the section. It was inserted immediately before a paragraph which provided that any person over the age of 16 years who shall have or carry concealed upon his person a pistol without a license should be guilty of a felony; and it had used in two of the other paragraphs of the same section the words "who shall have or carry," and in the other "who carries or possesses." But when it came to amend by inserting this entirely new provision in the center of the section the wording of which was clear and before the Legislature for amendment, it left out the word "carries" which appeared in each of the other paragraphs, and provided that:

"Any person over the age of sixteen years who shall have in his possession
 * * * any pistol * * * of a size which may be concealed upon the
 person, without a written license therefor, * * * shall be guilty of a mis-
 demeanor."

The learned court at Special Term has limited the language of the paragraph added to the section by, in effect, writing into the language thereof words which the Legislature left out, so that he makes it read, any person who shall carry or have in his physical possession, any pistol which may be concealed upon the person, shall be guilty of a misdemeanor. As the following clause already read that any person who shall have or carry concealed upon his person a pistol shall be guilty of a felony, this construction would make the offense a felony or a misdemeanor, depending upon whether the pistol should be carried upon the person concealed, or not; and the sole effect of the act, which was passed, after considerable public discussion, as a forward step in an attempt to limit crimes of violence, would be to provide against the open carrying of pistols which were of a size to be concealed—an utterly unreasonable conclusion, in view of the fact that there was no evil of that kind to be protected against and that such a remedy for the real evil that did exist would be inapplicable and inefficient.

[2] The legislation must be interpreted in view of the preceding condition of the law and the evil aimed at. The language itself, "a pistol of a size which may be concealed upon the person," indicated that the Legislature intended exactly what it said, to prohibit a person at any time and in any place, within a city, village, or town, to have such a pistol in his possession without the permit required.

As bearing upon the intention of the Legislature, it is worthy of notice that said chapter 195 of the Laws of 1911, added to article 172 of the Penal Law an entirely new section, as follows:

"Sec. 1914. Sale of pistols, revolvers and other firearms. Every person selling a pistol, revolver or other firearm of a size which may be concealed upon the person, whether such seller is a retail dealer, pawnbroker or otherwise, shall keep a register in which shall be entered at the time of sale, the date of sale, name, age, occupation and residence of every purchaser of such a pistol, revolver or other firearm, together with the caliber, make, model, manufacturer's number or other mark of identification on such pistol, revolver or other firearm. Such person shall also, before delivering the same to the purchaser, require such purchaser to produce a permit for possessing or carrying the same as required by law, and shall also enter in such register the date of such permit, the number thereon, if any, and the name of the magistrate or other officer by whom the same was issued. Every person who shall fail to keep a register and to enter therein the facts required by this section, or who shall fail to exact the production of a permit to possess or carry such pistol, revolver or other firearm, if such permit is required by law, shall be guilty of a misdemeanor. Such register shall be open at all reasonable hours for the inspection of any peace officer. Every person becoming the lawful possessor of such a pistol, revolver or other firearm, who shall sell, give or transfer the same to another person without first notifying the police authorities, shall be guilty of a misdemeanor. This section shall not apply to wholesale dealers."

In *People ex rel. Brown v. Woodruff*, 32 N. Y. at page 364, the court said:

"It is always competent for the Legislature to speak clearly and without equivocation, and it is safer for the judicial department to follow the plain and obvious meaning of the act rather than to speculate upon what might have been the views of the Legislature in the emergency which may have arrived."

In *Tompkins v. Hunter*, 149 N. Y. 117, at page 122, 43 N. E. 532, at page 534, the court said:

"In construing statutes it is a well-established rule that resort must be had to the natural significance that the words imply, and, if they have a definite meaning which involves no absurdity or contradiction, there is no room for construction, and courts have no right to add or take away from that meaning. *Newell v. People*, 7 N. Y. 9; *McCluskey v. Cromwell*, 11 N. Y. 593; *People ex rel. Brown v. Woodruff*, 32 N. Y. 355, 364; *Matter of Miller*, 110 N. Y. 216, 222 [18 N. E. 139]. In *Matter of Miller*, 110 N. Y. 216, 18 N. E. 139, where it was contended that the reason and equity of a statute brought within its operation certain parties not mentioned in it, it was said: 'If that be so, it constitutes no reason for controlling its language, although it might seem that the Legislature would have provided for such a case had their attention been called to it.' It is not the duty of courts to disregard the plain words of a statute, even in favor of what may be termed an equitable construction."

In *People v. Luhrs*, 195 N. Y. 377, 89 N. E. 171, 25 L. R. A. (N. S.) 473, the court reiterated—

"the rule of construction that all the words of a statute are to be given effect if possible. It would be unreasonable to hold that the Legislature intended to prohibit the same act by two successive commands expressed in two successive clauses each of which makes that identical act a crime, when the statute permits the construction that the second clause was aimed at a different evil caused by a different act, the prohibition of which was necessary to furnish the complete protection which it was the object of the Legislature to afford."

Relator respondent, in his brief upon this appeal, repudiates the construction placed upon the act by the Special Term, and says:

"It seems fair to believe that the Legislature did mean to prohibit constructive possession in the home of the unlicensed home revolver. The only question that relator submits on this appeal is the constitutionality of the law for licensing the possession of the home revolver."

He says further:

That he "explicitly abandons all narrow and technical considerations by admitting that an unlicensed possession of a concealable weapon, committed by having a concealable revolver at home in a drawer or cabinet, is prohibited by the statute. By further admitting that constructive possession of a revolver in the house was prohibited by the statute as much as an actual physical possession. By further admitting that the prohibition relates to citizens of New York state, and that the Legislature had the home in mind as much as it had public places in mind when it made this prohibition. By admitting, further, that there is nothing obscure in the language of the statute in so far as an intention to prohibit the possession in the home of a revolver without a license therefor."

What he stands upon is the inherent and inalienable right to keep and bear arms, declared by the English Bill of Rights, inherited by the Colonies, recognized by the Bill of Rights as adopted in this state, and in the Constitutions of many other states, and alluded to in the second amendment to the Constitution of the United States, which provides:

"A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

[3] It is settled by a long line of authorities that the first 10 amendments to the Constitution of the United States are not operative on the

states. *Barron v. Baltimore*, 7 Pet. 243, 8 L. Ed. 672; *Spies v. Illinois*, 123 U. S. 131, 8 Sup. Ct. 22, 31 L. Ed. 80; *Brown v. New Jersey*, 175 U. S. 172, 20 Sup. Ct. 77, 44 L. Ed. 119; *Maxwell v. Dow*, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597; *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97. In *Robertson v. Baldwin*, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715, Brown, J., said:

"The law is perfectly well settled that the first 10 amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which had continued to be recognized as if they had been formally expressed. Thus * * * the right of the people to keep and bear arms is not infringed by laws prohibiting the carrying of concealed weapons."

And it has been specifically held that the second amendment, here relied upon, has no other effect than to restrict the powers of the national government, as said by the Chief Justice in *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588:

"The right of the people to keep and bear arms is not a right granted by the Constitution. Neither is it in any way dependent upon that instrument."

See, also, *Presser v. Illinois*, 116 U. S. 252, 6 Sup. Ct. 580, 29 L. Ed. 615; *Miller v. Texas*, 153 U. S. 535, 14 Sup. Ct. 874, 38 L. Ed. 812; *Andrews v. State*, 3 Heisk. (50 Tenn.) 165, 8 Am. Rep. 8.

In *People v. Persce*, 204 N. Y. 397, 97 N. E. 877, in passing upon section 1897 of the Penal Law prior to the amendment here under consideration, the Court of Appeals said:

"Neither is there any constitutional provision securing the right to bear arms which prohibits legislation with reference to such weapons as are specifically before us for consideration. The provision in the Constitution of the United States that the right of the people to keep and bear arms shall not be infringed is not designed to control legislation by the state. *Presser v. Illinois*, 116 U. S. 252 [6 Sup. Ct. 580, 29 L. Ed. 615]. There is no provision in the state Constitution at least directly bearing on this subject but only in the statutory Bill of Rights."

[4] The Legislatures of nearly all the states have enacted statutes making it an indictable offense to carry concealed weapons. The general rule is stated in 5 Am. & Eng. Enc. of Law, 731:

"The provisions of the state statutes prohibiting the carrying of concealed weapons do not infringe any constitutional right of the citizen, but are merely police regulations forbidding the carrying weapons in a particular manner which is found dangerous to the safety and peace of the citizen."

In *People v. De Morio*, 123 App. Div. 665, 108 N. Y. Supp. 24, the Appellate Division in the Second Department said:

"That part of section 410, Penal Code, pertinent to this case, provides: 'Any person over the age of sixteen years, who shall have or carry concealed upon his person in any city or village of this state, any pistol, revolver, or other firearm, without a written license therefor, theretofore issued to him by a police magistrate of such city or village, * * * shall be guilty of a misdemeanor.' There is no dispute that the defendant was found outside of a bar

in a barroom with a revolver in his pocket. The appeal rests upon the contention that the defendant was on his own premises, and that any proof of intent was lacking. The statute does not contain any exception which permits the carrying while on one's own premises such a weapon concealed about the person. Wharton on Criminal Law (10th Ed.) § 1557, says: 'It is no defense that the weapons, when there is no exception in the statutes, were only carried about in the defendant's own house.' Bishop on Statutory Crimes (3d Ed.) § 789, says: 'Nor will it avail him that the carrying was on his own premises unless the statute has this exception'—citing cases. See, too, *Harman v. State*, 69 Ala. 248; *Carroll v. State*, 28 Ark. 99 [18 Am. Rep. 538]; *Maupin v. State*, 89 Tenn. 367 [17 S. W. 1038]. The mere fact that a man carries such a weapon in his own curtilage does not warrant the conclusion that he would not use it if occasion offered, and does not negative the conclusion that he did not have it under such circumstances for any wrongful, offensive, or defensive purposes. This part of the statute quoted does not contain any provision as to intent to use the same. Hence the intent may be presumed from the commission of the act."

[5] The provisions of the Bill of Rights, in this state, are embodied in the statutes, to wit, the Civil Rights Law (chapter 6, Consol. Laws 1909; chapter 14, Laws of 1909), and not in the Constitution. Nevertheless we fully recognize the proposition that the rights enumerated in the Bill of Rights were not created by such declaration. They are of such character as necessarily pertain to free men in a free state.

[6] But in order to appeal thereto for the purpose of declaring null and void an act of the Legislature, possessing all the lawmaking power of the people, it is necessary, before the act is declared null and void, that it should clearly be made to appear that it is in flat violation of some fundamental right of which the citizen may not be deprived by any power.

The right to bear arms is coupled with the statement why the right is preserved and protected, viz., that "a well-regulated militia is necessary to the security of a free state." If the Legislature had prohibited the keeping of arms, it would have been clearly beyond its power. As said by the Supreme Court of the United States in *Presser v. Illinois*, *supra*:

"It is undoubtedly true that all citizens capable of bearing arms constitute the reserve military force or reserve militia of the United States as well as of the states, and, in view of this prerogative of the general government as well as of its general powers, the states cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms so as to deprive the United States of their rightful source for maintaining the public security and disable the people from performing their duty to the general government; but, as already stated, we think it clear that the sections under consideration do not have this effect."

In *English v. State*, 35 Tex. 473, 14 Am. Rep. 374, in referring to a statute prohibiting the carrying of certain specified deadly weapons, among others, pistols, daggers, slungshots, and bowie knives, the court said:

"To refer the deadly devices and instruments called in the statute 'deadly weapons' to the proper or necessary arms of a 'well-regulated militia' is simply ridiculous. No kind of travesty, however subtle or ingenious, could so misconstrue this provision of the Constitution of the United States as to make it cover and protect that pernicious vice, from which so many murders, assassinations, and deadly assaults have sprung, and which it was doubtless the in-

tention of the Legislature to punish and prohibit. The word 'arms,' in the connection we find it in the Constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense. The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the saber, holster pistols, and carbine; of the artillery, the field piece, siege gun, and mortar, with side arms."

Many other cases are to the same effect in interpreting the character of "arms" referred to and upholding the statutes against the carrying of concealed weapons.

[7] In the statute at bar the Legislature has not prohibited the keeping of arms. For the safety of the public, for the preservation of the public peace, in the exercise of the police power, the means employed being within its discretion and not in that of the courts, unless flagrantly in violation of constitutional provisions, the Legislature has passed a regulative, not a prohibitory, act. Legislation, which has for its object the promotion of the public welfare and safety, falls within the scope of the police power and must be submitted to even though it imposes restraints and burdens on the individual. The rights of the individual are subordinate to the welfare of the state. The only question that can then arise is whether the means employed are appropriate and reasonably necessary for the accomplishment of the purpose in view and are not unduly oppressive. *People ex rel. Nechamous v. Warden*, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718; *People v. Ewer*, 141 N. Y. 129, 36 N. E. 4, 25 L. R. A. 794, 38 Am. St. Rep. 788; *Wright v. Hart*, 182 N. Y. 330, 75 N. E. 404, 2 L. R. A. (N. S.) 338, 3 Ann. Cas. 263; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725; *Lemienx v. Young*, 211 U. S. 489, 29 Sup. Ct. 174, 53 L. Ed. 295.

There had been for many years upon the statute books a law against the carriage of concealed weapons. No court in this country, so far as I know, has ever declared such a law in violation of the Constitution or the Bill of Rights. It did not seem effective in preventing crimes of violence in this state. Of the same kind and character, but proceeding a step further with the regulatory legislation, the Legislature has now picked out one particular kind of arm, the handy, the usual, and the favorite weapon of the turbulent criminal class, and has said that in our organized communities, our cities, towns, and villages where the public peace is protected by the officers of organized government, the citizen may not have that particular kind of weapon without a permit, as it had already said that he might not carry it on his person without a permit. If he has it in his possession, he can readily stick it in his pocket when he goes abroad. In the attempt to prevent this particular kind of crime, the carrying of concealed weapons, the Legislature says that possessing a concealable pistol shall be a misdemeanor. It is an attempt to keep away temptation, opportunity. If the citizen carries it concealed on his person, it is a felony; if he has it in his possession handy and ready whenever the impulse shall come to violate the law, he shall be guilty of a misdemeanor, unless a permit is procured. The Legislature assumed that the obliga-

tion to procure the permit would be a most effective preventive to the possession of such weapon by the criminal classes.

[8-10] I am unable to persuade myself that such an act, regulating a right which is not denied, is not a legitimate exercise of the police power of the state. Whether it is a wise law, whether it will accomplish the purpose for which it was intended, whether it will check crimes of violence, is not the business of the court to inquire. If it fails to accomplish the purpose intended, if it creates more evil than good, if it is an annoyance and an incentive to blackmail, it can easily be repealed by the same lawmaking power which enacted it. The sole question for the court is, not whether the Legislature ought to have enacted the particular statute, not whether the particular statute was wise, but solely whether it was within the power of the Legislature to adopt; and, when a litigant comes into court to ask the court to declare a particular statute null and void as being beyond the power of the Legislature to pass, he must show precisely and conclusively that it is beyond such power.

"Whether the legislation was wise is not for us to consider. The motives actuating and the inducements held out to the Legislature are not the subject of inquiry by the courts, which are bound to assume the lawmaking power acted with a desire to promote the public good. Its enactments must stand, provided always that they do not contravene the Constitution, and the test of constitutionality is always one of power—nothing else." *Bohmer v. Haffen*, 161 N. Y. 390, 399, 55 N. E. 1047, 1048.

"This is not a question of substituting the judgment of the court for that of the Legislature. If the act is within the power of the state, it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain, is it within the police power of the state, and that question must be answered by the court." *Lochner v. New York*, 198 U. S. 45, 56, 25 Sup. Ct. 539, 543 (49 L. Ed. 937, 3 Ann. Cas. 1133).

It should be borne in mind that this appeal is in a habeas corpus proceeding, brought by the relator solely to test the validity of the law; that he concedes the possession in his house of a loaded revolver, and that such possession and such weapon came within the purview of the law; that it has been held under the former law that the carrying of a concealed weapon upon one's person upon his own premises was prohibited by said law (*People v. De Morio*, supra), and that the Court of Appeals, in *People v. Persce*, supra, has held that a theoretical, technical and fanciful construction was not to be put upon the law, saying of the former statute:

"It clearly should not be construed to mean a possession, for instance, such as would theoretically and technically follow from the legal ownership of a weapon in a collection of curious and interesting objects."

As the former law prohibited the carrying concealed a revolver upon the person, even upon one's own premises, the present law is but a step further and prohibits the possession of a concealable revolver upon the premises without a permit.

As I think that the statute is merely along the line of regulation, and fairly within the undoubted police power of the Legislature, I think it must be sustained by the courts.

It follows therefore that the order appealed from should be reversed, and that the writ of habeas corpus should be quashed and the relator remanded.

LAUGHLIN and MILLER, JJ., concur.

SCOTT, J. (dissenting). I am unable to concur in the construction given by my Brother CLARKE to section 1897 of the Penal Law as amended by chapter 195 of the Laws of 1911. I fully recognize the useful rules of construction compiled by him from numerous reported cases; but there is one other rule, to which he does not refer, but which is well settled, which is that every statute shall be given a reasonable construction, where its language is susceptible of more than one construction, and, in determining what is a reasonable construction, regard is to be had not only to the language, but also to the evil sought to be guarded against and to the nature of the remedy provided. This is especially true of statutes like the one now under consideration, which is highly penal, creates a crime out of that which was formerly lawful and relies for its authority upon the existence of that somewhat vague and shadowy right known as the "police power."

It is entirely clear, and is not disputed, that prior to the amendment of 1911 it was not unlawful for a resident over 16 years of age to have and keep in his house, but not on his person, a pistol, and no provision was made for a license for such possession. The purpose of the act was to prevent the use or the temptation to use pistols hastily, improperly, or unnecessarily. The opportunity and temptation so to use a pistol is undoubtedly greater when such a weapon is in the physical possession of a person than when it is merely in his constructive possession, and the evident purpose of the act can be completely carried out without giving a forced meaning to the word "possession" as used in the amendment. That the Legislature intended that its prohibition should be confined to pistols carried on the person, and thus in the physical possession of the owner, seems to me to be strongly indicated by the limitation of the articles prohibited to pistols "of a size to be carried upon the person." Under the construction now sought to be given to the act it would be perfectly legal to keep at one's bedside, or in a cabinet, a blunderbuss or a horse pistol, or whatever modern weapons correspond in size to those ancient arms, but unlawful to so keep their smaller relative of a size that might be concealed upon the person. And when we come to consider the size of pistols thus forbidden, it is clear that it must be considered with reference to a clothed, and not an unclothed, person, for it is difficult to conceive of a lethal weapon so small that it could be concealed upon the person otherwise than by clothing.

In determining the construction to be given to a particular clause in a section of the act we should consider the whole section, and the sense in which similar words are used. The purpose of the whole section is clearly to provide, so far as legislation will be effective for said purpose, against the carrying of pistols by criminals and other persons who may, it was feared, make an improper use of them. It was not intend-

ed to absolutely and entirely prohibit such carrying, because provision is made for the issue of licenses to persons approved by certain magistrates.

Of course, no such prohibition can be completely effective with respect to the class of persons against whom it is principally directed, and probably no one ever thought it would be; but the best the Legislature deemed it possible to do was to enact the prohibition and attach a heavy penalty for its violation. The practical result of the construction now sought to be given to the act will be that the professional criminal will generally violate the act and take his chances of discovery and punishment, while the law-abiding citizen will be obliged to disarm himself of his only effective protection against the predatory classes. The best police force in the world cannot always, or even usually, anticipate and prevent crimes of violence. They can and usually do preserve peace and order, and sometimes discover the perpetrators of crimes; but they can seldom prevent. A law-abiding citizen in his walks abroad can usually avoid dangerous localities, and if he is compelled to traverse them can obtain a license to carry a defensive weapon; but in his own house, wherever it may be situated, he can never be entirely secure against the midnight marauder. For protection there he is compelled to rely upon himself and upon such means of defense as he may have at hand. The construction now sought to be given to the act would deprive him of such protection.

I am therefore satisfied that the true construction of the act, and one which does no violence to its language, is that adopted by the learned justice at Special Term, and which accords well with the reasonable construction given to section 1897 of the Penal Law in *People v. Persce*, 204 N. Y. 397, 97 N. E. 877.

The order appealed from should be affirmed.

INGRAHAM, P. J., concurs.

(79 Misc. Rep. 10.)

**BERTUCH et al. v. UNITED STATES & HAYTI TELEGRAPH
& CABLE CO.**

(Supreme Court, Appellate Term, First Department. January 9, 1913.)

**1. TELEGRAPHS AND TELEPHONES (§ 36*)—CABLE MESSAGE—AGREEMENT TO
WITHDRAW—FAILURE TO PERFORM.**

Where a cable company to which plaintiff had delivered a cipher message for transmission to Brazil agreed to stop the message, but negligently failed to do so, resulting in loss to plaintiff, it was liable for the damage sustained.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 26, 31; Dec. Dig. § 36.*]

**2. TELEGRAPHS AND TELEPHONES (§ 56*)—CABLE MESSAGE—AGREEMENT TO
PREVENT DELIVERY—FAILURE TO PERFORM—RIGHT TO SUE.**

Where defendant cable company agreed with the sender of a cipher cable message to stop the same and prevent delivery, but negligently failed to do so, the right to sue either for breach of contract or in tort is in the sender and not in the addressee.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 37; Dec. Dig. § 56.*]

**3. TELEGRAPHS AND TELEPHONES (§ 36*)—CABLE MESSAGE—AGREEMENT TO
STOP—BREACH—SERVICE TOLL.**

Where a cable company agreed to stop a message previously delivered to it for transmission, but negligently failed to do so, resulting in loss to the sender, it was no defense to an action for the damages sustained that the stopping of the message would require the sending of an additional message for which defendant was entitled to additional tolls; no additional tolls having been charged or demanded.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 26, 31; Dec. Dig. § 36.*]

**4. TELEGRAPHS AND TELEPHONES (§ 67*)—CABLE MESSAGE—AGREEMENT TO
STOP—BREACH—NOMINAL DAMAGES.**

Where plaintiff had delivered to defendant cable company a cipher cable message, unintelligible except to the parties, with no further information than that it related to a business matter, and afterwards requested defendant to stop delivery, which defendant agreed but negligently failed to do, plaintiffs were only entitled to recover nominal damages, whether the suit was brought for breach of contract or in tort.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 64-68; Dec. Dig. § 67.*]

**5. TELEGRAPHS AND TELEPHONES (§ 66*)—CABLE MESSAGE—AGREEMENT TO
STOP—FAILURE TO PERFORM—GROSS NEGLIGENCE.**

Defendant cable company operated in connection with another company a cable line between New York and Brazil. Plaintiff delivered to it a cipher message, and later requested defendant to stop the message, which it agreed to do. Defendant made efforts to that end which resulted in failure because of some mistake or error of an operator at some distant post from where the message was sent. Whether the operator who failed in the performance of his duty was an employé of the defendant or of a connecting line did not appear. *Held*, that defendant was not chargeable with gross negligence.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. TELEGRAPHS AND TELEPHONES (§ 67*)—FAILURE TO STOP MESSAGE—SPECIAL DAMAGES—KNOWLEDGE OF FACT.

The mere fact that a cable company knew that a cipher message related to a "business matter" did not charge it with knowledge of the nature of a message so as to render it liable for special damages for failure to stop its transmission on the order of the sender.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 64-68; Dec. Dig. § 67.*]

Guy, J., dissenting.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Paul Bertuch and others, doing business under the name of Hagemeyer & Brunn, against United States & Hayti Telegraph & Cable Company. From a Municipal Court judgment in favor of plaintiffs, defendant appeals. Modified and affirmed.

Argued December term, 1912, before SEABURY, GUY, and GERARD, JJ.

Roberts, Hepburn & des Garennes, of New York City (Francis Raymond Stark, of New York City, of counsel), for appellant.

Cardozo & Nathan, of New York City (Michael H. Cardozo, Jr., of New York City, of counsel), for respondents.

SEABURY, J. This is an action to recover damages caused by reason of the act of the defendant in sending without authority a cipher message, the sending of which resulted in damage to the plaintiffs. The facts are undisputed. Prior to August 15, 1911, Nunes, Sobrinho & Co., at Para, Brazil, advised the plaintiffs that they had bought for their account and would ship by steamer five tons of rubber of a specified quality at a specified price. On August 15, 1911, the plaintiffs filed with the defendant telegraph company, for transmission by cable to Nunes, Sobrinho & Co., a message written in cipher, which contained the single word "Auzholzen." The meaning of the cipher message was, "Your acceptance of offer came too late." Shortly after the cipher message had been delivered to the defendant, the plaintiffs were informed through Henderson & Korn, rubber brokers, of an opportunity to sell the rubber offered by Nunes, Sobrinho & Co., and they at once telephoned to the defendant and asked if the cipher message could be stopped. The agent of the defendant receiving this inquiry said that the message had gone forward, but that it could and would be stopped. Within an hour thereafter, the plaintiffs again inquired as to the message, and were told that it had been stopped. Relying upon this information, the plaintiffs made a contract to resell the rubber to B. F. Goodrich Company. In September, 1911, the plaintiffs learned that the cipher message of August 15th had been delivered to Nunes, Sobrinho & Co. As soon as the plaintiffs ascertained that they would not receive the five tons of rubber from Nunes, Sobrinho & Co., they purchased that amount of rubber in the market so as to be able to make delivery under their contract with B. F. Goodrich Company. The plaintiffs have recovered a judgment for the difference between the price at which Nunes, Sobrinho & Co. offered

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the rubber, and the price which the plaintiffs were required to pay in the market for rubber bought in order to enable them to fulfill their contract with B. F. Goodrich Company.

The exceptions of the appellant to rulings upon evidence presents no prejudicial error, and there seems to be no dispute that the record contains all the facts as they actually occurred. The contention of the appellant that its operator was not authorized to agree on behalf of the defendant that the message would be stopped, and that the plaintiffs' request to stop the message involved the performance of an illegal act, because it required the sending of a free message in violation of law, do not impress us as possessing merit. If the defendant was entitled to an additional charge for the service it assumed to render in stopping the message, it should have collected it; but its failure to demand prepayment is not an excuse for its omission to perform in a careful manner the obligation which it assumed.

This appeal presents but two questions which require discussion: First, was the unauthorized sending of the cipher message an actionable wrong against these plaintiffs? And, second, if it was, can more than nominal damages be recovered?

[1] It is settled that, if one contracts with a telegraph company to transmit a message, and the latter fails to exercise reasonable care in the transmission, whereby the sender suffers loss, the sender has a cause of action against the telegraph company. This principle has been applied in cases where the telegraph company has failed to deliver a message which it agrees to deliver, and we think it is applicable to this case, where the telegraph company delivered a message which it was not authorized to deliver.

[2] The claim of the appellant that the addressee of the message alone has a cause of action against the defendant is without merit. The delivery of the message to the addressee did not violate any right of the addressee, and therefore the latter had no cause of action against the telegraph company in tort, and, as the addressee had no contract with the telegraph company, it had no cause of action for breach of contract. This view does not conflict with the rule applied in *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511, and in *Chesebrough v. Western Union Telegraph Co.*, 76 Misc. Rep. 516, 135 N. Y. Supp. 583, cited by the appellant. In those cases the sender of the message had adopted the method of communication used by the addressee, and, as between the sender of the message and the addressee, the sender had a right of action against the addressee. Here the plaintiffs have no cause of action against the addressee, and are seeking to assert a cause of action growing out of the negligent manner in which the telegraph company performed its public duty under its contract with them. If any cause of action arises out of the facts of this case against the defendant, it exists in favor of the plaintiffs and not in favor of the addressee.

The plaintiffs contracted with the defendant to transmit the message, and before the message was delivered, and while there was ample time and opportunity to prevent its delivery, the plaintiffs instructed the defendant to stop the message, and the defendant assumed to do so.

After the defendant received instructions to stop the message and agreed to do so, its duty was to exercise reasonable care to bring about this result. The delivery of the message resulted in harm to the plaintiffs, and this harm the defendant could have avoided by the exercise of reasonable care. Its omission to exercise this degree of care rendered it liable to the plaintiffs for its neglect. It is true that the original instruction of the plaintiffs required the defendant to send the message; but, while the message was under the control of the defendant, it was none the less the duty of the defendant to exercise reasonable efforts to stop the message if the sender so directed. If one gives a message to the operator of a telegraph company and pays the charge, and, before the operator sends the message, the sender alters his purpose and directs that the message shall not be sent, it will hardly be contended that the operator would have the right to persist in sending the message. While the message remained under the control of the telegraph company, and while ample time and opportunity existed to enable the telegraph company to stop the message, we think that the message, so far as the telegraph company is concerned, was subject to the order of the sender, and, if the sender directed that it should be stopped, it was the duty of the telegraph company to use reasonable care to stop it.

[3] That, under the circumstances, the telegraph company could exact an additional charge, is probably true; but that fact is of no importance here, because it assumed to perform this duty without asking for prepayment of additional compensation. In the absence of a request for prepayment, we are not justified in assuming that, if the request had been made, the plaintiffs would have refused to comply with it.

While the plaintiffs might maintain an action for damages under their contract with the defendant for the negligent breach of duty, the right of the plaintiffs to proceed against the company in tort is equally clear. In *Jones on Telegraph & Telephone Companies*, § 468, it is said that:

"The weight of authority is that the sender may maintain an action for the breach of the contract, or he may proceed against the company for the breach of its public duty or sue in tort."

In *Brown v. Chicago, etc., R. R. Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41, the court said:

"All the cases hold that the person injured through the negligence or carelessness of the carrier may proceed either upon contract, alleging the careless or negligent acts of the defendant as a breach of the contract, or he may proceed in tort, making the carelessness and negligence of the company the ground of his right of recovery."

[4] It only remains to be determined whether, under the circumstances disclosed, the plaintiffs are entitled to recover more than nominal damages. The plaintiffs' election to sue in tort has apparently been made on the assumption that, in so far as the measure of damages is concerned, there is a radical difference whether the action is in contract or tort. The contention of the plaintiffs seems to be that, if they had

sued in contract, the rule declared in *Hadley v. Baxendale*, 9 Exch. 34, would be applicable and would limit their recovery to the damages naturally arising out of the breach, or such as may reasonably be supposed to have been within the contemplation of both parties at the time the contract was made as the probable result of its breach, but that, inasmuch as they have elected to sue in tort, they are entitled to recover for any damages which are the result of the defendant's neglect. In cases of the class, within which the case at bar falls, there is no significance in the distinction which the plaintiffs seek to emphasize. Whether the plaintiffs sounded their action in tort or contract is immaterial, as in either event the plaintiffs are only entitled to recover the damages which would be satisfaction for such loss as might reasonably have been expected under the particular circumstances to occur. In *Jones on Telegraph & Telephone Companies*, § 518, it is said:

"The general rule, however, for ascertaining the measure of damages, is applicable in both kinds of actions. In an action in tort, or for a breach of a public duty, the damages which a plaintiff can recover are in satisfaction of the natural and proximate consequences of the defendant's act; in other words, they are in satisfaction of the loss that might reasonably have been expected under the particular circumstances to occur."

The general rule is that a telegraph company receiving a cipher message, or one otherwise unintelligible, the nature and purpose of which is only known to the sender and addressee, is liable in the event of negligence only for nominal damages. This is the rule which prevails in England and Canada, in the United States Supreme Court, in New York, Massachusetts, Wisconsin, and most of the other states. *Sanders v. Stuart*, 1 Law Rep. Common Pleas Division, 326; *Kinghorn v. Montreal Tel. Co.*, 18 Up. Can. (Q. B.) 60; *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; *Western Union Telegraph Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Landsberger v. Magnetic Telegraph Co.*, 32 Barb. 530; *Leonard v. Telegraph Co.*, 41 N. Y. 544, 1 Am. St. Rep. 446; *Baldwin v. Telegraph Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Lowery v. Western Union Telegraph Co.*, 60 N. Y. 198, 19 Am. Rep. 154; *McColl v. Western Union Telegraph Co.*, 44 N. Y. Super. Ct. 487; *Wheelock v. Postal Telegraph Cable Co.*, 197 Mass. 119, 126, 83 N. E. 313, 14 Ann. Cas. 188; *Candee v. Western Union Telegraph Co.*, 34 Wis. 471, 17 Am. Rep. 452.

In *Sanders v. Stuart*, *supra*, the plaintiff intrusted defendant with a message in cipher, which was unintelligible to defendant, for transmission to America. The defendant negligently omitted to send the message, and as a consequence the plaintiff lost a sum of money. Lord Coleridge, C. J., in rendering the decision of the court, said:

"Upon the facts of this case we think that the rule in *Hadley v. Baxendale* applies, and that the damages recoverable are nominal only. It is not necessary to decide, and we do not give any opinion, how the case might be if the message, instead of being in language utterly unintelligible, had been conveyed in plain and intelligible words. It was conveyed in terms which, as far as the defendant was concerned, were simple nonsense."

Baldwin v. United States Telegraph Co., *supra*, declared the rule which has ever since been followed in this state in the following language:

"For all the purposes for which the plaintiffs desired the information, the message might as well have been in cipher or in an unknown tongue. It indicated nothing to put the defendant upon the alert or from which it could be inferred that any special or peculiar loss would ensue from a nondelivery of it. Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for the nonperformance of contracts, whether for the sale or carriage of goods, or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the nonperformance. In other words, the damages given by way of indemnity have been the natural and necessary consequences of the breach of contract, in the minds of the parties, interpreting the contract in the light of the circumstances under which and the knowledge of the parties of the purposes for which, it was made, and when a special performance is intended by one party, but is not known to the other, such special performance will not be taken into account in the assessment of damages for the breach."

In 27 American & English Encyclopedia of Law, p. 1062, it is said:

"The rule is well established that where the message, as delivered for transmission, is in cipher and unintelligible except to the sender and addressee, and the company has no information otherwise as to its character or purport, nor of its importance and urgency, the party injured can recover nothing more than nominal damages."

[5] No question arises in this case as to whether the telegraph company can limit its liability as to its own negligence, whether ordinary or gross. There is no provision of the contract with the telegraph company which applies to the peculiar facts of this case, which prescribes any limitation of liability. Nor does the appellant claim that its liability is limited by contract. The authorities which discuss the question of gross negligence do so only to show that a telegraph company cannot limit its liability against its own gross negligence. The correctness of this proposition is unquestioned. As we view the matter, therefore, the discussion of the question of gross negligence has no application whatever to the question presented for determination.

Moreover, the evidence does not justify the conclusion that the defendant was guilty of gross negligence. The defendant made efforts to stop the message, and these efforts resulted in failure because of some mistake or error of an operator at some distant post from where the message was sent. Whether the operator who failed in the performance of his duty was the employé of the defendant, or the employé of a company owning some connecting line, does not appear. It does appear, however, that the defendant and the corporation which delivered the message in Brazil were separate and distinct corporations. Moreover, the complaint predicates the charge of negligence upon the unauthorized sending of the message, and not upon the failure to notify the plaintiffs that the message had been delivered. We are satisfied that the defendant failed to exercise due care to stop the message, but this fact alone would not sustain a finding that the defendant was guilty of gross negligence.

[8] We find no support in the evidence for the claim that the defendant knew that the cipher message related to a "business matter"; but, if the defendant might have inferred that such was the case, that circumstances alone would not acquaint the defendant with a knowledge of the nature of the message so as to make it liable for any special damages which resulted from the defendant's neglect. In *Western Union Telegraph Co. v. Coggin*, 68 Fed. 137, 15 C. C. A. 231, the plaintiff told the telegraph company that the message related to "a business matter," and the court, in discussing this feature of the case, said:

"The nature of the business was not disclosed. Whether it was of much or little moment, and whether it related to business of the past, present, or future, or to business which, if not transacted at a particular time or place, would be attended with pecuniary loss or damage, was not stated; nor was anything said from which such results can be said to have been within the contemplation of the parties."

While the facts proved established a cause of action in the plaintiffs against the defendant, the circumstances of the case were such that, under well-established rules, no more than nominal damages could be recovered.

Judgment modified by reducing the judgment to nominal damages, and as modified affirmed, with costs to the appellant.

GERARD, J., concurs.

GUY, J. I am constrained to dissent from the opinion of my learned colleagues for the following reasons:

This action is not an action upon contract, nor an action in tort growing out of contract, but is an action in tort for damages resulting from the gross negligence of the defendant in sending an unauthorized telegraph message to an addressee in Brazil, purporting to have been sent by the plaintiffs, the sending and delivery of which, at the time it was sent, was in direct disregard of specific notice given by the plaintiffs to the defendant that the message must not be transmitted or delivered. The rule therefore that, for a failure to exercise reasonable care in the authorized sending and delivery of a cipher message, the company is only liable for nominal damages, whether the action be brought on the contract or in tort, unless the defendant had notice of the meaning and importance of the message, is not applicable. The tort in such cases grows out of the contract, and the damage is measured by what was in contemplation of the parties making the contract. In this case there is no contract. The evidence shows that, so far as the original message delivered by plaintiffs to defendant was concerned, it had been withdrawn, and the contract for its transmission and delivery, as between the plaintiffs and defendant, had, by mutual consent, been canceled; the plaintiffs having notified the company not to deliver the message, the company having consented to stop the delivery thereof, and having subsequently notified the plaintiffs that the message had been stopped.

The suggestion that there was a new contract made to stop delivery,

and that this action is for negligence in performing that contract, is without merit. The appellant denies the making of any such new contract. There is no evidence that it was the intent of the parties to make any charge therefor, on the one hand, or to make any payment therefor, on the other. Nor is there any evidence to support the contention that the message was delivered by the mistake of some distant agent of a connecting line. The only evidence on this point is defendant's letter subsequently written to plaintiffs, which justifies the inference that the wrongful transmission and delivery of the message was due to the gross negligence of defendant's authorized agents in its home office, acting within the scope of their authority.

"Whether it be in contract or in tort, the proper measure of damages, except where punitive damages are allowable, is a just indemnity to the party injured for the loss which is the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the complainant would not have averted." *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507, Rapallo, J., writing the opinion.

This rule, of course, is subject to the modification that, in actions on contract, the damage is further measured by what was expressly or impliedly within the contemplation of the parties.

"The general rule in actions for torts is that the wrongdoer is liable for all injuries resulting directly from the wrongful acts, whether they could or could not have been foreseen by him." 13 Cyc. 28, citing *Eten v. Luyster*, 60 N. Y. 252.

It is urged that the message was not signed with the name of the plaintiffs; but defendant had knowledge that the sending of a message in the form of the message in question would be construed by the addressee as a message sent by the plaintiffs.

In *Elwood v. W. U. T. Co.*, 45 N. Y. 549, 556 (6 Am. Rep. 140), a telegraph message was sent in the name of the cashier of a bank at the request of a party who was thereby held out as entitled to credit for a large amount, without any evidence of his authority to use the name of the cashier. In affirming a judgment in favor of the plaintiff therein, the court (Rapallo, J., writing the opinion) say:

"That the sending of such a message in the name of the cashier of a bank, at the request of the party who was thereby held out as entitled to credit for a large amount, without any evidence of his authority to use the name of the cashier, * * * was an act of gross negligence, is too clear to admit of argument. The act was done in the direct course of the employment of the agent. The agent was placed in the office, and in the control of the instruments, to use them in transmitting messages for a compensation. *If the agent performed that duty in a negligent manner, whereby the plaintiff was injured, the principal is clearly liable.*"

In the case at bar the defendant had actual knowledge that the message was unauthorized, so that there is here no question of the exercise of reasonable care to discover whether the message was authorized, but a flagrant neglect of duty resulting in damage to the plaintiffs. The utter failure on the part of the defendant to notify plaintiffs of the wrongful sending of the message, after it had been withdrawn by plaintiffs, and its delivery stopped, constituted further negligence of the grossest character, for which defendant would be liable. See 37

Cyc. 1673, citing *Laudie v. W. U. Telegraph Co.*, 126 N. C. 431, 35 S. E. 810, 78 Am. St. Rep. 668.

While it would seem that, where the action is based upon a gratuitous, independent tort, the defendant's liability for all the direct consequences thereof would be the same, whatever the degree of negligence, some of our courts have directly held, and others strongly intimated, that a greater degree of liability would follow where the negligence is gross. From the very nature of the business, few instances arise of gross negligence on the part of a telegraph company, and there does not seem to be any reported case analagous with the case at bar.

But it is well settled by numerous recent authorities in this state that a telegraph company, as a quasi public corporation, cannot, *even by express contract*, limit its liability where gross negligence is shown, such as an absolute failure to perform its duty or to exercise any degree of care, manifesting utter recklessness as to consequences.

In *Postal Telegraph Cable Co. v. Robertson*, 36 Misc. Rep. 785, 74 N. Y. Supp. 876, the court say:

"The rule is that a telegraph company may, by contract, limit its liability for mistakes or delays in the transmission and delivery, or nondelivery, of messages, caused by negligence of its servants, if the negligence is not gross: * * * but such company cannot by notice limit its liability in this respect, by any form of contract, when its negligence is gross or its conduct willful."

This statement of the rule has been cited with approval in *Will v. Postal Telegraph Cable Co.*, 3 App. Div. 22, 37 N. Y. Supp. 933; *Dixon v. W. U. Telegraph Co.*, 3 App. Div. 61-64, 38 N. Y. Supp. 1056; *Empire Roller Rink Co. v. W. U. Telegraph Co.*, 75 Misc. Rep. 567-568, 133 N. Y. Supp. 717; *Weld v. Postal Telegraph Cable Co.*, 199 N. Y. 88, 92 N. E. 415.

In *Weld v. Postal Telegraph-Cable Co.*, 199 N. Y. 88, 92 N. E. 415, the court say:

"It is therefore but right that telegraph companies should have the power to limit their liability in cases where mistakes occur through no fault on their part, or for such mistakes of their employés as will occur through ordinary negligence in spite of the most stringent regulations or the most vigilant general oversight. *But manifestly this power cannot be extended without placing the public absolutely at the mercy of those engaged in transmitting telegraph messages.* This is the reason of the rule, long since established in this state, that individuals and corporations engaged in this quasi public business cannot contract to absolve themselves from liability for their own willful misconduct or gross negligence. They may protect themselves by contractual limitations, *but beyond that they may not go.*"

In this case it is conceded by both sides that there is no clause in the original contract, which, if it were still existent, would bring the parties within the rule permitting telegraph companies to limit their liability by express contract.

An absolute failure to perform a duty, or an utter disregard of an express injunction not to transmit or deliver a message, is a conscious disregard of consequences and constitutes gross negligence. See *Elwood v. W. U. Telegraph Co.*, *supra*; 37 Cyc. 1673; *Rrailroad Co. v.*

Lockwood, 84 U. S. (17 Wall.) 376-382, 21 L. Ed. 627; Kiley v. West. Union Telegraph Co., 109 N. Y. 231, 16 N. E. 75; Western Union Telegraph Co. v. Way, 83 Ala. 543, 4 South. 844.

It is true that the authorities cited hold only that a telegraph company cannot, by express contract, relieve itself of full liability for gross negligence; but as such decisions are based upon the broad principle that it would be against public policy and manifestly unjust to permit a quasi public corporation, for any reason whatever, to avoid such liability, it must be assumed that the rule of law invoked by the appellant herein is an established rule of law only as to cases where only ordinary negligence is established, and is not a rule of law as to cases involving gross negligence.

The contention that quasi public corporations, though denied the right, by one well-established rule of law, to limit their liability for gross negligence, even by express contract, shall be permitted to accomplish the same result by invoking another rule of law applicable only where ordinary negligence is involved, even though the courts have everywhere declared that to permit such freedom from liability is against public policy and "cannot be extended without placing the public absolutely at the mercy of those engaged in transmitting telegraph messages," is not worthy of serious discussion. What the law forbids by direct action, it surely will not permit by indirection.

A rule of law is not an arbitrary thing, like a statute, but must be founded in good reason and justice. Where the reason no longer exists, or where it would be manifestly unjust or against public policy to apply such a rule, the rule is deemed not to exist. See *Fitzwater v. Warren*, 206 N. Y. 355-358, 99 N. E. 1042.

In this case, gross negligence has been established, taking the case out of the rule. But, irrespective of the distinction which may be drawn between cases of ordinary negligence and gross negligence on the part of quasi public corporations, this case does not come within the rule invoked by the appellant, for the reason that the contract had ceased to exist, and the unauthorized sending and delivery of the message constituted an independent, gratuitous tort, which would render the defendant liable for all the direct and proximate damages resulting therefrom.

The judgment should be affirmed, with costs to the respondents.

LIPPMANN v. MENDE et al.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. TAXATION (§ 708*)—PEOPLE OF STATE—SUFFICIENCY OF ALLEGATION.

Greater New York Charter (Laws 1901, c. 466) § 1035, as amended by Laws 1911, c. 65, provides that, where the people of the state of New York is made a defendant, the complaint shall state, in addition to the other matters required, detailed facts showing the particular nature of the interest in or lien on said realty of the people, and detailed facts showing the particular nature of such interest or lien which plaintiff has

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

reason to believe the people may have and the reason for making the people a party, and upon failure to so state the complaint shall be dismissed as to the people. *Held*, that a mere allegation of the complaint in an action to foreclose a transfer tax lien, to which the people was made a party, that the premises may have escheated to the people, was not a detailed statement of the facts showing the nature of the people's interest in the realty, to justify making them a defendant.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1291-1297, 1406; Dec. Dig. § 708.*]

2. STATES (§ 191*)—ACTIONS AGAINST—CONSENT.

The state can only be sued by its own consent.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 170-184; Dec. Dig. § 191.*]

3. TAXATION (§ 708*)—AIDED BY AFFIDAVITS.

The complaint, in an action to foreclose a transfer tax lien, cannot be aided by answering affidavits subsequently filed on motion to strike a party defendant.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1291-1297, 1406; Dec. Dig. § 708.*]

Appeal from Special Term, New York County.

Action by David Lippmann against Roma H. Mende and others. From an order dismissing the complaint as against one defendant, plaintiff appeals. Affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Harold Swain, of New York City, for appellant.

Thomas Carmody, Atty. Gen. (Robert P. Beyer, of New York City, of counsel), for respondent.

CLARKE, J. This is an action to foreclose a transfer tax lien. The complaint alleges the purchase of the tax lien, the situation of the property, the failure to pay the semiannual interest, the election by the defendant to deem the aggregate amount of said tax lien to be immediately payable, and then follow these two allegations:

"Seventh. The plaintiff is informed and believes, or has reason to believe, that the defendants and each of them have, claim to have, or may have an interest in or claim upon the real property affected by the said lien, which interest or claim is subject and subordinate to the lien of the plaintiff herein.

"Eighth. The people of the state of New York is made a party defendant to this action by reason of the fact that the premises in this action may have escheated to said the people of the state of New York upon the death of one John Cotter, the grantee in a certain deed made by Ely Moore and wife, dated November 16, 1827, and recorded in the office of the register of the county of New York on November 14, 1828, in Liber 241 of Conveyances, page 542."

[1] Section 1035 of the Greater New York Charter, as amended by chapter 65 of the Laws of 1911, provides as follows:

"Where the people of the state of New York * * * is made a party defendant the complaint shall set forth, in addition to the other matters required to be set forth by law, detailed facts showing the particular nature of the interest in or the lien on the said real property of the people of the state of New York * * * and detailed facts showing the particular nature of the interest in or the lien on said real property which plaintiff has reason to believe that the people of the state of New York * * * has or may

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

have in the said real property, and the reason for making the people of the state of New York * * * a party defendant. Upon failure to state such facts, the complaint shall be dismissed as to the people of the state. * * *

[2] Of course, it is a fundamental proposition that the state cannot be sued, except by its own permission. When it has provided how it may be sued, and what allegations must appear in the complaint, and distinctly provides for a dismissal of a complaint which does not comply with the law permitting the suit to be brought, there is nothing to do but obey the law and dismiss the complaint. It is obvious that the law has not been complied with, and that the mere statement that the premises may have escheated to the people upon the death of one John Cotter is not "the detailed facts showing the particular nature of the interest" and the "detailed facts showing the particular nature of the interest in or the lien on said real property which plaintiff has reason to believe that the people has or may have in the said real property, and the reason for making the people a party defendant." In other words, if this allegation satisfies the law, the statute was idle, and we are back just where we were at the time the law was enacted. It was passed for the very purpose of relieving the Attorney General's office from a horde of cases upon the mere allegation that the state may have a lien, which is all that this complaint does.

[3] Appellant claims that the facts set up in the answering affidavits satisfy the requirements of the statute. It is a sufficient answer that this order was made on the complaint, which cannot be pieced out by subsequent affidavits. The complaint, as framed, fails to comply with the law.

The order of dismissal as against the people should be affirmed, with costs and disbursements to the respondent. All concur.

(78 Misc. Rep. 213.)

GRACE et al. v. REPOSE MAUSOLEUMS, Inc., et al.

(Supreme Court, Special Term, Kings County. November, 1912.)

CEMETERIES (§ 5*)—RIGHTS OF CEMETERY ASSOCIATIONS—STATUTORY PROVISIONS.

A company formed as a business corporation, with wide and general commercial powers, is not entitled to the rights of a cemetery corporation.

[Ed. Note.—For other cases, see Cemeteries, Cent. Dig. §§ 5-8; Dec. Dig. § 5.*]

Action by William R. Grace and another, on behalf of themselves and all other persons similarly situated who may desire to join as parties plaintiff, against the Repose Mausoleums, Incorporated, and another. Heard on motion to continue a temporary injunction. Granted.

Parker, Hatch & Sheehan, of New York City, for the motion.
Holm, Whitlock & Scarff, of New York City, opposed.

PUTNAM, J. The Repose Mausoleums, Incorporated, having been formed as a business corporation with wide and general commercial

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

powers, is not, and cannot claim the rights of, a cemetery corporation. "A cemetery for the burial of the dead," says Mr. Justice Gray, in *Close v. Greenwood Cemetery*, 107 U. S. 474, 2 Sup. Ct. 273, 27 L. Ed. 408; "if not a strictly charitable use, is in some respects a pious and public use." And this is the view of the Legislature. The Rural Cemetery Act (Laws of 1847, c. 133) authorized not less than seven persons to incorporate, with not less than six nor more than twelve trustees. A corporation so formed (section 4) could hold not more than 200 acres of land, "to be held and occupied exclusively for a cemetery for the burial of the dead." The present statute (Memb. Corp. Law [Consol. Laws 1909, c. 35] art. 4) intrusts a cemetery corporation to the management of trustees in whose election the lot owners may vote (section 63). Such cemetery corporations have also a limited power to condemn lands by eminent domain (section 65), and lands for cemetery purposes are tax exempt (Tax Law [Consol. Laws 1909, c. 60] § 7) and cannot be mortgaged, sold, or applied to payment of debts so long as used for cemetery purposes (Real Prop. Law [Consol. Laws 1909, c. 50] § 450). After payment of the purchase money of the burial lands, the proceeds of the sale of lots are to "be applied only to the improvement, preservation and embellishment of such cemetery and the incidental expenses of the corporation." Section 70. The additional real or personal property up to \$200,000 in value which cemetery corporations may have is also strictly limited, as it, or the income thereof, is to be used only for the purpose of improvement and preservation of the cemetery, with its tombs, structures, trees and flowers. Section 65.

The power of the state to regulate cemeteries with regard to the health of the living caused the Legislature (Laws of 1852, c. 280) to amend the act of 1847 so as to prohibit any cemetery corporation so incorporated to take land in the counties of Westchester, Kings, or Queens without consent of the county supervisors. This, however, was insufficient, as it did not apply to cemeteries then incorporated by special acts or to individual burial places. In country regions the owner of a freehold had long been accustomed to devote a part of his private lands to the burial of his family or friends. Even this might imperil the health of communities spreading out into these three counties, so this restriction was further amended (Laws of 1854, c. 238) to add:

"Nor shall it be lawful for any person [or corporation not incorporated under said act] to take as aforesaid or set apart or use any land or ground in either of said counties for cemetery purposes without the consent of the board of supervisors of such county first had and obtained."

This stands re-enacted, except the part in brackets, in similar words in Real Property Law, § 451. These restrictions upon cemetery corporations, in their corporate organization and in subjecting them to local regulation, are part of the general policy of the different states. See *Ransom v. Brinkerhoff*, 56 N. J. Eq. 149, 163, 38 Atl. 919; *Brown v. Maplewood Cemetery*, 85 Minn. 498, 89 N. W. 872; 6 Cyc. 710.

No authority has been cited to sustain the proposition that a stock corporation organized under the Business Corporation Law can have the rights of a cemetery corporation. It is to secure permanence for "God's Acre" that cemetery corporations are restricted to burial purposes, and cannot engage and involve their property in general corporation activities. If the cemetery could take up general stock corporation enterprises, a reverse might lead to a sequestration of its funds, and so reach and absorb the permanent investments sacredly devoted to its preservation and the care of memorials of the dead. The Repose Mausoleums, Incorporated, by its certificate states its objects, besides conducting a cemetery, to be to manufacture and deal in monuments; the general business of a florist; to construct chapels, buildings, crematories, mausoleums, burial vaults, and ornaments; to buy, sell, hold, lease, mortgage, and otherwise dispose of land in the United States and foreign countries; to acquire the rights, good will, and property of any firm or association, and pay for same in stock or bonds of this company; to own, use, and operate trade-marks, patents, and inventions, and issue licenses to others; also to hold stocks and bonds of any corporation, and issue in exchange therefor its stocks, bonds, or other obligations, and all such powers to be exercised to the same extent "as a natural person might or could do, and to carry on its operations throughout the states of the United States and elsewhere as principals, agents, or otherwise." Such corporate enterprises would unfit a cemetery for the discharge of the duties which it owes to the public, and for the execution of which a cemetery corporation is permitted by the state.

This application to the supervisors on May 20th was signed by "William Hart, as agent for Repose Mausoleum, a cemetery corporation." The permit purporting to be passed by the supervisors September 28, 1912, five times recites the Repose Mausoleum as "a cemetery corporation." As this defendant was not a cemetery corporation, but, on September 28, 1912, was, and now is, a business corporation, attempting as one of its corporate objects to exercise the rights of a cemetery corporation, without being organized in compliance with the statutes of this state for that purpose, the so-called permit was unauthorized.

The temporary restraining order is continued, and an order will also be made granting the various applications filed to be joined as parties plaintiff.

Ordered accordingly.

(78 Misc. Rep. 190.)

WEINSTEIN v. HELFENBERG.

(Kings County Court. November, 1912.)

COURTS (§ 169*)—COUNTY COURT—JURISDICTION—AMOUNT IN CONTROVERSY—COUNTERCLAIM.

Where, in an action in a county court for money only, the complaint demands judgment for an amount not over \$2,000, the court has jurisdiction to render judgment on the counterclaim, irrespective of its amount.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413-436; Dec. Dig. § 169.*]

Action by Abraham Weinstein against David Helfenberg. On demurrer to counterclaim. Overruled.

Frank Weinstein, of New York City, for plaintiff.

Israel H. Perkins, for defendant.

DIKE, J. A demurrer is interposed here to the counterclaim contained in the amended answer of the defendant. The first ground of demurrer is that the court has not jurisdiction of the subject thereof. The amended answer sets forth by way of counterclaim that the defendant has performed all acts properly to be performed by him under the alleged contract in question, but that owing to certain acts of the plaintiff the defendant has been damaged in the sum of \$8,000, and asks that the complaint be dismissed and for judgment in his favor for that amount.

The jurisdiction of the County Court in actions for the recovery of a sum of money only is limited by section 14 of article 6 of the Constitution and section 340 of the Code of Civil Procedure to actions in which the complaint demands judgment for a sum not exceeding \$2,000. There seems to have been certain doubt as to whether the court would have jurisdiction to pass upon a counterclaim, as in the case at bar, exceeding on its face the \$2,000 limitation fixed by the Constitution and the Code. Having obtained jurisdiction under the complaint, and all the parties being before the court, it would seem, to my mind, a grievous burden that a defendant could not avail himself of a counterclaim under such conditions, and that the entire controversy should not be settled and adjusted at that time. The limitation is upon the amount in the complaint. There is no limitation as to what may be counterclaimed in the answer. That such a practice should obtain seems to me eminently proper. It is along the lines of economy to litigants, as well as a means of speedy adjustment of differences at one time. Nor am I able to see, in view of the decision in the case of *Howard Iron Works v. Buffalo Elevating Co.*, 176 N. Y. 1, 68 N. E. 66, how there can be any further doubt.

The demurrer is therefore overruled, with costs.

Demurrer overruled, with costs.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(78 Misc. Rep. 324.)

In re McNAMEE'S WILL.

(Surrogate's Court, Kings County. November, 1912.)

WILLS (§ 734*)—CONSTRUCTION—GENERAL LEGACY—INTEREST.

Where a general legacy is payable on the death of the residuary legatee, it bears interest only from the happening of that event, and the income derivable from the sum aggregating the amount of several such legacies passes to the residuary legatee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1847-1872; Dec. Dig. § 734.*]

Proceeding for the probate of the will of Patrick McNamee. Application granted, and will construed.

Magner & Carew, of Brooklyn (John F. Carew, of Brooklyn, of counsel), for executor.

Robert A. B. Dayton, of New York City, for John McNamee and Anne Quinn.

KETCHAM, S. The general legacies in this will present but one exceptional feature. Instead of being payable, under the statute, after the expiration of one year from the grant of letters, they are by the will made payable upon the death of the residuary legatee. In no other respect do they differ from the typical general legacy of money. Except in circumstances which do not appear in this case, legacies bear interest only from the time when they are payable. *Lyon v. Industrial S. Ass'n*, 127 N. Y. 402, 28 N. E. 17.

The income to be derived during the life of the residuary legatee from the portion of the estate out of which these legacies are to be paid is not given to the general legatees. It must, therefore, remain in the mass of the estate, and the residuary legatee takes everything which is not given to anybody else. *Riker v. Cornwell*, 113 N. Y. 115, 20 N. E. 602; *Seibert v. Miller*, 34 App. Div. 602, 55 N. Y. Supp. 593. Hence she is entitled to enjoy during her life the income upon the fund applicable to the payment of the pecuniary legacies.

It is no part of the task of construction to direct that the executrix give security for the safety of the fund from which the general legacies are to be discharged. The probate decree should contain the construction that the legacies contained in paragraphs 1, 2, 3, 4, 5, 6, and 7 will bear interest only from the death of the residuary legatee, and that in the gift of the residue the income properly derivable from the sum aggregating the amount of these legacies is given to the residuary legatee.

Decreed accordingly.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PEOPLE v. BUCCUFURRI.

(Supreme Court, Appellate Division, Second Department. January 17, 1913.)

1. APPEAL AND ERROR (§ 569*)—CASE ON APPEAL—CONTENTS.

The case on appeal should show the facts as they really happened on the trial, and where there are errors or omissions in the stenographer's minutes should not follow the minutes.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2530-2545; Dec. Dig. § 569.*]

2. APPEAL AND ERROR (§ 569*)—CASE ON APPEAL—SETTLEMENT.

The responsibility of settling a case on appeal is on the trial judge, and his notes and recollection of what occurred must prevail; and while he may be aided by the stenographer's minutes, he should not rely upon them alone.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2530-2545; Dec. Dig. § 569.*]

3. APPEAL AND ERROR (§ 570*)—CASE ON APPEAL—SETTLEMENT—REVIEW.

While the Appellate Division cannot dictate as to how the trial judge should settle a case, where he has based the settlement entirely upon the stenographer's minutes, and not on his personal recollection, refreshed or aided by other means, it will order a resettlement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2546-2549; Dec. Dig. § 570.*]

Appeal from Special Term, Kings County.

Proceeding by the People against Vincenzo Buccufurri. From an order denying a motion to resettle the case on appeal, defendant appeals. Reversed, and case remitted for resettlement.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

Samuel Wechsler, of New York City, for appellant.

Hersey Egginton, Asst. Dist. Atty., of Brooklyn (James C. Cropsey, Dist. Atty., of Brooklyn, on the brief), for the People.

RICH, J. This appeal is from an order denying appellant's motion to resettle a case on appeal and to allow a proposed amendment, so that it will contain an exception to the refusal of the trial court to charge as requested by appellant. The exception was in the proposed case on appeal, but was stricken out upon the settlement of the case, upon the ground as stated in the memorandum of the learned justice at Special Term:

"Case and amendments settled. I must allow the ninth amendment. Stenographer's minutes show no exception taken, or intimation that counsel was not satisfied with the response to the request."

The affidavit of the attorney who represented the respondent at the trial, as well as that of his assistant, state that the exception was taken. The assistant district attorney averred that to the best of his recollection no exception was taken.

[1, 2] A party to an appeal is entitled to have his case show the facts as they really happened on the trial, and should not be prejudiced by an error or an omission of the stenographer. The duty is upon the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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trial judge to pass upon the accuracy of the record. The minutes of the stenographer are entitled to great weight, but they are not conclusive. *Otto v. Young*, 43 Misc. Rep. 630, 88 N. Y. Supp. 188; *McCready v. Lindenborn*, 24 Misc. Rep. 606, 54 N. Y. Supp. 46. The responsibility of settling a case is upon the trial judge. His notes and his recollection of what occurred, and any other means which may satisfy him, must prevail; and while he may be aided by the stenographer's minutes, he ought not to rely upon them alone.

[3] It is beyond our power to dictate as to how a case should be settled, and we do not presume to do so; but we cannot assume that the ruling was based upon the personal recollection of the trial justice, refreshed or aided by other means, in view of the record before us.

The order of the Special Term must therefore be reversed, and the case remitted to the trial justice for resettlement. All concur.

KRAUS v. COMET FILM CO.

(Supreme Court, Appellate Term, First Department. January 15, 1913.)

JUDGMENT (§ 143*)—OPENING DEFAULT—EXCUSES—INEXPERIENCE OF ATTORNEY.

A default, not willfully or intentionally allowed, but attributable to the inexperience of the defendant's attorney, will be opened on motion, since it is the duty of the courts to protect litigants from the neglect of their attorneys.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269-291; Dec. Dig. § 143.*]

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by Maurice Kraus, doing business as the Kraus Manufacturing Company, against the Comet Film Company. From a judgment by default in favor of the plaintiff, and from an order denying defendant's motion to open the default, defendant appeals. Order reversed, and default opened, upon defendant's repayment of \$10 costs and upon his deposit of the amount of the judgment or his undertaking as provided for by Municipal Court Act, § 256; and appeal from judgment dismissed.

Argued November term, 1912, before LEHMAN and PAGE, JJ.

Robert H. Elder, of New York City (Otho S. Bowling, of New York City, of counsel), for appellant.

Bernard Robinson, of New York City, for respondent.

PER CURIAM. The default in this case does not seem to have been willfully or intentionally allowed, but was largely attributable to the inexperience of the defendant's attorney. We have recently held that:

"It is the duty of the courts to protect litigants from the neglect and misconduct of their attorneys, and not deprive them of an opportunity to be fully and fairly heard where the fault was not their own." *Heiliger v. Ritter*, 78 Misc. Rep. 264, 266, 138 N. Y. Supp. 212, 214.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The order appealed from should be reversed, without costs of this appeal to either party, and the default opened, upon payment by the defendant of \$10 costs and the depositing by defendant with the clerk of the Municipal Court of the amount of the judgment, or the giving of an undertaking as provided in section 256 of the Municipal Court Act (Laws 1902, c. 580). Appeal from judgment dismissed.

(79 Misc. Rep. 88.)

BRUDER V. CRAFTS & D'AMORA CO.

(Supreme Court, Appellate Term, First Department. January 15, 1913.)

1. LANDLORD AND TENANT (§ 30*)—PROVISION FOR TERMINATION—VALIDITY.

A provision in a lease that it shall terminate upon 60 days' notice of a bona fide sale is a valid limitation of the term.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 86, 87; Dec. Dig. § 30.*]

2. LANDLORD AND TENANT (§ 152*)—REPAIRS—"COVENANT RUNNING WITH THE LAND."

A landlord's covenant to pay for repairs upon termination of the lease on notice of sale is a "covenant running with the land," and binds the heirs and assigns of the parties.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 152, 538-543, 545-549, 551-557; Dec. Dig. § 152.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1698-1703.]

3. LANDLORD AND TENANT (§ 44*)—TERMINATION—CONSTRUCTION OF LEASE.

Under a lease which provided that, in case the landlord made a bona fide sale of the premises during the term, he might cancel the lease upon 60 days' written notice to the tenant, the right of termination on sale was reserved only to the original lessor, and did not pass on the sale of the premises to his grantee, who accepted them subject to the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 108-110; Dec. Dig. § 44.*]

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Summary proceedings by Abe Bruder, as landlord, against the Crafts & D'Amora Company, tenant. From a final order of the Municipal Court, entered upon a verdict rendered by direction of the court in favor of the landlord, and from an order denying a motion for new trial, the tenant appeals. Judgment and final order reversed, and petition dismissed.

Argued November term, 1912, before LEHMAN and PAGE, JJ.

Marcus E. Joffe, of New York City, for appellant.

Henry C. Neuwirth, of New York City (John J. Weiss and F. J. Groehl, both of New York City, of counsel), for respondent.

LEHMAN, J. In September, 1909, one William H. Palmer, Jr., leased certain premises to Louis H. Craft and Matthew R. D'Amora for a term of years. By mesne assignments the title to the premises has been transferred to the present landlord, and the lease has been

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

assigned to the present tenant. The lease contains the following clause:

"In case the landlord makes a bona fide sale of the premises above described during the term of this lease, it is mutually agreed that he shall have the right to cancel this lease upon 60 days' written notice to the tenants, and he agrees that in this event he will return to the tenants the rent for the last month of the term, which, as above stated, is to be paid upon the execution of this lease, and also that he will pay such amount as the tenants may have expended upon structural improvements to the building: Provided, however, that the landlord shall not be required to refund to the tenants the cost of any improvements for which the contracts for making which were not approved by the landlord in writing before said improvements were made."

The present landlord has made a bona fide sale of the premises, and has given the tenants 60 days' notice of his desire to cancel the lease, and the question presented by this appeal is whether these acts have caused the termination of the lease.

[1, 2] It is well established that a provision in a lease that it shall terminate upon 60 days' notice of a bona fide sale is a valid limitation of the term of the lease. It is also established that the covenant to pay for repairs upon such termination is a covenant running with the land, and binding the heirs and assigns of the parties. *Douglaston Realty Co. v. Hess*, 124 App. Div. 508, 108 N. Y. Supp. 1036.

[3] These considerations, however, do not dispose of the real question in the case, viz., whether the parties intended that the term should be limited upon a bona fide sale and notice by the original landlord, or upon a bona fide sale by the original landlord, his heirs and assigns. There can be no serious doubt but that the parties had a right to provide that the term of the lease should be limited upon either contingency, and if they have evinced the intention that the right to terminate shall be exercised by the landlord or his heirs and assigns, that intention can be given effect, even if they have not used the technical terms most appropriate to the situation. *Adler v. Lowenstein*, 52 Misc. Rep. 556, 102 N. Y. Supp. 492. In this case, however, the parties have used no term that shows any intent to give such a privilege to any person other than the original landlord, nor can I find in the entire instrument, construed in the light of the surrounding circumstances, any intent to give such right to the landlord's assigns. The original landlord was interested in preserving his right to make a sale free from the incumbrance of any lease, and has provided in the lease that upon a sale he shall have the right to terminate the lease. When he sold the premises, and his immediate assignee accepted them subject to the lease, the purpose of this clause had ceased. It is true that the new landlord might prefer to have the premises incumbered only by a lease which he also could terminate; but, in the absence of appropriate words giving him such a right, I fail to see how we can consider that the right reserved to the original landlord passed also to his assignee.

Judgment and final order should be reversed, with costs, and petition dismissed, with costs.

PAGE, J., concurs.

PEOPLE v. CARLESI.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. CRIMINAL LAW (§ 1172*)—HARMLESS ERROR—SUBMISSION OF COUNT—CURE BY VERDICT.

Error, if any, in submitting a count under Penal Law (Consol. Laws 1909, c. 40) § 881, for uttering a forged instrument was cured by a conviction of forgery in the second degree.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154–3157, 3159–3163, 3169; Dec. Dig. § 1172.*]

2. CRIMINAL LAW (§ 1212*)—EXTENT OF PUNISHMENT—SECOND OFFENSE—PENALTY—"FORGERY"—"POSSESSION WITH INTENT TO DEFRAUD"—"POSSESSION WITH INTENT TO UTTER."

Penal Law (Consol. Laws 1909, c. 40) § 1941, provides that a person who has been convicted within this state of a felony, or under the laws of any other state or government of a crime which, if committed in this state, would be a felony, is punishable on subsequent conviction as for a second offense. Section 881 defines as forgery the possession of any forged coin with intent to utter, and section 894 punishes the possession of United States coins knowing them to be counterfeit with intent to utter, by fine and imprisonment or both. U. S. Rev. St. § 5457 (U. S. Comp. St. 1901, p. 3683), makes the possession of counterfeit United States coin with intent to defraud an offense punishable by fine and imprisonment. *Held*, that there was no distinction between the federal offense of possession with intent to defraud and the state offense of possession with intent to utter, and that defendant, after conviction under the federal statute of selling and having in his possession counterfeit coins, might be convicted of forgery as a second offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3303; Dec. Dig. § 1212.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2900, 2910; vol. 8, p. 7665.]

3. CRIMINAL LAW (§ 1212*)—PUNISHMENT—SECOND OFFENSE—PRIOR PUNISHMENT PARDONED.

Under Penal Law (Consol. Laws, c. 40) § 1941, which provides that a person who, after having been convicted in this state of a felony, or under the laws under any other government of a crime which, if committed in this state, would be a felony, commits any crime, is punishable upon conviction as for a second offense, a prior conviction of a felony under the federal statute, after pardon and restoration to civil rights, may be the basis of a conviction of a subsequent crime as a second offense; since the punishment inflicted is solely for the second offense to which a greater degree of criminality is thereby attached.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3303; Dec. Dig. § 1212.*]

Appeal from Court of General Sessions, New York County.

Charles Carlesi was convicted of forgery in the second degree as a second offense, and he appeals. Affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, MILLER, and DOWLING, JJ.

George Gordon Battle, of New York City, for appellant.

Robert S. Johnstone, of New York City, for the People.

MILLER, J. The defendant was indicted as a second offender for the crime of forgery in the second degree (section 887 of the Penal

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Law [Consol. Laws 1909, c. 40]), and uttering a forged instrument (Id. § 881). The jury found him guilty "of forgery in the second degree as a second offense." This appeal is from the judgment of conviction by which he was sentenced to imprisonment in a state prison for the term of 12 years and 11 months.

[1] It was proved that on or about June 15, 1907, the defendant got possession of a genuine check of the Fiss, Doerr & Carroll Horse Company by cashing it for the holder; that he procured fac simile lithographed blanks to be made, filled in one of the blanks for \$3,200, and caused it to be deposited in a bank by a third party, and the proceeds to be drawn out. The signature on the forged check was traced from that on the genuine check, which remained in the defendant's possession until July 17, 1907. The forged check was made and uttered on July 9th. While the evidence consisted principally of the testimony of accomplices, that testimony was strongly corroborated by the fact, which was established by independent evidence of the possession by the defendant of the genuine check which was on a special lithographed form, and of which the forged check was a fac simile, except for date, amount, and name of the payee. That fact tended directly to connect the defendant with the commission of the offense, and the proof of it did not depend upon expert testimony as is asserted by the appellant, even if that could make any difference. Even if it was error to submit the second count of the indictment to the jury, which we are far from deciding, it was cured by the verdict.

[2] The appellant urges, however, that he was improperly convicted as a second offender. The indictment charged that the defendant was convicted on the 20th day of December, 1892, at a Circuit Court of the United States of America for the Southern District of New York of the crime of selling and having in his possession counterfeit silver dollars upon an indictment which charged that the defendant and others "did unlawfully and feloniously, and with intent to defraud some person unknown, sell, utter, and publish a certain falsely made, forged, and counterfeited coin, in resemblance and similitude of the silver coin of the United States, called and known as the standard silver dollar, * * * and within the jurisdiction of the court last aforesaid feloniously, and with intent to defraud some person unknown, did have in their possession a certain falsely made, forged, and counterfeited coin, in resemblance and similitude of the silver coin of the United States, called and known as the standard silver dollar, * * * well knowing the same to be false, forged, and counterfeited," and that he was sentenced by said court to be imprisoned in the Monroe County Penitentiary for the term of 3½ years, and to pay a fine of \$1. The defendant conceded the previous conviction as alleged in the indictment, and put in evidence a pardon granted to him on October 3, 1904, which recited the fact of his indictment, his conviction on a plea of guilty, his sentence, that he had served his term of imprisonment, and, after earning all allowances for good conduct, was discharged on September 10, 1898, and had since conducted himself in an exemplary manner, and concluded as follows:

"Now, therefore, be it known, that I, Theodore Roosevelt, President of the United States of America, in consideration of the premises, and divers other

good and sufficient reasons me thereunto moving, do hereby grant unto the said Charles Carlesi a pardon, and restore his civil rights."

Of course, the principal, if not the sole, purpose of the pardon in this case was to restore to the convict his civil rights. We prefer, however, to put our decision on the broad ground that the first conviction may, notwithstanding the offense be pardoned, be the basis for a conviction under section 1941 of the Penal Law, which provides:

"A person, who, after having been convicted within this state, of a felony, or an attempt to commit a felony, or of petit larceny, or, under the laws of any other state, government, or country, of a crime which, if committed within this state, would be a felony, commits any crime, within this state, is punishable upon conviction of such second offense, as follows. * * *"

The appellant urges two propositions: (1) That the first offense as defined by section 5457 of the United States Revised Statutes (U. S. Comp. St. 1901, p. 3683) was not a felony as defined by the laws of this state (sections 881 and 894 of the Penal Law), and that, therefore, the defendant could not be convicted as a second offender perforce of said section 1941; and (2) that the prior conviction could not after a pardon be the basis of a conviction of a subsequent crime as a second offense.

Said section 5457 of the United States Revised Statutes provides:

"Every person who falsely makes, forges, or counterfeits, or causes or procures to be falsely made, forged or counterfeited, or willingly aids or assists in falsely making, forging, or counterfeiting any coin or bars in resemblance or similitude of the gold or silver coins or bars which have been, or hereafter may be, coined or stamped at the mints and assay offices of the United States, or in resemblance or similitude of any foreign gold or silver coin which by law is, or hereafter may be, current in the United States, or are in actual use and circulation as money within the United States, or who passes, utters, publishes or sells, or attempts to pass, utter, publish or sell, or bring into the United States from any foreign place, knowing the same to be false, forged, or counterfeited, with intent to defraud any body politic or corporate, or any other person or persons whatsoever, or has in his possession any such false, forged or counterfeited coins or bars, knowing the same to be false, forged or counterfeited, with intent to defraud any body, politic or corporate, or any other person or persons whatsoever, shall be punished by a fine of not more than five thousand dollars, and by imprisonment at hard labor not more than ten years."

Section 881 of the Penal Law of this state provides:

"A person who, knowing the same to be forged or altered, and with intent to defraud, utters, offers, disposes of or puts off as true, or has in his possession, with intent so to utter, offer, dispose of, or put off:

(1) * * * (2) a forged coin; or, (3) * * * is guilty of forgery in the same degree as if he had forged the same."

Section 894, Id., provides:

"A person who has in his possession a counterfeited of any gold or silver coin, whether of the United States or of any foreign country or government, knowing the same to be counterfeited, with intent to sell, utter, use, circulate or export the same, as true or as false, or to cause the same to be so uttered or passed, is punishable by imprisonment not more than five years, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment."

The argument is that there is a distinction between possession with intent to defraud and possession with intent to utter. That distinction is too nice, and in any event the first conviction was of "selling and having in possession."

[3] The second proposition is based on the following language of Mr. Justice Field, speaking for the majority of the United States Supreme Court in *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366, viz.:

"A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and, when the pardon is full it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching. If granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights. It makes him, as it were, a new man, and gives him a new credit and capacity."

The appellant cites many cases in which that language has been quoted or referred to with approval, one case in which the precise proposition contended for by him seems to have been decided (*Edwards v. Commonwealth*, 78 Va. 39, 49 Am. Rep. 377), and 1 Bishop on Criminal Law, § 919, wherein the author takes the view that a second offense, the first one having been pardoned, is not a second but a first offense.

The precise point does not seem to have been decided in this state, and, so far as the research of counsel goes, has been decided in only two states, the Supreme Court of Appeals of Virginia in *Edwards v. Commonwealth*, supra, taking the appellant's view, and the Court of Appeals of Kentucky holding to the contrary. *Mount v. Com.*, 2 Duv. (63 Ky.) 93; *Herndon v. Com.*, 105 Ky. 197, 48 S. W. 989, 88 Am. St. Rep. 303. The case nearest in point in this state is *People v. Price*, 53 Hun, 185, 6 N. Y. Supp. 833, affirmed on the opinion below, 119 N. Y. 650, 23 N. E. 1149. But the appellant seeks to distinguish that case by the fact that the pardon for the first offense was granted by the Governor of the state of Georgia, and that the decision was put upon the ground that the Legislature of the state of New York was not controlled by the Constitution or laws of the state of Georgia. While that point was made by Mr. Justice Landon, writing for the General Term, his opinion, which was adopted by the Court of Appeals, put the decision on a much broader ground, namely, that the conviction was not obliterated by the pardon, but remained as a fact in the past history of the defendant, and that the punishment for the second offense was solely for that and not at all for the offense committed in Georgia; and necessarily the latter proposition is correct, else all the statutes providing for increased punishment for second offenses would be unconstitutional. See *People ex rel. Cosgriff v. Craig*, 195 N. Y. 190, 88 N. E. 38.

Manifestly, the language of Mr. Justice Field, quoted, supra, is to be read in its bearing upon the precise point before the court. The pardon of this defendant did not "make a new man" of him. It did not "blot out" the fact or the record of his conviction, and, of course, the Supreme Court, in deciding that the Congress could not impinge upon the pardoning power of the executive, did not intend to hold

that the executive could blot out a solemn record of the judicial branch of government. See *Roberts v. State of New York*, 30 App. Div. 106, 51 N. Y. Supp. 691; 160 N. Y. 217.¹ The pardon in this case merely restored the defendant to his civil rights. If it had been granted before his term of imprisonment had been served, it would also have relieved the defendant of that. But it did not obliterate the record of his conviction or blot out the fact that he had been convicted. *Matter of ———*, an Attorney, 86 N. Y. 563. It relieved the defendant of the consequences which the law attached to his offense. But the defendant is to be punished now solely in consequence of his second offense. The fact of the former conviction is an element merely in determining the criminality of the second offense. *People v. Sickles*, 26 App. Div. 470, 50 N. Y. Supp. 377; *Id.*, 156 N. Y. 541, 51 N. E. 288; *People ex rel. Cosgriff v. Craig*, *supra*. The Legislature of this state has said that one who commits a crime after having been convicted of another crime is a greater offender than as though he had not previously been convicted, and the punishment inflicted is solely for the second offense to which a greater degree of criminality is thus attached. That degree of criminality is not at all lessened by the fact of a pardon which assumes his guilt, remits the punishment, and affords him an opportunity to become a law-abiding citizen. It was solely within the province of the Legislature to attach such greater criminality to the second offense from the mere fact of a conviction for a first, and the executive by the exercise of the pardoning power could no more interfere with that exercise of legislative power than the Legislature could interfere with the power to pardon.

The judgment of conviction should be affirmed.

INGRAHAM, P. J., and McLAUGHLIN and DOWLING, JJ., concur.

LAUGHLIN, J. (concurring). I am of opinion that, if the defendant had received a full unlimited pardon for the former offense, it would have constituted an invulnerable shield against a subsequent conviction for a felony as a "second offense" pursuant to the provisions of section 1941 of the Penal Law, which requires a longer sentence in such cases, because that statute presupposes not merely a former formal conviction, which may have been vacated or reversed, but which stands unaffected, whereas such a pardon obliterates guilt and is equivalent to a verdict of not guilty (1 Bishop's New Criminal Law, § 919; *Edwards v. Commonwealth*, 78 Va. 39, 49 Am. Rep. 377; *Ex parte Hunt*, 10 Ark. 284; *People ex rel. Forsyth v. Court of General Sessions*, 141 N. Y. 288, 295, 36 N. E. 386, 23 L. R. A. 856; *Knote v. U. S.*, 95 U. S. 149, 24 L. Ed. 442; *Ex parte A. H. Garland*, 4 Wall. 360, 18 L. Ed. 366; *Osborn v. U. S.*, 91 U. S. 478, 23 L. Ed. 388; *U. S. v. Klein*, 13 Wall. 128, 20 L. Ed. 519); but the pardon proved by the defendant was granted after he completely served his sentence, and is expressly limited to restoring his citizenship, and therefore the conviction remains unaffected.

¹ 54 N. E. 678.

BUSCHMANN v. McDERMOTT et al.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

PERPETUITIES (§ 6*)—SUSPENSION OF POWER OF ALIENATION.

An agreement between owners of real estate that none of them would sue for partition without the consent of the others does not suspend the power of alienation, and is a good defense to an action to partition; the power only being suspended when there are no persons in being by whom an absolute fee in possession can be conveyed.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-47, 49-53, 56; Dec. Dig. § 6.*]

Appeal from Special Term, New York County.

Action by Amelia Buschmann against Mamie H. McDermott and others. From an order granting judgment on the pleadings, the defendant McDermott appeals. Reversed.

See, also, 138 N. Y. Supp. 1109.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

J. Henry Esser, of Mt. Vernon, for appellant.

Edward Michling, of New York City, for respondent.

McLAUGHLIN, J. This appeal is from an order granting plaintiff's motion for judgment on the pleadings. The action is to partition certain real estate. All of the defendants defaulted in pleading except the appellant, who interposed an answer in which she admitted all of the allegations of the complaint and set up as an affirmative defense that all of the owners of the real estate in question had, prior to the commencement of the action, agreed, each with the other, in consideration of mutual covenants, that they, or either of them, would not at any time bring or prosecute an action in equity for the partition of such real estate in any court without the consent of all the parties to the agreement, but would hold and continue to hold the property as tenants in common until such time as a private sale thereof could be made without loss upon the original investment, or at such lesser figure as should be agreed to. The learned justice sitting at Special Term held that the agreement did not constitute a defense, for the reason, as appears from his opinion, if such effect be given to it, it would suspend the power of alienation for a period "not dependent upon lives in being."

I am of the opinion that the agreement, as pleaded, is not susceptible of this construction, and that it constitutes a good defense to the action. Under its terms the three parties to it, the owners of the property, can at any time they see fit convey the title. The power of alienation is only suspended when there are no persons in being by whom an absolute fee in possession can be conveyed. As was said by Judge Vann, in *Williams v. Montgomery*, 148 N. Y. 519, 43 N. E. 57:

"The test of alienability of real or personal property is that there are persons in being who can give a perfect title. * * * Where there are

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

living parties who have unitedly the entire right of ownership, the statute has no application. * * * The ownership is absolute, whether the power to sell resides in one individual or in several. If there is a present right to dispose of the entire interest, even if its exercise depends upon the consent of many persons, there is no unlawful suspension of the power of alienation. The ownership, although divided, continues absolute."

Here, as said, the three owners can sell at any time they see fit. All they have to do is to agree upon the price. Not only this, but the death of any one of the parties would terminate the agreement, when a sale or partition could be had. Agreements among owners of real estate not to bring an action to partition during a certain time are not uncommon, and where such an agreement is made it is a good defense to an action to partition. *Brown v. Coddington*, 72 Hun, 147, 25 N. Y. Supp. 649; *Ogilby v. Hickok*, 144 App. Div. 61, 128 N. Y. Supp. 860; affirmed 202 N. Y. 614, 96 N. E. 1123; *Martin v. Martin*, 170 Ill. 639, 48 N. E. 924, 62 Am. St. Rep. 411; *Eberts v. Fisher*, 54 Mich. 294, 20 N. W. 80; *Am. & Eng. Enc. of Law* (2d Ed.) vol. 21, p. 1158, and cases cited.

It follows that the court erred in granting judgment, and for that reason the order appealed from must be reversed, with \$10 costs and disbursements, and the motion for judgment denied, with \$10 costs. All concur.

BOOTH V. A. FELDMAN CONST. CO.

(Supreme Court, Appellate Term, First Department. January 15, 1913.)

CORPORATIONS (§ 522*)—JUDGMENT—PROCESS TO SUPPORT—SERVICE.

Service of summons upon an agent of a corporation, the agent being the sole defendant named, not shown to be an officer of the company, nor to have authority to consent to an amendment of summons by naming the company as defendant, was not effective to bring the company into court, so that a judgment rendered against it must be reversed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2035, 2099-2113; Dec. Dig. § 522.*]

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Ernest Booth against the A. Feldman Construction Company. From a judgment of the Municipal Court of the City of New York in favor of plaintiff, defendant appeals. Reversed, and complaint dismissed.

Argued November term, 1912, before LEHMAN and PAGE, JJ.

Benjamin Berger, of New York City, for appellant.

Leo R. Lawlor, of New York City, for respondent.

PER CURIAM. This action to recover the value of services rendered was commenced by the service of the summons upon one Annie Feldman, the sole defendant named therein. On the trial it appeared that the plaintiff had been employed by Mrs. Feldman, but that she was acting as agent for the Feldman Construction Company, where-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & rep'r Indexes

upon the court ordered the summons to be amended by naming that company as defendant. There was no evidence that Mrs. Feldman was an officer of the company, or had any authority to consent to such amendment. The trial proceeded, and resulted in a judgment in favor of the plaintiff and against the Feldman Construction Company, which had not been served, nor had it appeared in the action. Subsequently, on plaintiff's motion, without notice, an order was entered changing the name of the defendant so substituted to A. Feldman Construction Company.

The defendant corporation never having been served or brought into court in any manner, the judgment must be reversed, with costs, and the complaint dismissed, with costs.

MILLER v. PETTERS et al.

(Supreme Court, Appellate Term, First Department. January 13, 1913.)

JUDGMENT (§ 161*)—OPENING DEFAULT—SUFFICIENCY OF SHOWING.

Defendant's motion to open a default should have been granted, where his affidavits, if true, showed that he probably had a meritorious defense, though his proposed answer was improperly verified.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 317, 318; Dec. Dig. § 161.*]

Appeal from City Court of New York, Special Term.

Action by Samuel Miller against Frank Petters, impleaded with another. From an order denying motion to open default, defendant Petters appeals. Reversed, and motion granted, upon condition.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Harry Cook (Nathan April, of New York City, of counsel), for appellant.

Nathaniel Tonkin, of New York City, for respondent.

PER CURIAM. The defendant appeals from an order denying his motion to open his default. The justice at Special Term seems to have found that the papers showed a sufficient excuse for the default, but denied the motion, with leave to renew, on the ground that the moving papers fail to comply with *Dana v. Thaw*, 56 Misc. Rep. 612, 107 N. Y. Supp. 870. The affidavits show sufficient facts to enable the court to determine that the defendant has probably a meritorious defense, if these facts be true. The proposed answer is verified improperly, but that is apparently a mere clerical error. It seems to us that the defendant's default should therefore be opened, and he be permitted to serve a duly verified answer upon proper terms.

The order should therefore be reversed, without costs, and the motion granted, upon payment of taxable costs, and upon the defendant giving a surety company bond for the amount of the judgment.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CRAIG v. ROACH.

(Supreme Court, Appellate Term, First Department. January 13, 1913.)

PLEADING (§ 323*)—BILL OF PARTICULARS—FAILURE TO SERVE.

Where plaintiff failed to serve a bill of particulars within the time limited, after notice of a motion for an order precluding evidence, plaintiff should move to have his default opened and be allowed to serve his bill of particulars, and the court, on the hearing of the motion to preclude the evidence, should not extend the time for filing the bill without terms.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 976-979; Dec. Dig. § 323.*]

Appeal from City Court of New York, Special Term.

Action by Bessie Craig against Stephen J. Roach. From an order denying a motion to preclude the giving of evidence for failure to serve a bill of particulars, defendant appeals. Modified and affirmed.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

H. E. Lippincott, of New York City, for appellant.

Karlin & Busch, of New York City, for respondent.

PER CURIAM. An order requiring the plaintiff to serve a bill of particulars within five days after the service of a copy of the order with notice of entry was entered in this action on the 4th day of March, 1912, and a copy thereof with notice of entry served on the plaintiff's attorneys on the 5th day of March, 1912. Plaintiff's attorney failed to comply with this order, and on November 20, 1912, the defendant served a notice of motion, returnable November 27, 1912, for an order precluding plaintiff from giving evidence on the trial of this action of the causes of action with respect to which he had been ordered to serve a bill of particulars. On November 25, 1912, the plaintiff's attorneys attempted to serve a bill of particulars; but the defendant's attorney refused to accept it, and it was thereupon mailed to the defendant's attorney's address. On the return day of the motion, plaintiff's attorneys presented an affidavit setting forth the attempted service of the bill of particulars 8 months and 15 days after the same was ordered to be served, in opposition to the motion, and asked that the same be denied. He presented no excuse for his default, nor did he affirmatively ask to be relieved therefrom; but the court ordered that the motion be denied, on condition that the plaintiff serve the bill of particulars within two days after service of a copy of the order, otherwise granted, without the imposition of any terms.

We cannot approve of this practice. The plaintiff's attorneys had failed to obey the order of the court, and the order precluding his testimony followed as of course. *Smith v. Bradstreet Co.*, 134 App. Div. 567, 119 N. Y. Supp. 487. The plaintiff's attorneys should have moved to have his default opened and to be allowed to serve his bill of particulars, which relief could have been granted upon proper terms.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The order granted herein puts a premium upon disobedience of court orders and penalizes the diligent suitor.

The order will be modified, by directing the plaintiff to pay \$10 costs at the time he serves the bill of particulars, and, as modified, affirmed, with \$10 costs and disbursements of this appeal to the appellant.

(79 Misc. Rep. 84.)

BENJAMIN et al. v. BROWNSTEIN et al.

(Supreme Court, Appellate Term, First Department. January 13, 1913.)

1. COSTS (§ 227*)—ON APPEAL—AMOUNT.

On an appeal to the Appellate Term from an order of the City Court at Special Term, granting or denying a new trial on the ground of newly discovered evidence, only \$10 costs and disbursements are allowed, and disbursements are not taxable, unless specified in the order of the Appellate Term.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 847; Dec. Dig. § 227.*]

2. COSTS (§ 264*)—ON APPEAL—OMISSION FROM ORDER—RESETTLEMENT.

Where an allowance of costs and disbursements was by an oversight omitted from the order of the Appellate Term affirming an order of the City Court granting a new trial on the ground of newly discovered evidence, a motion to resettle the order to include such costs and disbursements will be entertained.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1004–1008; Dec. Dig. § 264.*]

Appeal from City Court of New York, Special Term.

Action by Ephraim Benjamin and another, copartners trading as Benjamin Bros., against Daniel J. Brownstein and others, individually and as copartners trading as Brownstein, Newmark & Louis. From an order denying a motion to strike out certain items from a bill of costs taxed by plaintiffs, defendants appeal. Reversed, and motion granted.

See, also, 137 N. Y. Supp. 1111; 138 N. Y. Supp. 1107.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

David Bernstein, of New York City, for appellants.

Morris & Samuel Meyers, of New York City, for respondents.

PER CURIAM. [1] Upon an appeal to this court from an order made at a Special Term of the City Court granting or denying a motion for a new trial upon the ground of newly discovered evidence, only \$10 costs and disbursements are allowable. *Brennan v. Joline*, 70 Misc. Rep. 537, 127 N. Y. Supp. 676. Disbursements are not taxable, unless so specified in the order. *Wilson v. Lange* (Sup.) 84 N. Y. Supp. 519.

[2] The omission in the order of this court to grant the plaintiffs \$10 costs and disbursements upon the affirmance of the order granting a new trial in the City Court upon the ground of newly discovered evidence was evidently an oversight, and the plaintiffs should have

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

applied for a resettlement of the order. Unless the defendants will stipulate that the plaintiffs may tax \$10 costs and their disbursements, a motion to resettle the order will be entertained. As the case now stands, however, the order appealed from must be reversed, with \$10 costs and disbursements, and the item of \$20 before argument, \$40 for argument, and \$48.38 disbursements, stricken from the bill of costs allowed in the lower court as appeal costs, etc.

Order reversed, with \$10 costs and disbursements, and motion granted.

JACOBSON et al. v. EBLING BREWING CO.

(Supreme Court, Appellate Division, Second Department. January 10, 1913.)

APPEAL AND ERROR (§ 1002*)—FINDINGS—CONCLUSIVENESS.

A verdict on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Appeal from Trial Term, Westchester County.

Action by Peter Jacobson and others against the Ebling Brewing Company. From a judgment for plaintiffs, and an order denying a motion for new trial, defendant appeals. Affirmed.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

Norbert Blank, of New York City, for appellant.

J. D. O'Connor, of Yonkers, for respondents.

WOODWARD, J. The plaintiff brings this action to recover \$213.50 for extra work, performed under the terms of a written contract upon the order of the architect employed by the defendant. The contract provided for the performance of certain work and the furnishing of certain materials, according to the plans and specifications furnished by the architect, for the sum of \$1,650, and it was provided that there should be no extra claims, except for work performed under written orders of the architect, and it is not disputed here that the plaintiff did secure a written order from the architect, in accord with the provisions of the contract; but it is urged that this extra work was not necessary, and that the architect was without authority to make the written order, the original contract having been completed before the extra work was undertaken.

It was the contention of the plaintiff that this extra work was performed in good faith under the written order of the architect, and there is no dispute that the work was in fact performed. The plaintiff produced evidence to show that the defendant's agent was approached in reference to the proposed changes, and that he refused to authorize them, declaring that it was up to the architect to determine such questions, and that thereupon the architect gave the order in question. The defendant's agent took the stand, and denied that he had given any authority whatever to the architect, but insisted, on the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

contrary, that he had said that no new work should be undertaken, except upon a written contract with the defendant. This was the principal issue submitted to the jury, in a charge to which no exception was taken, and the jury has found in favor of the plaintiffs, and we are of the opinion that the evidence is sufficient to justify the inference that the defendant's agent authorized the architect to determine upon the necessity of the alterations which were made, and that the defendant is liable.

It was also urged that the plaintiff had waived his right to recover by certain receipts which he gave at the time of receiving the final payments upon the original contract; but there was evidence that the plaintiff refused to sign the papers proposed by the defendant if it was understood to include the payment for the extra work, and that he was assured that it only related to the contract, and, while this was disputed, the jury has found with the plaintiff, and the judgment ought not to be disturbed. The defendant acquiesced in the law of the case as presented by the court, and, the jury having found the facts with the plaintiff, it would seem that there ought to be an end of the controversy.

The judgment and order appealed from should be affirmed, with costs. All concur.

FREDERICK v. OLIVER & BURR.

(Supreme Court, Appellate Division, Third Department. December 30, 1912.)

1. TRIAL (§ 14*)—CALENDARS—STRIKING CAUSE FROM CALENDAR—RULES OF COURT.

Where a plaintiff fails, as authorized by a rule of court, to show reason why the case, which has been on the calendar for several years, should be continued thereon, and the case is stricken, he must, to have the case restored, satisfy the court that the case is a live one and likely to be tried.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 33; Dec. Dig. § 14.*]

2. TRIAL (§ 14*)—CALENDARS—STRIKING CAUSE FROM CALENDAR—RULES OF COURT.

Code Civ. Proc. § 977, providing that a case put on the calendar must remain thereon until disposed of, means that a case shall continue on the calendar as unfinished business until the court for good reason otherwise disposes of it; and under section 822, authorizing the court in its discretion to dismiss the complaint for unreasonable neglect to proceed with the case, the court may on its own motion and on proper notice strike from the calendar any case which in its judgment is not a live one and is on the calendar for an unreasonable time.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 33; Dec. Dig. § 14.*]

Appeal from Special Term, Albany County.

Action by Charles F. Frederick against Oliver & Burr. From an order refusing to restore the case to the general calendar, plaintiff appeals. Affirmed.

Argued before SMITH, P. J., and KELLOGG, BETTS, HOUGHTON, and LYON, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Edwin W. Sanford, of Albany (William E. Woollard, of Albany, of counsel), for appellant.

Herrick & Herrick, of Albany, for respondent.

JOHN M. KELLOGG, J. [1] The case was duly placed upon the general calendar of the court in Albany county, and noticed for trial at the September, 1908, term, and on May 8, 1912, the court made an order reciting that pursuant to an order to show cause under rule 16, no cause having been shown, the case was stricken from the calendar, and the attorneys were informed that it would not be restored by the clerk, except on the order of the court. Rule 16, printed in the calendars of the Albany Trial Terms, provides, in substance, that the court may make an order at the opening of the term directing the clerk to mail to each attorney whose name appears as attorney in a cause on the calendar which has been at issue for more than two years an order to show cause, returnable at the opening of the court on the second Monday of the term, why such cause should not be stricken from the calendar, and such justice shall on that day call the calendar and strike therefrom all such cases, where no reason is shown for their continuance thereon. Evidently, under this order to show cause, which we must assume was properly served, the plaintiff had an ample opportunity to show a reason, if there was any, why the case should be continued upon the calendar. Not having availed himself of that opportunity, it became necessary, in order to have the case restored upon the calendar, to satisfy the court that it was really a live case, and that there was no substantial reason why it should not again appear upon the calendar, and give some reason why it had not been tried, and why he did not appear on the order to show cause. The court very properly held that the affidavit in this case was insufficient to require a reinstatement of the case. The court must be satisfied that it is a live case and likely to be tried, and that it is not put upon the calendar as a convenient resting place for four years more.

[2] It is, however, urged that under section 977 of the Code of Civil Procedure the case was improperly stricken from the calendar. That section provides, in substance, that in the county of Albany, where a case has been duly noticed and put upon the calendar, it is not necessary to serve a new notice of trial or a new note of issue for a succeeding term, "and the action must remain on the calendar until it is disposed of." Clearly this does not mean until it is tried; for, if that were its meaning, a calendar would be of no practical value to the court, the attorneys, or suitors, and would furnish no indication of what business is to come before the court for trial. This section evidently means until the case is disposed of in some way by the court. It does not deprive the court of its reasonable control over its own calendar practice. This case, as a case on the calendar for trial, was disposed of by the order striking it from the calendar. The section, I think, fairly means that the case shall continue on the calendar as unfinished business until the court, for good and sufficient reason, otherwise disposes of it. Under section 822 of the Code of

Civil Procedure the court may in its discretion dismiss the complaint, where the plaintiff unreasonably neglects to proceed with the case. But the right to free the calendars of the court of a stale case does not necessarily depend upon the action of the defendant under this section. The court may take the matter in its own hand, and upon proper notice strike from the calendar any case which in its judgment is not a live case and is found upon the calendar for an unreasonable time.

The order appealed from is therefore affirmed, with costs, with the right to the appellant to make such further motion for the restoration of the case as he may be advised. All concur.

BUFFALO COMMERCIAL BANK v. NICE et al.

(Supreme Court, Special Term, Erie County. August, 1912.)

JUDGMENT (§ 326*)—AMENDMENT AND CORRECTION OF RECORDS—ENTRY OF JUDGMENT.

Under the court's inherent power over its own records, and authority to relieve from judgments taken or entered through mistake, inadvertence, or excusable neglect, and on good and sufficient reasons to make proper amendments in the furtherance of justice, the Supreme Court was authorized to amend a judgment nunc pro tunc, so as to have the caption read "Supreme Court, County of Erie," instead of "County Court, County of Erie."

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 628; Dec. Dig. § 326.*]

Action by the Buffalo Commercial Bank against John L. Nice and another. Demurrer to complaint overruled, with leave to answer within 20 days upon payment of costs.

Appeal dismissed, 138 N. Y. Supp. 1109.

Thomas C. Burke, of Buffalo, for plaintiff.

Augustus Thibaudeau, of Niagara Falls, for defendants.

WHEELER, J. The complaint declares upon a judgment alleged to have been recovered by the plaintiff against the same defendants in the Supreme Court, upon the defendants' default on the 7th day of February, 1902. The validity of the judgment sued on turns upon the power of this court, by order, to amend and correct the judgment then entered; the plaintiff's attorney having, by inadvertence entered the judgment in the "County Court," instead of in the Supreme Court, and the Supreme Court, at Special Term, by an order dated January 10, 1910, directed that the judgment so entered be amended nunc pro tunc as of the 7th of February, 1902, so as to have the caption read, "Supreme Court, County of Erie," instead of "County Court, County of Erie."

In support of the demurrer, the defendants' counsel contends the court had no power or authority to order the amendment made, and the judgment was therefore a nullity, for the reason that by virtue of sections 724, 1282, and 1290 of the Code of Civil Procedure, the mo-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion to amend was not made within one year, nor even within two years after the filing of the judgment roll. It is now, however, definitely settled by the decision of the highest court of this state that the court has inherent power over its own records, and full authority to relieve from judgments taken or entered through mistake, inadvertence, or excusable neglect, and for good and sufficient reasons may make proper amendments in the furtherance of justice. *Clark v. Scovill*, 198 N. Y. 279, 91 N. E. 800, and cases cited. See, also, *Bohlen v. M. E. Ry. Co.*, 121 N. Y. 546-550, 24 N. E. 932. It did not exceed its authority in the case of the judgment sued on.

For these reasons, the demurrer must be overruled, with costs, with the privilege of answering within 20 days upon the payment of such costs. Let a decision be prepared accordingly.

So ordered.

COLE v. LUTZ & SHEINKMAN.

(Supreme Court, Appellate Term, First Department. January 15, 1913.)

APPEAL AND ERROR (§ 1171*)—DETERMINATION—REVERSAL.

On appeal from a judgment for profits on a contract, where it appeared that plaintiff's profits were necessarily reduced because of the subcontractor's poor work, a judgment which did not make that reduction must be reversed, and the cause remanded, where the amount of the loss does not appear upon the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4546-4554; Dec. Dig. § 1171;* Damages, Cent. Dig. §§ 16-18.]

Appeal from City Court of New York, Trial Term.

Action by Frank L. Cole against Lutz & Sheinkman. From a judgment for plaintiff, and an order denying its motion for new trial and to set aside the verdict or reduce the amount thereof, defendant appeals. Reversed and remanded.

Argued November term, 1912, before LEHMAN and PAGE, JJ.

Rasquin & Rasquin, of New York City, for appellant.

Smith & Bowman, of New York City (Harold H. Bowman, of New York City, of counsel), for respondent.

PER CURIAM. Upon the record presented for our consideration, it appears that the plaintiff was entitled to all the profits made by the defendant above an agreed amount. When the plaintiff consented to the substitution of a new subcontractor in place of Gazley Bros., he was still entitled to these profits, and the promise on the part of the defendant to pay him the 1 cent per thousand, which they saved on the contract price, as a substitute for Gazley Bros.' promise to pay 1½ cents per thousand as a commission, was therefore a valid promise. Inasmuch, however, as the plaintiff procured the contract with Gazley Bros. for his own benefit, the loss sustained by Gazley Bros.' imperfect work necessarily reduced the profits to which he would be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

entitled for his commissions, and must be offset. As the amount of this loss does not appear from the record, a new trial must be had.

Judgment reversed, and a new trial ordered, with costs to appellant to abide the event.

KENNY v. PHYFE.

(Supreme Court, Appellate Term, First Department. January 13, 1913.)

PLEADING (§ 52*)—COMPLAINT—SEVERAL CAUSES OF ACTION.

The third paragraph of the complaint in slander alleged upon information and belief that on or about June 15, 1912, the premises in question were broken into and certain personal property stolen therefrom. The fourth paragraph alleged upon information and belief that at divers times between said date and October 1st defendant, intending to injure plaintiff and to cause it to be believed that he had broken into the premises and stolen said property therefrom, in the presence and hearing of others maliciously spoke the following false and defamatory words: "My milkman, K. (meaning plaintiff), is the person who broke into and robbed my house"—meaning the premises referred to. *Held*, that the paragraphs stated distinct causes of action, so that they should have been separately stated and numbered.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 113; Dec. Dig. § 52.*]

Appeal from City Court of New York, Special Term.

Action by John Kenny against Edith Phyfe. From an order denying defendant's motion to require plaintiff to separately state and number the causes of action alleged in the complaint, and to make it more definite, defendant appeals. Order reversed, and motion granted.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Hawkins, Delafield & Longfellow, of New York City (M. Gregg Latimer, of Baltimore, Md., of counsel), for appellant.

John R. Jones, of New York City, for respondent.

SEABURY, J. [1] The action is for slander. The third and fourth paragraphs of the complaint are as follows:

Third. Upon information and belief, that on or about June 15, 1912, said premises were broken into and certain personal property stolen therefrom.

Fourth. Upon information and belief, that at divers times between said date and October 1, 1912, at Narragansett Pier, Rhode Island, the defendant, intending to injure the plaintiff and to cause it to be believed that he had broken into said premises and stolen said property therefrom, in the presence and hearing of divers persons, maliciously spoke concerning plaintiff the false and defamatory words following: "My milkman, Kenny (meaning plaintiff), is the person who broke into and robbed my house" (meaning premises 147 East Thirty-Seventh street).

I think it is evident from a perusal of these allegations that they set forth several separate and distinct causes of action and that the motion should have been granted.

Order reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs. All concur.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SMITH v. NEW YORKER STAATS ZEITUNG.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. LIBEL AND SLANDER (§§ 7, 49*)—WORDS LIBELOUS PER SE—COMPLAINT.

Defendant published a newspaper article entitled "Caught," and reciting that post office inspectors had made a good find in that they had discovered gold brick dealings which were the worst since the "Burr Case"; that they arrested plaintiff and another, the two probable heads of a tanning company. The article further charged that this company was incorporated with a \$1,500,000 capital; that it was without property, and that the stock was being fraudulently sold for the benefit of plaintiff and his associates. Plaintiff, after setting out the article, alleged that it was wholly false as to him, except that he was arrested; that he was admitted to bail and the charge afterwards dismissed, without a hearing; that the articles were published recklessly, willfully, wantonly, maliciously, and without any effort to ascertain the truth or falsity of the charges. *Held*, that the article was libelous per se, and that the complaint was not demurrable on the ground that the article was privileged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 17-78, 148; Dec. Dig. §§ 7, 49.*]

2. LIBEL AND SLANDER (§ 42*)—REPORT OF JUDICIAL PROCEEDINGS—STATUTES.

Code Civ. Proc. § 1907, provides that no action can be maintained against the publisher of a newspaper for the publication of a fair and true report of a judicial proceeding, without proving actual malice; and section 1908 declares that the prior section shall not apply to a libel contained in the heading of the report, or in any other matter added by any person concerned in the publication, or in the report of anything said or done, at the time and place of proceedings, which was not a part thereof. *Held*, that the qualified privilege therein created was limited to a fair and true report of the judicial proceedings, and did not extend to other matters added thereto.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 127-129; Dec. Dig. § 42.*]

Appeal from Special Term, New York County.

Action for libel by George Herbert Smith against the New Yorker Staats Zeitung. From an order (77 Misc. Rep. 601, 138 N. Y. Supp. 557) sustaining a demurrer to the complaint, plaintiff appeals. Reversed and remanded.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Putney, Twombly & Putney, of New York City (Edmonds Putney, of New York City, of counsel), for appellant.

Amend & Amend, of New York City (John E. Donnelly, of New York City, of counsel, and Alfred J. Amend, of New York City, on the brief), for respondent.

CLARKE, J. [1] The complaint sets up that the defendant published in an edition of said newspaper dated July 29, 1911, an article concerning this plaintiff, which, translated into English, is as follows: "Caught. Post Office Inspectors Bring Suit Against Four of the Head Members of the American Tanning Co.

"Post Office Inspectors Kincaid and Booth made a good find yesterday in that they discovered 'gold brick' dealings which show to be the worst since

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Burr Case. According to their suspicions that underhand dealings were going on, inspectors arrested in the Annex of the Produce Exchange * * * also F. C. Canfield and G. Herbert Smith, the two probable heads of the American Tanning Company. The four prisoners were brought before the district judge with the charge that they had used the mail for fraudulent purposes in connection with selling certain coal and tanning shares, and the judge placed * * * and Smith each under \$2,500, and stated that the trial would take place October 2nd. The Post Office inspectors bring the heaviest charge against Robinson or Raymond for, according to their statements, he was the secretary and the leading spirit in Henry N. Roach & Co., a brokerage firm which sold stocks for different companies, most of which failed, and the stocks were then placed in newer companies of doubtful character. One of the latest companies which Henry N. Roach used in this way is the American Tanning Co., against which the charge has been made. It was organized in May or June, 1909, and incorporated with a capital of \$1,500,000, consisting of 150,000 shares quoted at \$10 a share. They advertised extensively as having their own tannery in Newark, N. J., equipped with the newest and fastest known process. Both inspectors claim that the plant in Newark, N. J., is leased by the month and that the company has not dressed a single hide for business purposes. According to the charge, the company kept the people 'in the dark,' especially those with smaller interests, until it went into the hands of the receivers, as with all previous companies with whom H. N. Roach & Co. had dealings. Over 42,000 shares were sold at \$10 a piece and Roach & Co. was to get half of the profits for material and notices; the shareholders, however, received nothing. The inspectors estimate the earnings of the organizers at \$439,000. Among the thousands of sufferers was one woman confined to her bed whose husband was an invalid and the son in the last stages of consumption. In spite of this, she was persuaded to take a mortgage on her house for \$1,000 and to invest it in shares of the American Tanning Co."

"IV. That said article is wholly false as to this plaintiff, except that this plaintiff was arrested on the 28th day of July, 1911, and was admitted to bail in the sum of \$2,500 pending a hearing before United States Commissioner Shields. That the complaint upon which plaintiff was arrested was thereafter dismissed by said Commissioner Shields upon motion of the United States District Attorney for the Southern District of New York without any hearing ever having been had thereon, the plaintiff discharged, and all proceedings against the plaintiff terminated. That said article was published recklessly, willfully, wantonly and maliciously, and without any effort to ascertain the truth or falsity of the charges therein made."

Defendant demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The learned Special Term said, in its opinion:

"From the admissions by plaintiff in his complaint the article was a report of a judicial proceeding, and it appeared to be substantially correct. It was therefore privileged"

—and sustained the demurrer.

That conclusion is not warranted by the record. It would seem that there is a great deal stated in the article which is not the report of a judicial proceeding. It may be that everything there stated occurred in the course of the judicial proceeding referred to, but it is not apparent upon the face of the complaint. On the contrary, the charge is that the article was wholly false, except that the plaintiff was arrested and admitted to bail. The complaint affirmatively states that the commissioner, on the District Attorney's own motion, and without a hearing, dismissed the charge, discharged the plaintiff, and terminated the proceeding.

[2] The Code of Civil Procedure provides as follows:

"§ 1907. An action, civil or criminal, cannot be maintained against a reporter, editor, publisher, or proprietor of a newspaper, for the publication therein of a fair and true report of any judicial, legislative, or other public and official proceedings, without proving actual malice in making the report.

§ 1908. The last section does not apply to a libel, contained in the heading of the report; or in any other matter, added by any person concerned in the publication; or in the report of anything said or done, at the time and place of the public and official proceedings, which was not a part thereof."

The qualified privilege therein provided for is limited to a fair and true report of the judicial proceeding, and does not extend to other matters added thereto.

"The articles being libelous per se, privilege is a defense to be pleaded and proved, and upon the defendant rested the burden of showing that the publication was privileged." *Stuart v. Press Pub. Co.*, 83 App. Div. 467, 82 N. Y. Supp. 401.

It follows, therefore, that the defendant must be put to its answer.

The order appealed from should be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs, with leave to the defendant to withdraw the demurrer and interpose an answer, upon payment of said costs and within 20 days after the service of the order to be entered hereon. All concur.

SIMON v. BIERBAUER.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. PLEADING (§ 350*)—MOTION FOR JUDGMENT.

Where a party moves for judgment upon the pleadings, the allegations in his adversary's pleadings are to be accepted as true for the purposes of the motion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1053, 1054, 1070-1077; Dec. Dig. § 350.*]

2. ACTION (§ 53*)—SPLITTING CAUSE OF ACTION.

Where goods are sold on installments, and all installments are due, the seller cannot maintain separate actions on the various installments.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549-623; Dec. Dig. § 53.*]

3. JUDGMENT (§ 654*)—CONCLUSIVENESS—MATTERS CONCLUDED.

While a default judgment is conclusive as to matters which are necessarily determined, a default against defendant who counterclaimed is not conclusive as to the issues raised by the counterclaim, where that issue was simply dismissed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1165; Dec. Dig. § 654.*]

Appeal from Special Term, New York County.

Action by Nathan Simon against Bruno W. Bierbauer. From an order granting plaintiff's motion for judgment on the pleadings, defendant appeals. Reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, MILLER, and DOWLING, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Joseph A. Burdeau, of Brooklyn, for appellant.
David L. Podell, of New York City, for respondent.

McLAUGHLIN, J. The complaint alleges that on December 21, 1909, the Edinborough Publishing Company, plaintiff's assignor, entered into a contract with the defendant, by which it sold and delivered to him a set of books at the agreed price of \$2,400, of which \$130 was paid upon delivery, and the balance agreed to be paid in installments of \$130 each on the 1st day of each succeeding month until the whole sum should be paid; that the installments due on the 1st of January and February, 1910, were paid, but those for the four succeeding months were not; that plaintiff, on June 14, 1910, brought an action in the City Court of the city of New York to recover a judgment for such installments; that it had a recovery, and the judgment has since been paid. The present action is brought to recover the balance of the installments, viz., \$1,490, with interest. Annexed to and made a part of the complaint are the pleadings in the action in the City Court, including the contract there sued on. The answer of the defendant in the City Court, besides denying certain allegations of the complaint, set up facts by way of defense and as a counterclaim for damages alleged to have been sustained, for which judgment was demanded. A reply was served in that action, which put in issue all of the allegations of the counterclaim. The defendant did not appear at the trial in the City Court action, and the plaintiff took judgment for the amount demanded.

[1, 2] In the present case the defendant interposed an answer, in which he admitted the recovery of the judgment in the City Court, and alleged: That the contract, as pleaded in the complaint, was not the one entered into between the parties. That the contract contained a provision:

"That in case defendant failed to meet any payment within sixty days after the same became due, said failure would cause the total unpaid balance of the full price of said set of books to become due and payable."

And that the recovery of the judgment in the City Court, all of the installments under the contract being due, was a bar to the recovery of the installments here sued on. The answer also set up, by way of counterclaim, substantially the same facts that were pleaded as a counterclaim in the City Court action. After issue had been joined, the plaintiff moved for judgment on the pleadings, on the ground that the judgment rendered in the City Court action settled in his favor all of the issues sought to be raised by the defendant. The motion was granted, and defendant appeals.

I think the court erred in granting the judgment. If the contract between the defendant and plaintiff's assignor was as is claimed by the defendant—and for the purposes of the motion it had to be accepted as true—then all of the installments, at the time the action was commenced in the City Court, were due, and the plaintiff had to recover all of them, if at all. He could not recover four installments and thereafter bring another action to recover the others; and this under the well-settled rule that a plaintiff cannot split up an existing cause

of action by suing for some installments and reserving for future action others, which are already due. *Kennedy v. City of New York*, 196 N. Y. 19, 89 N. E. 360, 25 L. R. A. (N. S.) 847; *Pakas v. Hollingshead*, 184 N. Y. 211, 77 N. E. 40, 3 L. R. A. (N. S.) 1042, 112 Am. St. Rep. 601, 6 Ann. Cas. 60; *Secor v. Sturgis*, 16 N. Y. 548; *Goldberg v. Eastern Brewing Co.*, 136 App. Div. 692, 121 N. Y. Supp. 465. Here was an issue which had to be disposed of upon the trial, and it could not be summarily disposed of on a motion for judgment on the pleadings. *Emanuel v. Walter*, 138 App. Div. 818, 123 N. Y. Supp. 491.

[3] I am also of the opinion that the counterclaim which had been put in issue by a reply had to be disposed of before judgment could be granted. While the facts upon which it is predicated are substantially the same as those pleaded in the City Court, that judgment did not dispose of it, since the defendant defaulted at the trial. Defendant's default does not, of course, render the former judgment less conclusive as to all matters which were necessarily determined in awarding plaintiff judgment (*Brown v. Mayor*, 66 N. Y. 390; *Reich v. Cochran*, 151 N. Y. 122, 45 N. E. 367, 37 L. R. A. 805, 56 Am. St. Rep. 607); but there was no investigation upon the merits of the counterclaim. That was simply dismissed, and such dismissal did not, in and of itself, thereafter prevent defendant from recovering upon it. *Honsinger v. Union Carriage & Gear Co.*, 175 N. Y. 229, 67 N. E. 436; *Knickerbocker Trust Co. v. C. C. & R. S. R. Co.*, 188 N. Y. 38, 80 N. E. 568; *Barber v. Ellingwood*, 137 App. Div. 704, 122 N. Y. Supp. 369. It was in effect a nonsuit.

Upon both grounds, therefore, I think the motion for judgment on the pleadings should have been denied.

It follows the order appealed from is reversed, with \$10 costs and disbursements, and the motion for judgment denied, with \$10 costs. All concur.

COE v. CHAMPLAIN GRAPHITE CO. et al.

(Supreme Court, Appellate Division, First Department. January 3, 1913.)

1. CLERKS OF COURTS (§ 18*)—FEES.

A county clerk, as clerk of the Supreme Court, is not entitled to a fee for entering an order requiring plaintiff to give security for costs, under Code Civ. Proc. § 3306a, providing that the county clerk shall be entitled to receive for making entries required of him by law, of moneys deposited with the county treasurer, the sum of 50 cents, to be paid by the party to the action.

[Ed. Note.—For other cases, see *Clerks of Courts*, Cent. Dig. §§ 44, 47, 48; Dec. Dig. § 18.*]

2. CLERKS OF COURTS (§ 18*)—ENTRY OF ORDERS—PAYMENT OF FEES.

A clerk of the Supreme Court properly refused to file and enter an order until it had been judicially determined whether he was entitled to a fee therefor, if he was in doubt as to his right to a fee.

[Ed. Note.—For other cases, see *Clerks of Courts*, Cent. Dig. §§ 44, 47, 48; Dec. Dig. § 18.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. CLERKS OF COURTS (§ 71*)—PERFORMANCE OF OFFICIAL DUTY—REMEDY.

If defendant acted as a county clerk, and not as clerk of the Supreme Court, in entering an order requiring plaintiff to give security for costs, he could only be compelled to enter such order by mandamus, and could not be summarily compelled to do so by an order of the Supreme Court.

[Ed. Note.—For other cases, see Clerks of Courts, Dec. Dig. § 71.*]

Appeal from Special Term, New York County.

Action by Edward P. Coe against the Champlain Graphite Company and William F. Schneider, as County Clerk of the County of New York. From an order directing the clerk to file and enter, without payment of a fee, an order requiring plaintiff to give security for costs, defendant Schneider appeals. Affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Terence Farley, of New York City, for appellant.

John Larkin, of New York City, for respondent.

McLAUGHLIN, J. Upon motion of the defendant, the plaintiff was directed, either to pay into court the sum of \$250, to be applied to the payment of costs, if any, which might be awarded against him, or, at his election, give an undertaking in a like sum for the same purpose. The clerk of the court, who is also county clerk of the county of New York, refused to file or enter such order, unless he were paid a fee of 50 cents for so doing. Defendant then moved that he be directed to file such order without the payment of any fee. The motion was granted, and the clerk appeals.

[1] He contends that, inasmuch as he is county clerk of the county of New York, he is entitled, under the provisions of section 3306a of the Code of Civil Procedure, to a fee. This section provides that:

"The county clerk shall be entitled to receive for making the entries required of him by law of moneys deposited with the county treasurer the sum of fifty cents in each case to be paid by the party to the action or proceeding and taxed as a disbursement therein."

[2] Here, so far as appears, no money has in fact been paid into court, and if the undertaking be given none will be paid. Besides, in filing and entering this order, the appellant acted, not as county clerk, but as clerk of the Supreme Court. The order directing the payment into court or the giving of the undertaking is an order in the action, and it is the duty of the clerk of the court to file and enter the same without any fee. If a fee were paid, it would belong, not to the appellant, but to the city of New York; the county clerk receiving a salary in lieu of fees. The clerk being in doubt as to whether he were entitled to a fee, it was proper for him to refuse to file and enter the order until the matter had been judicially determined.

[3] It is also suggested by the appellant that the order should be reversed, because the clerk can only be compelled to act by mandamus, and not in a summary way by an order. This is true if the act which he is required to perform is that of a county clerk, and not as clerk of the Supreme Court. Matter of Murphy, 150 App. Div. 460, 135

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

N. Y. Supp. 23. The thing which he is here directed to do is the act of the clerk of the Supreme Court, and not that of the county clerk.

It follows that the order appealed from is affirmed, but, under the circumstances, without costs. All concur.

(78 Misc. Rep. 194.)

COATSWORTH v. HAYWARD et al.

(Supreme Court, Trial Term, Essex County. November, 1912.)

1. WATERS AND WATER COURSES (§ 154*)—USE OF WATER—EXTENT OF USE—EASEMENT IN GROSS.

Where a lease for 99 years of the right to pipe water from a spring granted to the lessee the privilege of attaching a half-inch pipe to the main pipe for the purpose of drawing water therefrom at any point between the lessor's dwelling house and the dwelling house of the lessee, such right was an easement in gross, and was not appurtenant to an intervening house, which the lessee also owned.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 167-173; Dec. Dig. § 154.*]

2. WATERS AND WATER COURSES (§ 154*)—EASEMENTS—USE.

Where a lessee of a water right was authorized to attach a half-inch pipe to the main pipe and draw water at any point between the dwelling house of the lessor and that of the lessee, the latter was entitled to use a half inch of water at her dwelling house or at any point where water was taken from the main pipe between the limits specified, and was therefore entitled to grant permission to one owning an intervening house to use water from the same pipe to the capacity of a half-inch pipe.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 167-173; Dec. Dig. § 154.*]

3. WATERS AND WATER COURSES (§ 154*)—RIGHT TO USE WATER—APPURTENANT TO LAND.

A right to use water piped from a spring on other land pursuant to a 99-year lease may be held by the lessee separate from any particular piece of land, or may be conveyed as an appurtenance to land on which the water is used.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 167-173; Dec. Dig. § 154.*]

4. WATERS AND WATER COURSES (§ 154*)—DEEDS—APPURTENANCES—RIGHT TO USE OF WATER.

Whether a right to the use of a water easement on certain land conveyed by the holder of the easement to her daughter passed to the daughter as an appurtenance, not having been otherwise referred to in the deed, depended on the intention of the parties.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 167-173; Dec. Dig. § 154.*]

5. EVIDENCE (§ 273*)—DECLARATIONS AGAINST INTEREST—PERSONS IN POSSESSION OF LAND—RIGHT TO EASEMENT.

Evidence that after conveyance of land by a mother to a daughter, the deed containing nothing indicating an intent to convey a right to the continued use of the mother's water easement on the land, unless included in the term "appurtenance," the mother declared that her daughter had no right to use the water except by her permission, and that the daughter, while in possession, replied, "I understand that," was admissible to rebut the inference that it was intended to convey the right to use the water by the deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1108-1120; Dec. Dig. § 273.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. WATERS AND WATER COURSES (§ 154*)—EASEMENTS—CONVEYANCE—ESTOPPEL.

N., having procured the right to a half-inch water supply from a spring to be taken at any point between the house of the grantor and a red house belonging to N., conveyed an intervening yellow house to her daughter, and without any conveyance permitted her to use water from the pipe in the yellow house. The yellow house was subsequently conveyed, the right to the water being expressly exempted from the warranty; the grantor assuming to convey only such rights as he had in and to the spring. The yellow house was later sold at auction and purchased by complainant, when the water was cut off. At the time complainant bid in the property he knew that the water from the spring had been used in the house, and supposed rightfully, but, after he discovered that the water had been disconnected, he completed his payments, and took the property. *Held*, that no right to the use of the easement passed to complainant.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 167-173; Dec. Dig. § 154.*]

Suit for injunction by Ruth A. W. Coatsworth against Charles C. Hayward and another. Complaint dismissed.

Stokes & Owen, for plaintiff.

Weeds, Conway & Cotter, of Plattsburgh, for defendants.

VAN KIRK, J. This action is brought to restrain the defendant from interfering with plaintiff's use of a spring situated on the farm of defendant Hayward. By the terms of a lease dated September 24, 1869, between David S. Hayward, the first party, and Laura A. Noble, the second party, the second party is permitted to take water from a spring on the Hayward farm for the term of 99 years. The lease provides for the laying of a one-inch pipe from the spring, and contains the following:

"And it is further agreed and understood by and between the parties to this agreement that the party of the second part has the privilege of attaching a half-inch pipe to the said main pipe for the purpose of drawing water therefrom at any point between the dwelling house of the party of the first part and the dwelling house of the party of the second part. And it is further understood and agreed that the party of the second part has the privilege of using one-half inch of said water at her dwelling house. And it is mutually agreed and understood by the parties to this agreement that neither of the parties is to allow said water to run to waste on their premises or at any point where water is taken from said main pipe."

At the time this agreement was made, David S. Hayward owned the hereinbefore mentioned farm. Laura A. Noble owned the red house and her brother Belden Welch owned the yellow house, which lay between the said farm and the red house. The inch pipe was constructed from the spring by Laura A. Noble and ran from the farm, in the highway, past the yellow house to a point opposite the red house. In connection with the laying of the inch pipe the same was tapped with a half-inch pipe and the water conducted to the yellow house.

The Hayward farm has since been conveyed, subject to the rights and covenants of the said lease, to the defendant Hayward. Therefore the defendant Hayward cannot interfere with the use of the said spring and the maintenance of the pipe line thereto, if the use and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

maintenance are in accord with the terms of said lease, by any person or persons succeeding to the rights of Laura A. Noble. Under the lease, an easement appurtenant to the red house, then owned by Laura A. Noble, came into existence, and Laura A. Noble has conveyed the red house together with said easement. In the deed dated December 31, 1892, Laura A. Noble to Henry H. Noble, is the following:

"Together with all and singular the rights, privileges and easements of bringing water and using the same on the said premises appurtenant to the same and now enjoyed thereon."

This is a grant of the right to use water through the half-inch pipe drawn from the said inch main as then used in the red house. *Cady v. Springfield W. W. Co.*, 134 N. Y. 118, 120, 31 N. E. 245. So that the defendant Harlan is the owner of the red house and of the said easement appurtenant thereto.

Laura A. Noble became the owner of the yellow house by deed dated July 3, 1876, in which no mention of any right to use water from the spring is made; and by no writing or otherwise had Laura A. Noble ever conveyed to Belden Welch any interest in said spring water or its use. By deed dated May 22, 1882, Laura A. Noble conveyed to Sarah E. N. Wait, her daughter, the yellow house, without any mention of any easement or right to use said spring water, but the deed contains the usual clause that the premises are granted with the appurtenances thereunto belonging. After the death of Mrs. Wait, the yellow house went by mesne conveyances to this plaintiff, and none of the conveyances in terms carries any right to take water from said spring, unless covered by the general clause that the premises are conveyed with the "appurtenances thereunto belonging." Henry H. Noble disconnected the pipe on or about October 22, 1892, under the direction of his mother, Laura A. Noble.

[1] In 1894, when Richardson went into occupancy of the house, he had the pipes connected and the water restored to the house. The water since then has been used in the yellow house until the time complained of in the complaint. The grant in the lease that the second party "has the privilege of attaching a half-inch pipe to the said main pipe for the purpose of drawing water therefrom at any point between the dwelling house of the party of the first part and the dwelling house of the party of the second part" was a grant of the right to use the water in gross and not appurtenant to the yellow house. 14 Cyc. 1140; *Linthicum v. Ray*, 76 U. S. (9 Wall.) 241, 243, 19 L. Ed. 657.

[2] The grant was to Laura A. Noble, and under that grant Laura A. Noble had the right to use the water to the capacity of the half-inch pipe without wasting. *Cady v. Springfield W. W. Co.*, 134 N. Y. 118, 31 N. E. 245; *Nellis v. Munson*, 108 N. Y. 453, 15 N. E. 739. She had the right to allow her daughter to use this water if she saw fit, or she had the right to change the connection to some other place between the points limited in the lease.

[3] Such a right may be held separate from any particular piece of land, and it may be retained by the grantee or conveyed as an appurtenance to land. *Bank of British North America v. Miller* (C. C.) 6 Fed. 545.

[4] If Laura A. Noble has ever parted with that right, it must have been by the deed to her daughter, Mrs. Wait. Whether or not this conveyance transferred said right in gross depends upon the intent of the parties to the deed. *Id.*; *Watson v. City of New York*, 67 App. Div. 573, 73 N. Y. Supp. 1027, affirmed 175 N. Y. 475, 67 N. E. 1091. If the right is one necessary and essential to the enjoyment of the property, the intent to convey is presumed (*Lampman v. Milks*, 21 N. Y. 507); and, without a recital in the deed showing it is excluded, or other competent and satisfactory evidence that the parties intended to exclude it, such necessary and essential right would pass with the conveyance as an appurtenance, under the general expression, "appurtenances thereunto belonging." *Root v. Wadhams*, 107 N. Y. 384, 14 N. E. 281, and cases cited. But the right to use this spring water in the yellow house is a valuable convenience. It can hardly be denominated a necessity to the reasonable use and enjoyment of the estate granted to Mrs. Wait. It is true there is no other spring upon the premises, or reached from the premises by pipes. Lake Champlain can be reached or a well dug. Residence properties are not generally supplied with spring water. But, in any event, the intent of the parties controls, and the said presumption, if it exists in this case, may be rebutted by parol. *Watson v. City of New York*, *supra*.

[5] A conversation has been related in which it is stated in substance that Laura A. Noble declared that Mrs. Wait had no right to use the water except by her (Noble's) permission, and Mrs. Wait, then in possession, replied, "I understand that." It is urged that on cross-examination the witness gave another meaning to his testimony, but a careful reading of all will disclose that this is the substance and his meaning. This statement of Mrs. Wait, while she was in possession of the premises, is competent and relevant testimony with reference to the intention of the parties to the deed in question, in an action between third parties. *Chadwick v. Fonner*, 69 N. Y. 404, 407; *Lyon v. Ricker*, 141 N. Y. 225, 36 N. E. 189; *Merkle v. Beidleman*, 165 N. Y. 21, 58 N. E. 757. In the deed of the red house the right is specifically granted. This fact has some significance in considering the deed of the yellow house to Mrs. Wait, which contains no reference to the right to use water.

I conclude that this right in gross was not conveyed to Mrs. Wait.

No title to this right in gross has been acquired by the owner of the yellow house by prescription.

[6] On October 22, 1892, E. K. Richardson bid in the yellow house at an auction sale. The water was then cut off. At the time he bid in the property, he knew that water from said spring had been used in the house, and supposed it was then so rightfully used. After he made his first payment, he discovered that the half-inch pipe had been disconnected in the highway opposite the yellow house. He still completed his payments and took the property. Under the circumstances the easement did not pass to Richardson. *Jones, Ease.* § 25. Nor could the easement pass by any subsequent conveyance, unless it passed by the deed to Mrs. Wait. *Spencer v. Kilmer*, 151 N. Y. 391, 45 N. E. 865; *Green v. Collins*, 86 N. Y. 246, 40 Am. Rep. 531. While it is

true that the existence of the piping and supply of water from the spring to the yellow house is to be fairly construed as an inducing cause for the purchase thereof by the plaintiff, and the plaintiff undoubtedly hoped that such right existed, she was warned by the deed from Wamsley that there was a question as to the right, because in said deed it is expressly excepted from the warranty and the grantor, Wamsley, assumed to convey only such rights as he had in and to said spring.

The defendant Harlan is entitled to an injunction against plaintiff's use of the spring.

The complaint should be dismissed, with costs. A decision may be submitted in accordance herewith.

Complaint dismissed, with costs.

(79 Misc. Rep. 91.)

REISLER v. INTERBOROUGH RAPID TRANSIT CO.

(Supreme Court, Appellate Term, First Department. January 15, 1913.)

1. FALSE IMPRISONMENT (§ 4*)—MATERIAL ISSUES.

In an action for false imprisonment, the sole question was whether the arrest was lawful, and the mental attitude of the defendant in causing the arrest was unimportant.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 16; Dec. Dig. § 4.*]

2. ARREST (§ 64*)—VALIDITY—MISDEMEANOR CASE.

An arrest without a warrant by a private person for misdemeanor is lawful only where a misdemeanor was actually committed in his presence.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 157-160; Dec. Dig. § 64.*]

3. FALSE IMPRISONMENT (§ 37*)—TRIAL—MISDEMEANOR—EVIDENCE.

Where, in an action for false imprisonment, the plaintiff and two witnesses testified that plaintiff did not commit the misdemeanor for which he was arrested, it was error to dismiss the complaint, regardless of the ground upon which plaintiff was discharged by the magistrate before whom he was taken after his arrest.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 116-120; Dec. Dig. § 37.*]

Appeal from City Court of New York, Trial Term.

Action by John J. Reisler against the Interborough Rapid Transit Company. From judgment dismissing complaint at close of plaintiff's case and denial of new trial, plaintiff appeals. Reversed, and new trial ordered.

See, also, 135 N. Y. Supp. 603.

Argued November term, 1912, before LEHMAN and PAGE, JJ.

Henry J. Goldsmith, of New York City, for appellant.

James L. Quackenbush, of New York City, for respondent.

LEHMAN, J. Plaintiff sues for damages for an alleged false imprisonment. At the trial the plaintiff showed that he was arrested without a warrant by a special officer in the employ of the defendant at

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the instigation of a guard in defendant's employ, and that at the hearing before the magistrate the complainant was represented by an attorney in defendant's employ. The charge was apparently disorderly conduct. The magistrate discharged the plaintiff.

[1] Since the complaint in this action is for false imprisonment, the mental attitude of the defendant in causing the arrest is unimportant. The sole question is whether the arrest was lawful.

[2] An arrest without a warrant by a private person for a misdemeanor is lawful only where a misdemeanor was actually committed in the presence of that person.

[3] In this case the plaintiff showed by his own testimony and the testimony of two witnesses that he used no vile language, and did not assault the guard. The guard was interrogated by the plaintiff as to his instigation of the arrest, and then was cross-examined by the defendant as to the justification for the arrest, and on the cross-examination testified that the plaintiff had called him a vile name, and assaulted him. The plaintiff then rested, and the trial justice thereupon dismissed the complaint. In the record appears a transcript of the proceedings before the magistrate, which is marked "Defendant's Exhibit A," although I fail to find in the record where or how this transcript was admitted. This transcript shows that in the proceedings before the magistrate the complainant made out a *prima facie* case of assault, but that the magistrate dismissed the charge on the ground that the arrest was illegal in its inception, because the offense was not committed in the presence of the special officer who made the arrest. Conceding that the magistrate erred in discharging the plaintiff, I fail to see how that fact justified the dismissal of this complaint.

The only question before the court in the action for false imprisonment is whether or not the arrest was lawful. If the arrest was unlawful, in fact, then the plaintiff has established his cause of action, even though the magistrate at the hearing should have required the plaintiff to meet the charge made against him. The plaintiff having made out a *prima facie* case, the trial justice erred in dismissing the complaint. In dismissing the complaint the trial justice stated:

"Under chapter 659, § 75, of the Laws of 1910, on two points, of lack of jurisdiction in the Magistrate's Court and the failure of proof in the Magistrate's Court, I shall have to dismiss the complaint."

Since the argument leading up to this statement is omitted from the record, and the respondent failed to file a brief, we are somewhat at a loss as to the exact meaning of this statement by the court. Certainly an arrest which is in itself illegal cannot be made legal by the failure to arraign the arrested party in the proper court and by failure of proof in the court where he is arraigned.

It follows that the judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event.

PAGE, J., concurs.

(79 Misc. Rep. 86.)

BARRIE et al. v. FRIEDMAN.

(Supreme Court, Appellate Term, First Department. January 13, 1913.)

CONTEMPT (§ 55*)—ORDER TO SHOW CAUSE—SERVICE.

Judiciary Law (Consol. Laws 1909, c. 30) § 760, permits an order to show cause to be made either before or after a final judgment, and section 761 provides that an order to show cause is equivalent to a notice of motion. Code Civ. Proc. § 802, provides that the article does not apply to service of a paper to bring a party into contempt, or where the mode of service is specifically prescribed by law. Section 796 permits a notice or other paper in an action to be served on a party or attorney personally, or as prescribed in section 797, which provides that service may be made upon a party by leaving the paper at his residence between 6 a. m. and 9 p. m. with a person of suitable age. *Held*, that an order to show cause why a judgment debtor should not be punished for contempt for failure to appear for examination was properly served by leaving a copy at the debtor's residence with a person of suitable age between 5 and 6 o'clock p. m.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 150-161; Dec. Dig. § 55.*]

Appeal from City Court of New York, Special Term.

In the matter of supplementary proceedings. George Barrie and others, judgment creditors, against Harold J. Friedman, judgment debtor. From an order denying a motion to punish the judgment debtor for contempt, the creditors appeal. Reversed, and matter remitted for further proceedings.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Walter L. Bunnell, of New York City, for appellants.

PAGE, J. The judgment creditors obtained an order for the examination of the judgment debtor, which was duly personally served on him. He appeared on the return day, and the examination was adjourned. Two other adjournments were had, and on the last adjourned day he failed to appear. An order to show cause why he should not be punished for a contempt was obtained, and was served on an associate in the same suite of offices with the judgment debtor. On the return day of the order to show cause the motion was denied upon the ground that motion papers to punish for contempt must be served on the judgment debtor personally or upon his attorney, with leave to renew. Another order to show cause why the judgment debtor should not be punished for contempt was obtained and served by leaving a copy at his residence in this city between the hours of 5 and 6 in the afternoon with a person of suitable age and discretion. On the return day of this order to show cause the motion was denied upon the ground "that service of the order to show cause upon a person other than the judgment debtor or his attorney is no service, and does not justify the court in punishing the debtor for his alleged disobedience thereof." If the motion had been to punish the judgment debtor for a disobedience of the order to show cause, then the ruling

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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of the court would have been correct. It was an order to show cause why the judgment debtor should not be punished for disobedience of an order that had been personally served upon him.

Article 19 of the Judiciary Law deals with the subject of contempt. Section 760 thereof reads as follows:

"When order to show cause may be made. An order to show cause may be made either before or after the final judgment in the action or final order in the special proceeding."

Section 761:

"Order to show cause defined. An order to show cause is equivalent to a notice of motion; and the subsequent proceedings thereupon are taken in the action or special proceeding, as upon a motion made therein."

In discussing section 2273 of the Code of Civil Procedure (Consol. Laws 1909, c. 30, §§ 754-781), from which the two sections of the Judiciary Law were taken, the Court of Appeals has said:

"Before the adoption of the provisions of the Code above quoted, it had been announced in *Pitt v. Davison*, 37 N. Y. 235, that a proceeding to punish for contempt, instituted by an order to show cause obtained by one party to an action against another, was a proceeding in the action. Subsequently there was an intimation in at least two cases that such a proceeding should be regarded as a special proceeding, and the revisers in their notes stated that the object of this section was to settle the rule in accordance with the decision of *Pitt v. Davison*. That they accomplished their purpose is apparent from the careful reading of the statute." *Jewelers' Mercantile Agency v. Rothschild*, 155 N. Y. 255, 256, 49 N. E. 871, 872.

In *Pitt v. Davison*, supra, the court said at page 241 of 37 N. Y.:

"The order to show cause provided for by the statute in the absence of any statutory provision to the contrary was there governed by the practice of the court in regard to orders to show cause, both in respect to its service and the further proceedings upon it."

The Code of Civil Procedure (sections 796 and 797) prescribes how all papers in an action may be served, except "a summons or other process, or of a paper to bring the party into contempt or to a case where the mode of service is specially prescribed by law" (section 802), and is as follows:

"A notice or other paper in an action may be served on a party or an attorney either by delivering it to him personally or in the manner prescribed in the next section. • • •"

Section 797:

"When the service is not personal, it may be made as follows: 4. Upon a party by leaving the paper at his residence within the state, between six o'clock in the morning and nine o'clock in the evening, with a person of suitable age and discretion."

This was the manner of service of the order to show cause herein, and was a sufficient service.

The order denying the motion is therefore reversed, with \$10 costs and disbursements; and the matter remitted to the City Court for appropriate action. All concur.

FRENCH v. WRAY.

(Supreme Court, Appellate Division, Third Department. December 30, 1912.)

BOUNDARIES (§ 48*)—ESTABLISHMENT—ACQUIESCENCE—FENCES.

Where a fence constructed between adjoining owners claimed by defendant as the boundary was erected between 1883 and 1885, and defendant had since cultivated a garden up to the fence without substantial interruption, and had also, to the knowledge of plaintiff's predecessors, built valuable buildings in reliance on the line, which buildings and improvements represented a substantial part of the premises in dispute, the fence having barred plaintiff and his predecessors from the premises and effectually inclosed the same as far as they were concerned, and they having acquiesced therein for more than 20 years and the original marks having been obliterated, plaintiff was estopped to deny that the fence established the true line.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 232-242; Dec. Dig. § 48.*]

Appeal from Trial Term, Warren County.

Action by Harma D. French, as committee, etc., against Emma Mann Wray. From a judgment for plaintiff from an order denying defendant's motion to set aside the verdict and for a new trial, defendant appeals. Reversed, and new trial granted.

Argued before SMITH, P. J., and KELLOGG, HOUGHTON, BETTS, and LYON, JJ.

Charles R. Patterson, of Glens Falls, for appellant.

Lyman Jenkins, of Glens Falls, for respondent.

JOHN M. KELLOGG, J. The calls of the patents cannot with great confidence be placed upon the ground. The starting point was a rock marked "W. F.," situated upon a rocky point. The marks cannot be found, and it is difficult to tell from what particular rock the survey started. The controversy arises from the plaintiff's locating the starting point in the survey some 200 or 250 feet south of the point where the defendant starts. The defendant has the advantage in the line which she claims of finding blazed and marked trees; the blazes and marks apparently having been made about the time the original survey was made. The plaintiff takes a starting point which will coincide with a line of marked trees, but it is conceded that the marks are of quite recent origin. It seems pretty well established that the elder Barnett, who occupied the premises on the lake immediately north of the patents in question, maintained a fence on his southerly line, and that his premises had been cleared up to the line; that about 29 years ago he had a survey made and removed the fence 200 or 250 feet to the south and marked trees along the new line, and immediately he and his sons cut the valuable timber from the land which had thus been acquired, and apparently the new fence built by them is what is now called the old fence near the line which the plaintiff claims as the proper line. The finding of the old marked trees along the lines as claimed by the defendant is convincing evidence in her favor. The marks upon the trees and the monuments found by the plaintiff are not convincing, as they were made long after the orig-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

inal patent, and the circumstances under which they were made are not shown. Some of them were evidently made by the Barnetts when they attempted to change the line. Some may have been made by others relying upon that survey. Clifton bought the premises now owned by defendant in 1882, and soon after he built a fence extending from the lake to the highway along the line which the defendant's survey indicates to be the original line of the patent, and that line passes through a large oak tree at the lake, and one of the patents shows that the true line passed through such a tree near the lake. This fence completely separated the defendant's premises from the plaintiff's lands. The premises were inclosed by this fence, the road, and the lake. They have been cultivated and improved since the fence was erected about 1883 to 1885, and a garden, without substantial interruption, has been maintained near the fence, and the defendant, with the knowledge of the plaintiff's predecessors, has built valuable buildings in reliance upon that line. We may infer that the buildings and improvements represent a substantial part of the value of the premises in dispute. This fence barred the plaintiff and his predecessors in title from the premises, and effectually inclosed the premises as far as they were concerned. It is improbable that the acts of the defendant, so open and hostile, would have been acquiesced in for over 20 years if the line represented by the fence had not been mutually agreed upon or at least understood by all the parties interested to be the correct line, and the evidence indicates that it was mutually agreed between the adjoining occupants that this fence was the line. The descriptions in the two patents do not accord. The monument representing the starting point is obliterated. So long a time has elapsed since the original survey was made that it is difficult to locate the exact lines. Under such circumstances, the continued occupancy by the defendant and her grantor up to this fence, and the improvements, and the recognition of it as the true line, is very convincing evidence in favor of the defendant. If in 1882 the plaintiff's predecessors had raised the question that the defendant's grantors were trespassing upon their premises, the true line at that earlier day probably could have been more correctly determined, and, if they had succeeded, the defendant's grantors would have lost nothing except they were unable to take land which did not belong to them. Since that time the situation has materially changed. On account of the changes by time, it is now more difficult to prove the exact line, and a recovery now would bring to the defendant great damage in the loss of her buildings and improvements. The plaintiff should not be thus benefited by the delay to assert her rights, if she had any. It is not reasonable to assume, where the acts were so open and hostile, that a mere trespass would have been suffered to ripen into a substantial right. It is not necessary to say that the plaintiff is estopped. It is sufficient to say that the acts of the plaintiff and his predecessors, and the acts of the defendant, under all the circumstances, leave the fence as the best evidence of the dividing line.

The findings of fact that the plaintiff is the owner and entitled to the possession of the premises in dispute and that the defendant is wrongfully in possession are disapproved of as against the evidence. The court properly excluded the testimony of the witnesses Clifton.

The judgment should therefore be reversed upon the law and the facts, and a new trial granted, with costs to the appellant to abide the event. All concur; LYON, J., in result.

(79 Misc. Rep. 80.)

KRAMER v. BARTH et al.

(Supreme Court, Appellate Term, First Department. January 13, 1913.)

1. APPEAL AND ERROR (§ 419*)—NOTICE OF APPEAL—FORM.

There is no right of appeal from "a paper," and an appeal purporting to be from a paper will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2145, 2146; Dec. Dig. § 419.*]

2. APPEAL AND ERROR (§ 78*)—CONSTRUCTION—FINAL JUDGMENTS.

A judgment entered upon the failure of defendants to act on the permission granted in the order overruling their demurrer to withdraw it and answer, is a final, not an interlocutory, judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 464-483; Dec. Dig. § 78.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2774-2798; vol. 8, p. 7663.]

3. PLEADING (§ 222*)—DEMURRER—TIME TO PLEAD OVER.

Where an order overruling a demurrer required defendant to plead over within six days after service of the copy "of this order" with notice of entry upon defendant's attorney, the service of the order, as resettled by defendant's attorney upon plaintiff's attorney, will not set the time running.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 570-574; Dec. Dig. § 222.*]

4. JUDGMENT (§ 163*)—DEFAULT JUDGMENT—VACATION—PRACTICE.

That the time for defendants to answer after the overruling of their demurrer was not set in motion by service of notice of entry of the order may be raised upon a motion to vacate a judgment entered for want of an answer, predicated upon an affidavit showing the facts.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 323; Dec. Dig. § 163.*]

5. COSTS (§ 152*)—DEMURRERS—PRACTICE.

Code Civ. Proc. §§ 964, 965, 969, respectively, provided that an issue of law arises upon demurrer, that issues of law must first be disposed of, and that they must be tried by the court, while sections 547 and 976, respectively, provide that an issue of law may be brought on and tried as a contested motion, and that, if either party be entitled to judgment upon the pleading, the court may upon motion issue joined give judgment upon the pleadings. *Held* that, under the latter sections, a demurrer may be disposed of as a contested motion in which case no written decision is necessary, and costs cannot exceed those before notice of trial and \$10 motion costs, or it may be disposed of as an issue of law, in which case under sections 1010 and 1021 a written decision is necessary: final judgment being directed if the unsuccessful party fails to comply with the interlocutory orders, and the costs will include those after notice of trial, and the trial fee.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 591; Dec. Dig. § 152.*]

6. PLEADINGS (§ 198*)—DEMURRERS.

One of several defendants may demur where the complaint states no cause of action against him; a demurrer being in effect a declaration

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the demurrant will go no further because nothing has been shown against him.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 461–463; Dec. Dig. § 198.*]

7. PARTIES (§ 92*)—JOINDER—MISJOINDER.

Code Civ. Proc. § 488, subsec. 6, providing that a defendant may demur where there is a defect of parties plaintiff or defendant, permits a demurrer only for nonjoinder, not misjoinder, of parties.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 150–152; Dec. Dig. § 92;* Pleading, Cent. Dig. § 494.]

Appeal from City Court of New York, Special Term.

Action by Mary Kramer against Max Barth and another. From an order overruling a demurrer with leave to withdraw the demurrer and answer, and "from a paper dated November 1, 1912, entered in pursuance of said order, purporting to be an interlocutory judgment," defendants appeal. Order reversed and proceedings vacated, but appeal dismissed in so far as taken from a paper purporting to be an interlocutory judgment.

See, also, 139 N. Y. Supp. 345.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Max Schleimer, of New York City, for appellants.

Jacob W. Block, of New York City, for respondent.

PAGE, J. [1, 2] There is no right of an appeal from a "paper." There was a judgment entered upon the failure of the defendants as is recited in the judgment to avail themselves of the permission granted in the order overruling the demurrer to withdraw the demurrer and serve an answer. This is not an interlocutory judgment, nor does it purport to be such. It is a final judgment.

[3, 4] The affidavit showing the default of the defendants recited in the judgment is not included in the printed papers on appeal, and is not before us. If the order of October 23, 1912, which recited the prior orders, was not served by the plaintiff upon the defendants, the time within which the defendants were required to withdraw the demurrer and serve an answer had not been limited. That time as stated in the order was "within six days after the service of a copy of this order with notice of entry upon their [defendants'] attorneys." The service of the resettled order by the defendants' attorney upon the plaintiff's attorney is not sufficient to set the time running. *Rohr v. Lynch*, 78 Misc. Rep. 45, 137 N. Y. Supp. 752. This objection, however, could properly be urged on a motion to vacate the judgment predicated upon affidavits showing the facts, or, if the affidavit upon which the judgment was entered does not show a service of the order with notice of entry on the defendants' attorney, the motion might be based upon the papers on which the judgment was entered. We, however, will not review the judgment on an appeal from a "paper."

[5] The appellant claims that the order and judgment should be reversed, for the reason that the court did not make and file a written

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

decision, and the imposition of \$35 costs as a condition for granting leave to amend is unauthorized, for the reason that \$10 costs is all that could be imposed. The attempts to simplify the practice with respect to demurrers has led to confusion in the minds of some members of the bar, and calls for a statement of what would seem to be elementary rules of practice. A demurrer may be brought on for trial as an issue of law. Code Civ. Proc. §§ 964, 965, 969. In which case a notice of trial must be served. On the determination of the issue, if the demurrer be sustained or overruled, and leave given to amend or to withdraw the demurrer and plead over, and the privilege is availed of, costs after notice of trial and the trial fee of an issue of law are properly imposed. But if final judgment is directed, or if final judgment is entered because the privilege of amending or pleading over is not accepted, then costs before and after notice of trial and the trial fee of an issue of law are taxable. *De Turckheim v. Thomas*, 113 App. Div. 123, 99 N. Y. Supp. 104. Or an issue of law may be brought on and tried at any term of court as a contested motion. Section 976. In which case a notice of motion, and not a notice of trial, is served, and on the determination of the motion, if the demurrer is sustained and leave given to amend, or overruled, and leave given to withdraw the demurrer and plead over, only \$10 motion costs are allowed. If final judgment is entered, costs before notice of trial and the motion costs are taxable.

Or a motion may be made for judgment on the pleadings (section 547), which, of course, must be brought on by notice of motion, and the court on determining the motion if leave to amend or to withdraw the demurrer and plead over be given has power to impose such terms as may be just. Costs, however, cannot exceed those before notice of trial and \$10 motion costs. *Singer Mfg. Co. v. Granite Spg. W. Co.*, 67 Misc. Rep. 575, 124 N. Y. Supp. 750; *Framingham Trust Co. v. Villard*, 74 Misc. Rep. 204, 210, 133 N. Y. Supp. 823.

While the amendments to the Code have provided two methods of disposing of a demurrer, additional to the trial of the issue of law, that method has not been eliminated from the Code, nor have the provisions applicable thereto been superseded. Therefore where, as in the present case, the issue of law is brought on for trial by the service of a notice of trial, the decision of the court in writing must be filed (section 1010), which must direct the final or interlocutory judgment to be entered thereupon, and shall contain no findings of fact but only conclusions of law. If leave is given to plead anew or amend, an interlocutory judgment should be directed, and, if no other issue remains to be tried, it should direct final judgment, if the party fails to comply with any of the terms of the interlocutory judgment. Section 1021. Where the matter is brought before the court on notice of motion either under sections 976 or 547, no written decision nor interlocutory judgment need be filed or entered, but an order should be entered. *People v. Bleecker St. & Fulton Ferry R. R. Co.*, 67 Misc. Rep. 582, 124 N. Y. Supp. 786; *Nat. Park Bank v. Billings*, 144 App. Div. 536, 129 N. Y. Supp. 846, affirmed 203 N. Y. 556, 96 N. E. 1122. It is an anomalous situation that there should be this

difference in practice, and what are called "antiquated and useless formalities" (*Nat. Park Bank v. Billings*, *supra*, 144 App. Div. 539, 129 N. Y. Supp. 848) should still be preserved, when a simpler and more expeditious manner has been devised for the disposition of an issue of law by bringing it on as a contested motion. Relief from this condition can be had, however, only in legislation. Further amendments to the Code of Civil Procedure eliminating the provisions for the trial of an issue of law otherwise than by motion, and the requirements for a written decision and interlocutory judgment, would simplify the practice and carry into effect the legislative intent by making that which now rests in the discretion of litigants, whether to bring on the demurrer by notice of trial or notice of motion, mandatory, by providing only the simpler and more rational method of motion, but, so long as both procedures are recognized, the court must adapt its procedure in compliance with the statutory requirements. It follows that the order must be reversed and all proceedings taken thereunder vacated and set aside, and the case remitted to the City Court for appropriate action.

[6] In order that the matter may be finally disposed of in the lower court, we have examined the grounds of demurrer set forth, and have come to the conclusion that the demurrer to the complaint for the reason that it did not state facts sufficient to constitute a cause of action against Charles Barth should have been sustained. In the amended complaint there is not a single allegation of fact concerning Charles Barth. It is true that where a party has been named individually, and there is a cause of action stated against him in a representative capacity or vice versa, the courts have held on demurrer that the caption was not controlling, but the entire complaint would be examined, and, if a cause of action was stated against him in either capacity, the demurrer would be overruled. *Rowe v. Rowe*, 103 App. Div. 100, 92 N. Y. Supp. 491; *Soldiers' Home v. Sage*, 11 Misc. Rep. 159, 33 N. Y. Supp. 549; *Beers v. Shannon*, 73 N. Y. 292, 297; *First Nat. Bank v. Shuler*, 153 N. Y. 163, 173, 47 N. E. 262, 60 Am. St. Rep. 601. These cases cannot be considered as sustaining the contention that where there are two defendants, and a cause of action is only alleged against one, the other defendant cannot demur for insufficiency as to him. The decisions are to the contrary. "Where there are several defendants some may answer while others demur. A demurrer is in effect a declaration that the party demurring will go no further, because the other has shown nothing against him. And a demurrer will be sustained where the cause of action set forth in the complaint fails to show any connection between the facts therein alleged and the party defendant by whom the demurrer is interposed." *Webb v. Vanderbilt*, 39 N. Y. Super. Ct. 4, 10. See, also, *People v. N. Y. City Cent. Underground Ry. Co.*, 15 N. Y. Supp. 245,¹ Gen. Term Sup. Ct. 1st Dep't; *Polak v. Runkel*, 56 App. Div. 365, 67 N. Y. Supp. 753.

[7] The joint demurrer of the defendants on the ground of a de-

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 60 Hun, 583.

fect of parties defendant was properly overruled. A defect of parties as ground of demurrer under subdivision 6 of section 488 of the Code of Civil Procedure means a nonjoinder, and not a misjoinder of parties. A complaint is not demurrable for too many parties defendant. *Hall v. Gilman*, 77 App. Div. 458, 79 N. Y. Supp. 303; *Tew v. Wolfshon*, 77 App. Div. 454, 79 N. Y. Supp. 286; *Adams v. Slingerland*, 87 App. Div. 312, 84 N. Y. Supp. 323.

In so far as the appeal is taken from "a paper purporting to be an interlocutory judgment," it is dismissed.

The order appealed from is reversed, and all proceedings had thereunder are vacated without costs to either party as against the other. All concur.

KRAMER v. BARTH et al.

(Supreme Court, Appellate Term, First Department. January 13, 1913.)

Appeal from City Court of New York, Special Term.

Action by Mary Kramer against Max Barth and another. From an order denying defendants' motion to vacate and set aside execution, and compel plaintiff to enter an interlocutory judgment on demurrer, defendants appeal. Order reversed.

See, also, 139 N. Y. Supp. 341.

Argued January term 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Max Schleimer, of New York City, for appellants.

Jacob W. Block, of New York City, for respondent.

PER CURIAM. It would have been the better practice to have moved to vacate the judgment, as well as the execution issued thereunder. For the reasons set forth in the appeal in this action decided herewith, this order will be reversed, with \$10 costs and disbursements, and the motion granted.

CZERWENY v. NATIONAL FIRE INS. CO. OF HARTFORD.

(Supreme Court, Appellate Term, First Department. January 9, 1913.)

1. INSURANCE (§ 164*)—POLICY—CONSTRUCTION—GOODS "HELD IN TRUST."

Under a fire insurance policy on goods held "in trust," recovery could be had for the loss of matches stored with insured as a bailee for hire.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 347-350; Dec. Dig. § 164.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3273, 3274.]

2. INSURANCE (§ 624*)—ACTION ON POLICY—PARTIES.

The assignee of the owner of matches stored with the insured as bailee for hire was the proper plaintiff in an action and under a trust clause of the policy for loss of the matches; the person for whose benefit a contract is made having the right to sue thereon, although not named therein.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1557-1571; Dec. Dig. § 624.*]

3. INSURANCE (§ 579*)—ACTION ON POLICY—PARTIES—EFFECT OF SETTLEMENT.

In the absence of waiver or estoppel, the plaintiff's rights in such case were not affected by a settlement between the insured and the insurance company with knowledge of the claim of plaintiff's assignor.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1417, 1419; Dec. Dig. § 579.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. INSURANCE (§ 648*)—ACTION ON POLICY—EVIDENCE OF INSURED'S INTENTION—COMPETENCY.

After H. J. bought certain merchandise from C., C. wrote, asking which of them should insure the merchandise, and H. J. replied for C. to do so. Thereupon C. took out insurance which was void by reason of his having parted with title. Thereafter a bailee for hire, with whom H. J. stored the merchandise, insured the contents of his warehouse under a policy containing a trust clause. After destruction of the merchandise by fire, H. J. assigned to C. his rights under the bailee's policy. *Held*, in an action by C. on the bailee's policy that evidence of the taking out of the void policy and of the preliminary correspondence was not competent to show that the bailee did not intend to insure this particular merchandise.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1669, 1676, 1677; Dec. Dig. § 648.*]

5. INSURANCE (§ 665*)—ACTION ON POLICY—EVIDENCE OF INSURED'S INTENTION—PROBATIVE EFFECT.

The fact that a trust clause was inserted in an insurance policy covering the contents of a warehouse was strong probative evidence that the insured intended to insure another's merchandise, which was stored with him as a bailee for hire.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1707-1728; Dec. Dig. § 665.*]

6. INSURANCE (§ 146*)—POLICY—CONSTRUCTION.

The intention of the parties to an insurance contract, even though extraneous evidence is permissible, must primarily be sought in the instrument itself.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.*]

7. INSURANCE (§ 559*)—PROOF OF LOSS—WAIVER.

An unqualified denial of liability under the trust clause of a fire insurance policy waived the proof of loss stipulated for by the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1391, 1392; Dec. Dig. § 559.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Alfred Czerweny against the National Fire Insurance Company of Hartford. From judgment for plaintiff, defendant appeals. Affirmed upon the opinion below.

The following is the opinion of Judge Spiegelberg, in the trial court:

This action, which was submitted upon an agreed statement of facts, is brought by the plaintiff, as assignee of Herman Jedel, to recover upon a policy of insurance issued by the defendant to A. Jedel Company. Some time prior to March 9, 1910, Herman Jedel, who was doing business under the name of the Anglo-American Fireworks Company, was the owner of a quantity of matches which were deposited by him in a brick warehouse owned by A. Jedel Company at Newark, Del., under an arrangement with said company, whereby Herman Jedel agreed to pay to said company for storage at the rate of 10 cents per case. On April 2, 1910, A. Jedel Company took out insurance with seven fire insurance companies, among which was this defendant, for the aggregate sum of \$25,000, \$6,000 of which was to cover the machinery and \$19,000 the stock. The policy issued by the defendant herein was for \$5,000 to cover pro rata the two items mentioned. The clause relating to the insurance of the stock reads as follows: "On stock, materials and supplies made up and in process, their own or held in trust, on consignment, or sold but not removed, while contained in brick buildings * * * situate near Pennsylvania Railroad station, Newark, Delaware." The warehouse in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which the matches were stored is one of the buildings described in the policy. On May 11, 1910, the building in question, together with others and their contents, were destroyed by fire, and among the goods destroyed were the matches owned by Herman Jedel. The A. Jedel Company filed a proof of loss with the defendant and the other fire insurance companies without mentioning the matches which had been stored with it. Thereafter representatives of the defendant and the other fire insurance companies went to Newark, Del., for the purpose of ascertaining the loss. At the interviews which took place there "a knowledge of the existence of said matches upon said premises at the time of the fire, their approximate value, and the circumstances and conditions under which they were there contained and their destruction by the fire was imparted to the said representatives of the said insurance companies by the representatives of the A. Jedel Company." The latter, upon being questioned, stated that they did not claim that the matches were covered by the insurance policies, and that they had no interest therein, but that they were the property of other parties and were covered by insurance taken out specifically thereon at the instance of the persons interested in said matches. Thereafter the amount payable by the insurance companies was settled by agreement between them and the A. Jedel Company at the sum of \$21,000, \$6,000 to be payable on the machinery and the fixtures and \$15,000 on the stock. Each company paid its proportionate share, leaving \$4,000 of the total liability unpaid. The policies were thereupon canceled by consent. The proportionate share of the defendant of said \$4,000 amounts to \$800. The value of the matches at the time of the fire was \$1,105, and the plaintiff seeks to recover herein from the defendant the proportionate share of its liability, to wit, \$221.

[1] Applying the law to the facts herein, it seems clear that the A. Jedel Company was a bailee for hire of the matches owned by Herman Jedel, and that, under the so-called "trust clause" above quoted, Herman Jedel has an insurable interest therein and the right to recover his loss from the defendant, so long as, as is the case herein, the liability of the insurance company has not been exhausted. The general rule of interpretation of such a clause is well stated in the English text-book of Wilford & OtterBarry on Fire Insurance, p. 164: "The expression 'goods held in trust' is not limited to goods held in trust in the strict technical sense of the phrase, but extends to goods with which the assured is intrusted. It therefore includes all goods which are in the possession of the assured as bailee, whatever the nature of the contract by which they come into his possession." The rule is the same in this country. In 19 Cyc. 669, it is said: "It is usual for persons engaged in the business of keeping property for others, on account of which they may be liable, to insure such property under policies covering goods held by them 'in trust'; but this term does not imply a technical trust, but only possession of property of others, for which the insured may be called on to account." In *Stillwell v. Staples*, 19 N. Y. 401, the court says: "It is quite apparent that the words 'in trust,' as thus used, are not to be taken in any strict technical sense, which would limit their operation to cases where the title to goods had been vested in a trustee, subject to some specific trust to be executed by him—for several reasons. In the first place, they would be entirely unnecessary for any such purpose, and would add nothing whatever to the force of the policy. Again, the structure of the clause itself shows the meaning to be different. The words are, 'the property of the insured, or held in trust,' etc. The antithesis shows that the words 'in trust' are meant to cover goods not the property of the insured. But goods held in trust, in the technical sense suggested, would be as much his property as between him and the insurer as those belonging to him in his own right. The words 'in trust' may, with entire propriety, be applied to any case of bailment, where goods belonging to one person are intrusted to the custody or care of another, and for which the bailee is responsible to the owner." To the same effect is *Utica Canning Co. v. Home Insurance Co.*, 132 App. Div. 420, 116 N. Y. Supp. 934.

[2] It likewise admits of no doubt that Herman Jedel or his assignee is the proper party to bring this suit. He is the real party in interest, and it

is well settled that a person for whose benefit a contract is made has a right to sue thereon, although he is not named therein. The learned counsel for the defendant does not dispute this proposition.

[3] I do not think that the settlement made with A. Jedel Company can affect the plaintiff's rights. It may be that the A. Jedel Company could have canceled the policy or waived the trust clause before the fire had taken place, but the liability of the defendant accrued and became fixed at the time of the fire and neither the disclaimer of the A. Jedel Company of any interest in the matches nor the subsequent adjustment of its loss and the cancellation of the policies can relieve the defendant, unless Herman Jedel has waived his rights, or is estopped from asserting them. Although Herman Jedel was a director and an officer of the A. Jedel Company, it is conceded that the business which was conducted by Herman Jedel under the name of the Anglo-American Fireworks Company was not connected with that of the A. Jedel Company, so that in this transaction these two parties are in no wise identified. The defendant when it made its settlement with the A. Jedel Company had actual knowledge of Herman Jedel's claim. Under these circumstances, the cancellation of the policies issued to A. Jedel Company cannot avail this defendant to defeat this action. *Utica Canning Co. v. Home Insurance Co.*, supra, 132 App. Div. 423, 116 N. Y. Supp. 934.

[4] The learned counsel for the defendant, however, argues with a great deal of force that, pursuant to the intention of the parties herein, the insurance policy did not cover Herman Jedel's matches, and relies upon the following circumstances: It appears that Herman Jedel some time prior to February 24, 1910, bought the merchandise in question from Alfred Czerweny, the plaintiff, who does business in the city of New York. After the matches had been shipped by Czerweny to Newark, Del., he on March 9, 1910, wrote to the Anglo-American Fireworks Company—that is, to Herman Jedel—a letter, which reads in part: "Referring to my conversation with your Mr. A. Jedel regarding the insurance on the matches, would request you to kindly let me know whether you have covered same, respectively whether you as the owner will take the responsibility in case of fire, or if you expect me to cover the insurance." On March 10, 1910, the Anglo-American Fireworks Company wrote a reply to this letter, containing the following statement: "According to our agreement, you are to effect and attend to the insurance on the matches." Thereafter Czerweny, on or about March 19, 1910, obtained a policy in the North River Fire Insurance Company, insuring Alfred Czerweny or A. Jedel Company as interest may appear for \$1,300. on matches in one-story brick warehouse of A. Jedel Company, situated at Newark, Delaware. The policy was to run for six months from its date, and was in full force on May 11, 1910, the date of the fire. At the time of the issuance of the policy Czerweny had parted with his title to the matches, and, though the purchase price had not been fully paid, he had no insurable interest in the property, and the policy issued to him was absolutely void. The defendant, however, claims that the correspondence between Herman Jedel and Czerweny and the subsequent issuance of the policy is clear proof that A. Jedel Company did not intend to insure the matches when it made its contract of insurance with this defendant and the other insurance companies. I cannot agree with this contention. It may be readily admitted that the terms of the insurance policy in question are not conclusive as between the defendant and the plaintiff's assignor, and that evidence dehors the instrument may be received to vary or contradict the contract made between A. Jedel Company and the defendant. *Lee v. Adsit*, 37 N. Y. 78; *Lowell Mfg. Co. v. Safeguard Fire Ins. Co.*, 88 N. Y. 591; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, at page 541, 23 L. Ed. 868. However, it must be borne in mind that A. Jedel Company was not a party to the correspondence between Herman Jedel and Czerweny and as Herman Jedel was neither connected with, nor acting for A. Jedel Company in relation to the matches in question, an arrangement between third parties cannot be injected into the written terms of the policy forming the contract between the A. Jedel Company and the defendant, nor can any intention which Herman Jedel may have had in regard to the insurance be imputed to, or be taken advantage of by the A. Jedel Company.

If there was on March 10, 1910, no intention on the part of A. Jedel Company to insure the merchandise held by it as bailee, why was on April 2, 1910, the trust clause inserted in the policies? It may be plausibly argued that even if an intention not to insure existed on March 10, 1910, it was abandoned on April 2, 1910, and if we are permitted to seek for a reason therefor, it seems quite likely that in the meantime the A. Jedel Company realized that Czerweny had no insurable interest in the matches, and that, on account of its liability to Herman Jedel, it was necessary to insure the goods by its own policies. It does not appear that A. Jedel Company had any goods other than those in question in trust upon its premises.

[5] If it is proper to inquire into the intention of the parties, the very fact of the insertion of the trust clause is of the greatest weight, and certainly of more probative force in showing what the intention of the parties was than the correspondence relied upon by the defendant which took place between other parties and before the issuance of the policy in suit. A similar situation was presented in the *Utica Canning Co. Case*, supra, where the court said (132 App. Div. 425, 116 N. Y. Supp. 938): "In the case at bar we think it clear that, under the terms of the policy, it was intended by the defendant that everything which De Groff & Son should have in their warehouse in the course of their business was to be insured, and this would seem to be the only purpose of the slip or clause which was added to the policy. Such slip was added to obviate the necessity of covering all sorts of different bailments with separate policies. We think that the fair interpretation and meaning of the policies was that they were intended to cover whatever property De Groff & Son had in their warehouse in the course of their business. Plaintiff's goods were there in the course of such business, the goods were lost, and the plaintiff is now entitled to the protection of the policies. De Groff & Son were bailees of plaintiff's goods for hire, and, under the authorities to which we have called attention, we think it clear that the defendant was liable to the owners of such goods for the loss which occurred to them by reason of the fire against which they were insured by the policies issued to De Groff & Son."

[6] That the intention of the parties, even though extraneous evidence be permissible, must primarily be sought in the instrument itself, is well settled. In *Burke v. Continental Insurance Co.*, 184 N. Y. 77, 76 N. E. 1086, the court held that the insurance under a similar clause as in this case did not inure to the benefit of the bailor, for the reason that the agreement with the bailee provided that the bailee should not be liable to the bailor for loss by fire. Upon a retrial of the case, it appeared that a short time before the fire this agreement was modified so that the bailee should be liable for loss by fire, but the terms of the policy remained unchanged. When the case came again before the Appellate Division (128 App. Div. 391, 112 N. Y. Supp. 865), the court held that the one clause which interfered with the risk had been changed, and that the bailee had an insurable interest in the property. See, also, *Kline Bros. & Co. v. German Union Fire Insurance Co.*, 147 App. Div. 790, 132 N. Y. Supp. 181, and *Symmers v. Carroll*, 149 App. Div. 641, 134 N. Y. Supp. 170, decided by the Appellate Division March 15, 1912. In the *Symmers Case* the court said: "It is manifest that Starin when he caused the words 'for account of whom it may concern' to be inserted in the policy had in mind and intended that in certain contingencies some one other than himself should be entitled to share in the proceeds of the policies."

[7] The plaintiff's claim is also resisted on the ground that his assignor did not make a proof of loss within the 60 days after the fire, as provided in the policy of insurance. Although I hardly think that this point is seriously urged, it may be well to dispose of it. In the first place, it is doubtful whether there was any obligation on the part of Herman Jedel to file any proof of loss. In *Heilbrunn v. German Alliance Insurance Co.*, 140 App. Div. 557, 125 N. Y. Supp. 374, it was held that neither the mortgagee of real property insured against loss by fire nor the mortgagor need give notice of the loss to the insurer or furnish proof of loss under a policy containing a clause that the loss, if any, be payable to the mortgagee as his interest may appear. The reasoning of that case applies to this, although the facts are not alike. In this case the notice of loss to the defendant is admitted, and the value of the

matches at the time of the fire is likewise admitted. In view thereof, what was the purpose of furnishing proof of loss within 60 days when all the facts were within the knowledge of the defendant? The defense herein is not based upon insufficient knowledge of the plaintiff's claim and the amount thereof or of the conditions under which the claim arose, but upon the denial of any liability for the loss suffered by the plaintiff's assignor. In such a case no proof of loss is required. The rule is stated in 1 Clement on Fire Insurance, 228, with the citation of numerous authorities, as follows: "An unqualified denial of liability or assertion that policy is void waives statement or proof of loss; and this effect is not prevented by a statute imposing an obligation to furnish proofs."

In the view that I take of this case there must be judgment for the plaintiff for the amount claimed.

Argued December term, 1912, before SEABURY, GUY, and GERARD, JJ.

Hartwell Cabell, of New York City, for appellant.

Hugo Wintner, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs, upon the opinion of Mr. Justice Spiegelberg in the court below.

(79 Misc. Rep. 140.)

PEOPLE ex rel. HOELDERLIN v. KANE, Warden.

(Supreme Court, Special Term, Kings County. January 8, 1913.)

1. INFANTS (§ 12*)—STATUTORY REGULATION OF EMPLOYMENT.

Labor Law (Consol. Laws 1909, c. 31) § 77, as amended by Laws 1912, c. 539, is constitutional in so far as it limits the working hours of minors; the state having power to protect its wards.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 13; Dec. Dig. § 12.*]

2. COURTS (§ 95*)—PRECEDENTS—DECISIONS OF COURTS OF OTHER STATES.

Since the adoption of the fourteenth amendment to the United States Constitution, the federal Supreme Court has become the final arbiter of whether a state in the exercise of its police power has violated the constitutional guaranty, thus making the various state courts courts of concurrent jurisdiction, and so the decisions of the courts of one state on such question are not to be regarded in another as those of a foreign tribunal, but as those of a court of equal authority.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 322, 323; Dec. Dig. § 95.*]

3. CONSTITUTIONAL LAW (§ 89*)—MASTER AND SERVANT (§ 10*)—POLICE POWERS—REGULATION OF FEMALE LABOR—HOURS OF WORK.

While the courts are bound to protect constitutional liberty against encroachments, even by the Legislature, the liberty to be protected is civil or political liberty, and, while persons are entitled to liberty of contract, the state, if for the protection of its inhabitants, may under its police power limit the hours which women may work in certain industries, as was done by Labor Law (Consol. Laws 1909, c. 31) § 77.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 157; Dec. Dig. § 89;* Master and Servant, Cent. Dig. § 13; Dec. Dig. § 10.*]

4. CONSTITUTIONAL LAW (§ 238*)—EQUAL PROTECTION OF LAW—CLASSIFICATION—"LAW."

While a law is a rule of conduct which must apply alike to all under like conditions, and the state cannot deny any person the equal protection

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the laws, the Legislature in framing them has a reasonable right of classification, and, unless the classification is unreasonable as a matter of common knowledge, the courts cannot interfere, and consequently cannot hear evidence on the reasonableness of the classification, hence Labor Law (Consol. Laws 1909, c. 31) § 77, which limits under a penalty the hours women may work in all factories other than canning establishments, is not invalid as class legislation, though excepting those establishments.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688–699, 706–708; Dec. Dig. § 238.*

For other definitions, see Words and Phrases, vol. 5, pp. 4014–4023; vol. 8, p. 7701.]

Habeas corpus by the People, on the relation of William Hoelderlin, against Thomas Kane, as warden of the city prison of the borough of Brooklyn, city of New York. Writ dismissed, and relator remanded to custody.

Alfred J. Talley, of New York City (Denis B. O'Brien, of New York City, of counsel), for relator.

James C. Cropsey, Dist. Atty., of Brooklyn (Hersey Egginton, Asst. Dist. Atty., of Brooklyn, of counsel), for respondent.

BLACKMAR, J. This is a proceeding on habeas corpus said to be brought to test the constitutionality of the law limiting the hours of labor of minors and women in factories, other than canning establishments, to 9 hours a day and 54 hours a week. The respondent returns that he holds the relator under three commitments for the violation of section 77 of the Labor Law: One, for employing a male minor under the age of 18 years more than 54 hours a week; another, for employing a female minor under the age of 21 years more than 54 hours a week; and another, for employing a female over the age of 21 years more than 54 hours a week. The return was traversed, alleging the unconstitutionality of section 77 of the Labor Law, as amended in 1912, and the district attorney appearing for the defendant demurred to the traverse.

[1] The case might be summarily disposed of on the ground that, whatever may be said regarding the validity of the law limiting the hours of labor of adult women, it was competent beyond question for the Legislature to prescribe such limitations in the case of minors, who are wards of the state, and that such provisions of the law are plainly severable. I shall not, however, place my decision on that ground, but shall consider the very question argued orally and in briefs, viz., whether it is constitutional for the Legislature to make it a crime to employ an adult female to work in a candy factory more than 54 hours in a week. It is claimed, first, that the constitutional guaranty of "liberty" is violated, in that the law in question abridges the right of both employer and employé to contract for labor; and, second, that the exemption of contracts for labor in canning factories during the summer season violates the principle that laws must be uniform in their application, and the provision in the fourteenth amendment to the United States Constitution forbidding any state to deny to any

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

person within its jurisdiction the equal protection of the law. I propose to rest this case on the authority of reported decisions of the courts, with a few prefatory remarks as to their relative value.

[2] Prior to the adoption of the fourteenth amendment to the United States Constitution, each state decided for itself the question of the limitation of the police power. It was a question of the domestic policy of the several states and the decisions of their tribunals upon it were final. Since the adoption of the amendment, the liberty of the individual is protected by the United States Constitution against action by the states. All judicial questions of the power of the several states to restrain liberty by the exercise of the police power are thus finally brought to the arbitrament of the United States Supreme Court. On this class of questions, that is the court of last resort, and its decisions are the supreme authority. Since the enactment of that amendment the courts of all the states, with reference to the rights therein secured to individuals, have become courts of co-ordinate jurisdiction. Whether the decision comes from Maine or Oregon, from Minnesota or Louisiana, if it sustains a statute of the state limiting liberty in the exercise of the police power, it is subject to review by the Supreme Court. The courts of all the states are working together with equal powers in this field of law. The decisions of the United States Supreme Court upon the police power are therefore controlling, and those of the courts of sister states may no longer be regarded as decisions of foreign tribunals, but they are entitled to that degree of deference which is yielded to courts of equal authority administering, not similar laws, but the same law.

[3, 4] Bearing this principle in mind, I proceed to an examination of the authorities. *Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957, decided that an act of the Legislature of Oregon prohibiting the employment of females in any mechanical establishment or factory or laundry more than ten hours during any day is not unconstitutional so far as respects laundries. The case differs from the one at bar, for in this case the employment was not in a laundry, but in a candy factory, and the legal limit is not 10 hours a day, but 9 hours a day and 54 hours a week. That case, however, decides the fundamental proposition that, for the purpose of the application of a law under the police power, the Legislature may establish a class composed of women alone, and may limit the hours of labor of the individuals composing that class.

In *State v. Somerville*, 67 Wash. 638, 122 Pac. 324, decided in March 1912, a law limiting the hours of labor of women to eight hours a day was held constitutional as applied to paper box manufacturies. In *Commonwealth v. Riley*, 210 Mass. 387, 97 N. E. 367, Ann. Cas. 1912D, 388, decided January 1, 1912, an act limiting the hours during which women may be employed in manufacturing and mechanical establishments to 56 hours in one week and 10 hours in one day was upheld. In *Ritchie & Co. v. Wayman*, 244 Ill. 509, 91 N. E. 695, 27 L. R. A. (N. S.) 994, decided April 21, 1910, the courts of Illinois upheld legislation forbidding the employment of females in any mechanical establishment, factory, or laundry more than 10 hours a day.

In *Withey v. Bloem*, 163 Mich. 419, 128 N. W. 913, 35 L. R. A. (N. S.) 628, a law prohibiting the employment of women in factories more than 10 hours a day and 54 hours a week was held not violative of the United States Constitution. For other cases in which like legislation has been held to be constitutional, see *Wenham v. State*, 65 Neb. 394, 91 N. W. 421, 58 L. R. A. 825; *Commonwealth v. Beatty*, 15 Pa. Super. Ct. 5; *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383.

I find practically nothing against all this weight of authority. *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315, has been distinguished to the point of being overruled by the later case of *Ritchie & Co. v. Wayman*, 244 Ill. 509, 91 N. E. 695, 27 L. R. A. (N. S.) 994. *Matter of Maguire*, 57 Cal. 604, 40 Am. Rep. 125, was a case of the employment of a woman in a barroom, and a statute prohibiting it was declared unconstitutional as violating section 18, art. 20, of the California Constitution, which provided that:

"No person shall on account of sex be disqualified from entering upon or pursuing any lawful business, vocation, or profession."

This case obviously is no authority for the relator. *Burcher v. People*, 41 Colo. 495, 93 Pac. 14, 124 Am. St. Rep. 143, was also decided upon the peculiar wording of the Constitution of Colorado.

The relator appeals to *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133. This is the famous bakeshop case. It holds that the state of New York cannot limit the hours of employes in bakeries to 10 hours a day without infringing the liberty of the individual to contract for his labor guaranteed by the fourteenth amendment. The case is exceedingly interesting. It arose in the County Court of Oneida county in this state, and progressed through the Appellate Division of the Supreme Court, the Court of Appeals, and the United States Supreme Court. Twenty-two judges participated in the several decisions. The only unanimous decision was by the County Court, where there was but one judge. In the Appellate Division the justices divided three to two; in the Court of Appeals, four to three; and in the United States Supreme Court, five to four. There were nine separate opinions written. Of the 22 judges, 12 were of the opinion that the law was constitutional, and 10 that it was not. The opinion of the minority prevailed because 5 of the 10 judges who thought the law unconstitutional were members of the court of last resort. What does this remarkable divergence of opinion suggest? I do not find in the nine opinions any reason for thinking that there were any differences as to the rules of law governing the case. The power of the state to enact laws for the welfare of the people, notwithstanding the constitutional guaranty of the liberty of the individual, was not questioned. The difficulty was in determining whether the law in question was in furtherance of public welfare. The courts were approaching a question of political economy. So Judge Edward T. Bartlett of the Court of Appeals speaks of a "coming day when the Legislature, in the full panoply of paternalism," etc. Justice Peckham of the United States Supreme Court says, "stat-

utes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual;" and Justice Holmes says, "This case is decided upon an economic theory which a large part of the country does not entertain," and again:

"But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*."

The fact that economic theories entertained by the judges influence their decisions as to the limits of the police power should not be excluded from the mind while studying the subject. Neither can such decisions be regarded as landmarks permanently defining such limits. Laws, which may be meddlesome interferences with the liberty of the individual in a primitive state, may in a highly organized society become essential to public welfare or even to the continuance of civil liberty itself. The pace at which courts move in sympathy with fast developing economic ideas may be illustrated by *Lochner v. New York*, the hesitating utterance of divided courts in 1905, followed by *Muller v. Oregon*, the confident pronouncement of a united bench in 1908. Whatever may be said of *Lochner v. New York*, it is so distinguished by the later case of *Muller v. Oregon* that it is no authority for the relator in the case at bar.

Neither does *People v. Williams*, 189 N. Y. 131, 81 N. E. 778, 12 L. R. A. (N. S.) 1130, 121 Am. St. Rep. 854, 12 Ann. Cas. 798, sustain the relator's claim. That case decided only that it was not competent for the Legislature to prohibit a woman from working in a factory before 6 in the morning and after 9 o'clock at night. The act had no relation to the number of hours of labor. To work a half hour or less in a factory before or after the forbidden hours violated the law, even if that were the extent of the whole day's work. The case is decided largely on the authority of *Lochner v. New York*; and *Muller v. Oregon* forbids our drawing therefrom any general rule that labor legislation for women alone is unconstitutional. The remark therein made that women are not wards of the state is unquestionably correct. This wardship depends on presumed (in the case of infants) or proved (in the case of lunatics) mental incompetency. No one claims that the differentiation of women from men, as subjects of legislation, depends on mental conditions. The justification for legislation special to women rests, as is said by Justice Brewer in *Muller v. Oregon*, on the fact of common knowledge that woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for existence. The element of invalidity in the statute under consideration, which was developed in *People v. Williams*, is plainly severable.

The authority upon the question seems complete. The power of the Legislature to create a class, consisting of women only, and limit their hours of labor, is established in *Muller v. Oregon*. That the limitation may be to 54 hours a week is decided by *State v. Somerville* and *Withey v. Bloem*; and in these two cases the regulation was held valid as applied to the manufacture of paper boxes, and seals for

locking freight cars, occupations apparently as light and innocuous as candy making.

But the relator claims that the exemption of the work in canning factories from the 15th of June to the 15th of October renders the law unconstitutional. A law is a rule of conduct. It must apply alike to all under like conditions. Nor can any state deny to any person within its jurisdiction the equal protection of the law. A law therefore cannot make an act criminal as to one person which is innocent in another under like circumstances and conditions. But, as circumstances and conditions differ, classification of those subject to the law may, and often must, be made for the purposes of securing that very uniformity which is essential to law. The precise question in this case is whether the Legislature may, for the purpose of regulating the hours of labor therein, establish a class consisting of factories, as defined by the law of New York, except canning factories. This depends on whether there is a difference in conditions which warrants the classification. Resorting to authority, we find that this very question has been decided in *State v. Somerville*, 67 Wash. 638, 122 Pac. 324, and in *Withey v. Bloem*, 163 Mich. 419, 128 N. W. 913, 35 L. R. A. (N. S.) 628, and in *Mt. Vernon, etc., Co. v. Frankfort, etc., Co.*, 111 Md. 561, 75 Atl. 105, 134 Am. St. Rep. 636. These are all cases in which canning factories have been exempted from the operation of laws fixing the hours of labor for women and children in manufacturing establishments.

The relator has presented to me a record of evidence taken this year before a committee of the Senate of the state of New York. It is claimed that this record shows that conditions in canning establishments are more injurious to the health of women and children than in many other factories; for instance, than in candy factories. But this is a subject upon which the court cannot take evidence. Classification for the purpose of confining the operation of laws is a legislative function. Every statute presupposes a finding by the Legislature of the facts necessary to bring the act within its powers. In ascertaining these facts the Legislature is not limited to the narrow field of legal evidence. It may draw its information from any source open to mankind. If the courts may review this finding of the Legislature with the aid of such limited means of knowledge as legal evidence affords, an act might be held constitutional in one case and otherwise in another, dependent upon the industry with which the evidence was collected and the skill with which it was presented. In *State v. Somerville*, *supra*, evidence was offered that the work was light and harmless, and the court held it irrelevant, saying:

"Courts, in passing upon the reasonableness or unreasonableness of a statute, and deciding whether the Legislature has exceeded its powers to such an extent as to render the act invalid, must look at the terms of the act itself and bring to their assistance such scientific, economic, physical, and other pertinent facts as are common knowledge, and of which they can take judicial notice."

And again:

"In all cases pertaining to the police power the Legislature is supreme, unless the general application of the law does violence to the common knowledge of men, in which event a court might properly intervene."

What matter of common knowledge instructs me that conditions in canning factories require the limitation of the hours of women therein in the same measure as in other factories? They may or may not. I do not know. Neither can I take evidence on the subject. I may read the act and bring to my assistance matters of common knowledge, such as a court may take cognizance of without evidence, and, unless it thereby appears that there is no reasonable basis for the exception, I must trust to the wisdom of the Legislature and uphold the act. The information received by the court in *Muller v. Oregon*, 208 U. S. 419, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957, such as the statutes of other states and foreign nations, reports of committees, bureaus and commissions, proceedings of medical societies, and matters of that kind, are legitimate means of ascertaining what are matters of common knowledge. Such things I may receive, but not evidence of conditions in certain canning factories such as is offered in this case. If the inquiry now in progress shows that the exception of canning factories is not justified, we may presume that the law will be corrected by the Legislature. But, irrespective of conditions in these factories, it is for the Legislature to determine whether the interest of the public in preserving perishable fruits is more important than the health of female and minor employés. However loathe the courts might be to acquiesce in the wisdom or humanity of such a decision, yet it is a matter of legislative, and not judicial cognizance.

I have not thought it necessary to decide the interesting question presented by the district attorney whether an exception introduced into an existing law could have the effect of invalidating the law.

The relator appeals to the court in the name of liberty. He claims that liberty is protected by the Constitution, which was enacted by the people themselves, and that none but the people, not even their agent the Legislature, has dispensing power over it. He claims that the Constitution itself, in article 13, § 1, requires that every judge before entering upon the duties of his office shall take an oath to support the Constitution of the United States and the Constitution of the state of New York, and that this means to support them even against the acts of the Legislature. In all this he is right. Such is the law, and such is the duty of all courts. What is the constitutional liberty which every judge is to protect? It is civil or political liberty. Man in a state of nature, as the eighteenth century philosophers were wont to say, has an inherent right, as a free moral agent, to act, think, and speak as he pleases. When he becomes a member of society, he necessarily surrenders a portion of that liberty in the interest of the rights of others and the welfare of society. The modicum of liberty, remaining after such surrender, is civil or political liberty. An act of the Legislature in the interest of the health, morals, or safety of the community operates within the field of the surrendered rights, and does not abridge civil liberty. If then the statute, forbidding the relator to employ in his candy factory minors under a certain age, and women more than 54 hours a week, is a measure in the interest of the welfare of society, it does not impair his civil liberty, although it does limit his right to contract for labor. I find this decided already by

authority, and, fully and sympathetically concurring in the reason by which the result was reached, I gladly follow the precedents.

The development of the industrial life of the nation, the pressure of women and children entering the industrial field in competition with men physically better qualified for the struggle, has compelled them to submit to conditions and terms of service which it cannot be presumed they would freely choose. Their liberty to contract to sell their labor may be but another name for involuntary service created by existing industrial conditions. A law, which restrains the liberty to contract, may tend to emancipate them by enabling them to act as they choose, and not as competitive conditions compel. All these considerations are for the Legislature, and for the Legislature alone. It is only where the statute controls conduct in matters plainly and obviously indifferent to the welfare of the public, or any portion thereof, that the courts can pronounce the act violative of civil liberty. Certainly this is not such a case.

The writ is dismissed, and the relator remanded to custody.

LOUISVILLE LUMBER CO. v. SMITH et al.

(Supreme Court, Appellate Division, Third Department. December 30, 1912.)

COSTS (§ 169*)—EXPENSE OF BOND.

Where defendant's application under Code Civ. Proc. § 3268, which provides that a foreign corporation may be required to give security for costs, a foreign corporation gave a surety company's undertaking, on recovery of judgment, the amount paid therefor was not taxable as costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 652, 653, 657, 658; Dec. Dig. § 169.*]

Appeal from Special Term, Broome County.

Action by the Louisville Lumber Company against Claremont E. Smith and another. From an order of the Special Term denying defendants' motion for a retaxation of plaintiff's costs as to the disbursements paid to a surety company as retaxed by the county clerk, defendants appeal. Order reversed, and motion granted.

Argued before SMITH, P. J., and KELLOGG, HOUGHTON, BETTS, and LYON, JJ.

Hinman, Howard & Kattell, of Binghamton, for appellants.

T. B. & L. M. Merchant, of Binghamton, for respondent.

BETTS, J. After the commencement of the action the plaintiff was required, upon application of the defendants, to file an undertaking as security for costs on the ground that it was a foreign corporation. For this undertaking the plaintiff paid \$10 to a surety company. On the trial the plaintiff recovered a verdict, and judgment was duly entered thereon. The plaintiff taxed its costs, including therein as a disbursement the \$10 paid to said surety company. The item in the costs as taxed without notice was: "Pd. Surety Company for Undertaking 10.00."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

After such taxation the plaintiff gave notice of retaxation before the clerk, when the defendants' attorneys appeared before the clerk and objected to the taxation of this item on the ground that it was not a proper item to charge said defendants with, and that it should not be taxed, as it was improperly contained among said disbursements as taxed. The plaintiff's attorney stated in support of such bill that the amount as charged was for the amount paid for the undertaking given as per an order of that court as security for costs, as required under section 3268 of the Code of Civil Procedure, where a foreign corporation brings an action. The objection to this item of \$10 was overruled by the clerk, and it was retaxed as originally taxed. Thereupon the defendants' attorneys noticed a motion as to such item for an order directing a retaxation of such item on the ground that it was improperly retaxed against the defendants. This motion was denied by the Special Term, and from that order this appeal is taken.

The decision here is governed by our decision in *Shipman*, as receiver, against *Treadwell* and another, decided in March of this year, wherein a precisely similar item was disallowed as a taxable disbursement, for the reason that there was no statutory authority for the clerk to tax the same. No opinion was filed in that case. Costs were not known to the common law, and, in order to recover, the parties seeking to recover the same must point to some statute authorizing the clerk to tax and allow such items. *Equitable Life Assurance Society v. Hughes et al.*, 125 N. Y. 106, 26 N. E. 1, 11 L. R. A. 280; *McKuskie v. Hendrickson*, 128 N. Y. 555, 28 N. E. 650; *Stevens v. Central National Bank*, 168 N. Y. 560-566, 61 N. E. 904; *Miller v. Bush*, 29 App. Div. 117, 51 N. Y. Supp. 486. Practically the same question has been decided in *Bick v. Reese*, 52 Hun, 125, 5 N. Y. Supp. 121, where the plaintiff in an action in replevin had paid a premium to the American Surety Company for its bond, and the court held that the same could not be taxed. It is a prerequisite for maintaining an action of replevin that a bond should be filed. A surety company bond, however, is not required. It is also necessary when required by the defendant to secure the defendant from possible loss and as a protection to our citizens against nonresidents who use our courts for the purpose of asserting or defending claims that an undertaking should be filed or cash be deposited, so that the case of *Bick v. Reese*, *supra*, and this case are the same in principle. It was also held in *Lee Injector Mfg. Co. v. Penberthy Injector Co.*, 109 Fed. 964, 48 C. C. A. 760, that the sum of \$10.50 paid a surety company for furnishing appeal bond must be disallowed on a taxation of costs as there is no authority for taxing such an item.

The court is pointed to no authority by the plaintiff in this case for the taxation of this item, and I think the same should be disallowed.

It follows that the order appealed from must be reversed, with \$10 costs to appellants.

Order reversed, with \$10 costs and disbursements and motion granted as per opinion, without costs. All concur.

CASHMORE v. PEERLESS MOTOR CAR CO. OF NEW YORK.

(Supreme Court, Appellate Division, Second Department. January 17, 1913.)

MASTER AND SERVANT (§ 190*)—INJURIES TO SERVANT—LABOR LAW—NEGLIGENCE OF ACTING SUPERINTENDENT.

Labor Law (Consol. Laws 1909, c. 31) § 200, subd. 2, as amended by Laws 1910, c. 352, imposes on the master liability for injuries to a servant by reason of the negligence of any person in the service of the master intrusted with any superintendence. *Held*, that such section eliminated the fellow servant rule when the injury to the employé was caused by the negligence of a coemployé with the authority of superintendence or control, with authority to direct any other employés in performance of such employé's duty, notwithstanding the work in hand did not constitute an act of superintendence, and where plaintiff, an employé in a machine shop, was directed by his foreman to hold a steel shaft while the foreman negligently struck it with a hammer, causing particles of steel to fly into plaintiff's eyes, from which he became totally blind, the master was liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.*]

Appeal from Trial Term, Kings County.

Action by Arthur Cashmore, an infant, by Sarah H. Cashmore, his guardian ad litem, against the Peerless Motor Car Company of New York. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

John C. Robinson, of New York City, for appellant.

John J. Kuhn, of Brooklyn (Owen N. Brown, of New York City, on the brief), for respondent.

RICH, J. This appeal is by the defendant from a judgment in an action brought to recover for negligence. At the time of the accident, plaintiff was employed in defendant's factory. It is conceded that, if the recovery plaintiff has obtained is to be sustained, it must be under subdivision 2 of section 200 of the Labor Law (Consol. Laws 1909, c. 31). The jury has found, and there was sufficient evidence to sustain the finding, that while engaged in the performance of his duties the plaintiff was seriously injured in consequence of the negligence of one Malone, who was a foreman in defendant's machine shop, the negligent act consisting in striking a piece of hard steel shafting, which was fastened in a vice and was held by the plaintiff at Malone's direction, with a hard steel hammer, causing pieces of steel to fly from the shafting or hammer, some of which entered plaintiff's eyes and made him totally blind.

It is contended that the negligence of Malone was that of a fellow servant in a detail of the work, for which the defendant is not liable, that there was no evidence warranting the submission of the question as to defendant's liability to the jury, and that the trial court erred in its refusal to dismiss the complaint. Under the provisions of the statute prior to the amendment of 1910 (chapter 352), this contention would have been sound, as the negligence of Malone was while he

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was engaged in the performance of a detail of the work, and not an act of superintendence, in addition to which the principal duty of Malone was not that of superintendence. *Gallagher v. Newman*, 190 N. Y. 444, 83 N. E. 480, 16 L. R. A. (N. S.) 146; *Guilmartin v. Solvay Process Co.*, 189 N. Y. 490, 82 N. E. 725; *Falk v. Havemeyer*, 123 App. Div. 657, 108 N. Y. Supp. 140; *McLaughlin v. Interurban St. R. Co.*, 101 App. Div. 134, 91 N. Y. Supp. 883; *Hope v. Scranton & Lehigh Coal Co.*, 120 App. Div. 595, 105 N. Y. Supp. 372; *Kujava v. Irving*, 122 App. Div. 375, 106 N. Y. Supp. 837; *Droge v. Robins Co.*, 123 App. Div. 537, 108 N. Y. Supp. 457; *McConnell, Adm., v. Morse I. W. & D. D. Co.*, 187 N. Y. 341, 80 N. E. 190, 10 L. R. A. (N. S.) 419, 10 Ann. Cas. 205. When these cases were decided, that statute (subdivision 2, c. 600, Laws of 1902 [subdivision 2, § 200, Labor Law]) provided that where personal injury was caused to an employé who was himself in the exercise of due care at the time "by reason of the negligence of any person in the service of the employer intrusted with and exercising superintendence whose sole or principal duty is that of superintendence, or in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer," the employer might be held liable for such injury.

For many years the tendency of legislation has been to protect persons engaged in skilled and manual labor; the object being to make the employer more careful in the performance of his duties, as well as in the selection of persons placed in charge and control. In 1906 the Legislature, impelled thereto, as the Court of Appeals said in *Hart v. N. Y. C. & H. R. R. Co.*, 205 N. Y. 317, 98 N. E. 493, by "the sentiment that the fellow servant rule should be limited to those cases, where the employé whose act occasioned the injury was not in authority or control," amended the Railroad Law (Laws 1890, c. 565), eliminating therefrom the fellow servant rule when the injury to the employé was caused by the negligence of a coemployé "with the authority of superintendence, control or command of other persons in the employment * * * or with the authority to direct or control any other employé in the performance of the duty of such employé."

In 1910 subdivision 2 of section 200 of the Labor Law was amended, among other things, so as to read:

"2. By reason of the negligence of any person in the service of the employer intrusted with any superintendence or by reason of the negligence of any person intrusted with authority to direct, control or command any employé in the performance of the duty of such employé."

It will be noticed that the last sentence of this amendment is in substantially the same language as that of the corresponding sentence in the amendment to the Railroad Law.

The Legislature is presumed to have been familiar with the existing statutes, as well as the construction given to them by the courts, and it is clearly evident that it was their intent, in response to the same public sentiment which Judge Gray speaks of, to extend to all employés the benefits and protection it had secured to railroad employés, and to enlarge the liability of all employers of labor in the same ratio and to the same extent that had been charged upon railroad corpora-

tions. It seems clear that it was the legislative intent to change the meaning of the language of subdivision 2, and by so doing to enlarge the class of servants for whose negligence the employer might be held liable. This is not only indicated by the title of the amending statute, "An act to amend the labor law, in relation to employer's liability," but by the language used in the amendment. Liability is first predicated upon the negligence of a servant intrusted "with any superintendence"; and second, in addition the disjunctive "or" being used, upon the negligence of a servant "intrusted with authority to direct, control or command any employé in the performance of the duty of such employé." I think that the effect of this amendment is precisely the same as the amendment to the Railroad Law, and that the "fellow servant" rule is entirely abrogated where the negligent act causing the injury is that of a person coming within the definition. The language is clear, and the Legislature has accomplished just what it intended, viz., that an employer should thereafter be liable for the negligent acts, not only of a servant intrusted with superintendence, but also of a servant who, though not possessed of the authority of a superintendent, is intrusted with authority to direct, control, or command another employé in the discharge of his duty, and no matter how limited the authority of the negligent servant may be, if he comes within the statutory definition the master is liable for his negligence. He is the alter ego of the master while in the discharge of his duties. It is the grade of the negligent servant, as well as the nature of the negligent act, that is to be considered now in determining the master's liability.

Under this construction of the statute, there can be no dispute as to defendant's liability for the negligence of Malone, who was defendant's working foreman. He had charge of the men in the department in which he was employed. He decided how the work was to be done and had authority over the helpers, as is testified by the superintendent and assistant foreman. On the day of the accident plaintiff was assigned to assist and work with Frank Danow, one of defendant's mechanics, who directed him to take a ballrace off from a steel shaft, and while endeavoring to do this Fenton, the general superintendent, took the shaft to the machine shop and directed Malone to remove the ballrace, and Danow directed the plaintiff to follow the superintendent. He had the authority to make this direction. It was the plaintiff's duty to obey it and he did so. The plaintiff testified that Malone was his foreman when he was in the machine shop, and this is shown to be so by the evidence of the superintendent. Upon being directed by Malone to hold the shaft, plaintiff said to him, "I don't want to hold it." Malone replied, "You got to hold it." He did as directed, with the result that has been stated. Malone knew that the inevitable result of striking one piece of hard steel with another would be to cause flakes or slivers to fly therefrom. The plaintiff did not have this knowledge. No warning was given to him, and he was grievously injured in consequence of Malone's negligence.

The judgment is not excessive, and it must be affirmed, with costs. All concur.

BOROUGH DEVELOPMENT CO. v. HARMON et al.

(Supreme Court, Appellate Division, Second Department, January 17, 1913.)

1. EVIDENCE (§ 441*)—PAROL—TO VARY WRITING.

A contract between a party having a contract with a city to remove and dispose of street sweepings by which such sweepings were to be furnished defendant for the purpose of filling in streets provided that the material to be used was ashes, earth, and street sweepings "as delivered to us by the street cleaning department." Another clause specified the quantity of material to be furnished. *Held* that, in an action for breach of the contract, proof of oral representations that the sweepings would come from a particular part of the city was inadmissible, as it would vary the terms of the written contract, the quoted portion of which specified the quality to be furnished.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2030-2047; Dec. Dig. § 441.*]

2. APPEAL AND ERROR (§ 1057*)—REVIEW—HARMLESS ERROR.

In an action on a contract to furnish street sweepings for filling in streets, evidence of oral representations that the sweepings would come from a particular part of the city was excluded. Such representations were, however, shown by testimony admitted, and there was evidence sufficient to sustain a finding that the material delivered came from a part of the city referred to in the representations. *Held*, that the exclusion of the evidence mentioned, if erroneous, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.*]

3. TRIAL (§ 48*)—EVIDENCE INADMISSIBLE IN PART.

Where most of a letter manifestly offered in evidence had no probative force on any issue involved, its rejection when offered in its entirety was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 120; Dec. Dig. § 48.*]

4. DAMAGES (§ 124*)—BREACH OF CONTRACT—INCIDENTAL EXPENSES.

Where performance of a contract is wrongfully prevented, incidental expenses made in anticipation of performance may be recovered as damages, but not in addition to a recovery for prospective profits.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 326-338; Dec. Dig. § 124.*]

5. DAMAGES (§ 45*)—BREACH OF CONTRACT—PERFORMANCE INVOLVING LOSS.

A party performing a contract at a loss may recover nominal damages for its breach, and also incidental expenses necessarily made in anticipation of performance.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 92-98; Dec. Dig. § 45.*]

6. APPEAL AND ERROR (§ 221*)—REVIEW—QUESTIONS NOT RAISED BELOW.

In an action for preventing performance of a contract by which plaintiff had agreed to furnish street sweepings to fill in land for defendant, the court permitted a recovery for the cost of constructing a corduroy road necessary to the performance of the contract. *Held* that, the question whether the value of the use of this road in the performance of so much of the contract as was completed should have been deducted not having been raised below, no such deduction would be made on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1353-1368; Dec. Dig. § 221.*]

Burr, J., dissenting.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, Kings County.

Action by the Borough Development Company against William E. Harmon and another, copartners. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, WOODWARD, and RICH, JJ.

Dallas Flannagan, of New York City, for appellants.

Frank S. Angell, of New York City (Charles F. White, of New York City, on the brief), for respondent.

HIRSCHBERG, J. The defendants, composing a firm engaged in the business of improving and selling suburban property, owned certain farm land in the borough of Brooklyn, designated by them as "Flatbush Gardens," which they desired to sell in building lots, after opening certain streets through the property. The plaintiff, a domestic corporation, had a contract with the city of New York to remove and dispose of the street sweepings from the borough of Brooklyn. The plaintiff and defendants entered into a contract in the latter part of the year 1908, evidenced by certain letters interchanged and not by formal contract, whereby the plaintiff agreed to fill in such streets on the defendants' property as they should designate with ashes, earth, and street sweepings, as delivered to it by the street cleaning department of the city of New York, and to deliver an approximate minimum average of 300 cubic working yards of material per day, and whereby the defendants agreed to pay the plaintiff 15 cents per cubic yard for the material so delivered. Deliveries were to commence December 9, 1908, but they did not commence until March of the following year, and they then were made in a less amount than specified in the correspondence. These deviations from the contract, however, were waived by the defendants, who accepted the deliveries as made.

About the 12th day of July, 1909, the defendants refused to receive any further material, whereupon this action was instituted by the plaintiff. The complaint contains two causes of action—the first a cause of action to recover the contract price for the material already delivered and unpaid for, and the second to recover damages because of the defendants' alleged breach of contract. In their answer the defendants alleged, in substance, as reasons for the refusal to accept further material, that the quality of the material furnished was not such as had been contemplated by the parties to the contract, but consisted of so much decayed animal and vegetable matter that its dumping upon their property constituted a criminal violation of certain ordinances of the city of New York. By way of counterclaim the defendants alleged that they had been put to considerable expense in completing the contract by filling in the property with suitable material obtained elsewhere.

The issues were submitted to the jury after a trial lasting several days, during which considerable conflicting evidence was adduced on either side, and the submission resulted in a verdict dismissing the counterclaim and awarding the plaintiff the contract price of the material furnished by it up to the time of the breach of the contract, together with damages for such breach. The defendants have appealed

from the judgment entered thereon, and from the order denying their motion for a new trial made upon the minutes. The judgment is not against the weight of evidence, and it must be affirmed unless some error of law necessitates a new trial.

The appellants urge the improper admission of evidence and the adoption of an erroneous measure of damages, as grounds for a reversal.

[1] During the trial the appellants' counsel offered testimony that oral representations were made to the appellants on behalf of the respondent prior to and at the time the contract was executed, to the effect that the street sweepings would come from a particular part of Brooklyn, where such sweepings were unusually clean. This testimony was excluded as tending to vary or contradict a written contract. I am inclined to think that the ruling was correct. The written offer signed by the respondent, and which was accepted by the appellants, used this language:

"The material to be used is ashes, earth and street sweepings, as delivered to us by the street cleaning department."

That clause related exclusively to the quality of the material, and specifically provided that such quality need only be of the grade furnished by the street cleaning department. The clause had no relation to quantity because the quantity to be furnished was specifically stated in another clause of the accepted offer. *Bagley & Sewall Co. v. Saranac River Pulp & Paper Co.*, 135 N. Y. 626, 32 N. E. 132, cited by appellants, is not in point. There a guaranty was given by the vendor that certain machines would take care of all the pulp produced from "four Scott grinders." It appeared on the trial that "Scott grinders" were of different capacities, and the vendee was permitted to prove an oral representation that the particular grinders referred to in the contract were of a certain capacity. There the contract was silent on the question of capacity, and the evidence admitted was merely explanatory of that matter. In the case at bar the contract provided that the quality of the sweepings should be as delivered by the street cleaning department, and to allow oral evidence to show a different quality, or that the parties intended to limit the material to deliveries made from a particular location, would seem to vary or contradict the import of the writing.

[2] Assuming, however, that the ruling below was erroneous, no harm has been sustained by the appellants, because they succeeded in placing the nature of the alleged representations before the jury by other testimony and evidence than that excluded. Moreover, there is evidence in the record sufficient to sustain a finding that the material delivered came from that portion of the borough of Brooklyn referred to in the alleged representations.

[3] The appellants further claim that the learned trial court erred in excluding a lengthy letter written by the general manager of the respondent to the appellants after the breach of the contract. This letter, among other things, contained statements to the effect that the respondent never stated that the material would be free from rubbish; that the contract had been carefully analyzed in detail prior to its execution; that appellants had intended to cover the material with earth;

that any delay in deliveries had been acquiesced in; that respondent had disposed of the rejected material elsewhere at an increased price, and concluded with a plea for payment based on the ground that the entire transaction had been unprofitable to the respondent and the material supplied at a loss. Manifestly most of this letter was of no probative force on any issue involved, and I do not think that the court's rejection of it when offered in its entirety constituted error.

[4] The appellants contend that an improper measure of damages was adopted by the learned trial court. The respondent did not attempt to prove any loss of profits. It did prove that in order to perform the contract a corduroy road was necessarily constructed, and it recovered the reasonable expense thereof. Upon the facts in this case I do not think that such recovery was error. Expenditures necessarily made in anticipation of performing a contract may in many instances be recovered as an element of damage sustained after performance has been wrongfully prevented. *Long Island C. & S. Co. v. City of New York*, 204 N. Y. 73, 97 N. E. 483; *United States v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168; *Phillips, etc., Const. Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341. It may be that a recovery for both the prospective profits and the preliminary expenditures could not be sustained. See *Mackey v. Olssen*, 12 Or. 429, 8 Pac. 357.

[5] Assuming, however, that the contract was being conducted by the respondent at a loss, it would have been entitled to recover nominal damages at least for the breach; and I see no reason why in such instance it cannot also recover incidental expenditures necessarily made in anticipation of performance.

[6] It may be that the respondent could have been required to deduct from the cost of the road the value of its use in the performance of so much of the contract as had been completed at the time of the breach, but no such question was raised at the trial, and such an apportionment cannot be made upon appeal.

The judgment and order should be affirmed, with costs.

JENKS, P. J., and WOODWARD and RICH, JJ., concur. BÜRR, J., dissents upon the ground that plaintiff was not entitled to recover the costs or any portion of the costs of constructing the corduroy road.

BROOME COUNTY v. CORTLAND COUNTY.

(Supreme Court, Appellate Division, Third Department. December 30, 1912.)

PAUPERS (§ 39*)—LEGAL SETTLEMENT—LIABILITY FOR AID.

Poor Law (Consol. Laws 1909, c. 42) §§ 40, 42, 51, provide for the acquisition of legal settlements, and declare that a person who has made settlement in any town shall be maintained thereby, and that, when a poor person is removed or goes from a town or county into any other town or county not legally chargeable with his support, he shall be maintained by the superintendent of the county, who may recover the same. A person and his family acquired a legal settlement in a town in B. county. For several months he and his family resided in T. county, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for some months they resided in C. county, and then returned to the town. They had received no aid from T. or C. counties, and their going was voluntary. *Held*, that the town or B. county was liable for their subsequent support, and there could be no recovery from C. county therefor.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. §§ 162–179; Dec. Dig. § 39.*]

Lyon, J., dissenting.

Appeal from Trial Term, Broome County.

Action by the County of Broome against the County of Cortland. From a judgment for plaintiff, defendant appeals. Reversed, and judgment directed for defendant.

Argued before SMITH, P. J., and KELLOGG, HOUGHTON, BETTS, and LYON, JJ.

James F. Tobin, of Cortland, for appellant.

James K. Nichols, of Binghamton, for respondent.

JOHN M. KELLOGG, J. Oscar Austin and his family of four children were natives of Lisle, Broome county, and resided there without material interruption until March 12, 1909. Therefore they had a legal settlement in that town under section 40 of the Poor Law, and such settlement continued until they had gained a like settlement in some other town or city by a residence of a year. Chapter 46, Laws of 1909 (Consol. Laws 1909, c. 42). From about March 12, 1909, to about the middle of October, 1909, they resided in the county of Tioga, and from the latter date until the family returned to Lisle, about May, 1910, they resided in Cortland county. They had not received any aid from the poor authorities of Tioga or Cortland counties, and the going from Tioga to Cortland county and from Cortland county to Lisle were entirely voluntary acts upon their part.

Section 42 of the Poor Law required that this family be supported by the town of Lisle or the county of Broome, the place where they were when they applied for relief. Section 51 provides that if a poor person is removed, or comes from a city, town, or county into any other city, town, or county "not legally chargeable with his support," he shall be maintained by the superintendent of the county where he may be, and then provides for giving notice to a county which it is claimed is liable under the law for the support of the poor person. This section does not apply to this case, as the Austins in returning to Lisle did not come into a town or county not chargeable with their support, but came to the county legally chargeable with their support.

County of Delaware v. Town of Delaware & Sullivan County, 105 App. Div. 130, 93 N. Y. Supp. 954, and like authorities, do not apply to this case. They proceed upon the theory that section 51 of the Poor Law furnishes no remedy over against the town where the poor person had a legal settlement, unless the person was a poor person when he came into the county actually furnishing the relief. That case does not affect the question as to which county is primarily liable for the support of the poor person; but, as the statute requires the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

person to be supported in the town where he is and only provides a remedy over in case the person coming into the county was a poor person when he came, it held that there could be no recovery. But here the town of Lisle or the county of Broome was legally chargeable with the support of the family when the relief was granted. Section 51 gives plaintiff no right to recover over, and, as the burden rested upon Lisle or Broome county, the county of Cortland is not liable.

We have not discussed the facts as to the situation of the Austin family, but have so far treated the case as one of law. As a matter of fact, however, we are satisfied that the family of Oscar Austin were poor, shiftless, and improvident, and were considered fair subjects for charity and treated as such before they left Broome county, and that they were really poor persons within the meaning of the statute when they came to Tioga and Cortland counties.

The judgment is therefore reversed upon the law and the facts. The particular findings of fact disapproved of are the second, third, and fourth, and judgment is directed in favor of the defendant in the court below, with costs, and with costs of this appeal. All concur, except LYON, J., dissenting.

NUGENT v. BROOKLYN HEIGHTS R. CO.

(Supreme Court, Appellate Division, Second Department. January 10, 1913.)

INFANTS (§ 72*)—INJURY TO UNBORN CHILD—RIGHT OF ACTION AFTER BIRTH —"NEGLIGENCE."

Although there is a residuum of injury for which neither parent can recover, and although a child *en ventre sa mere* is an entity for many purposes, yet a child cannot after its birth recover from a railroad company damages for a deformity caused by the company's negligence in transporting its mother, who was then *enceinte*, for no relation of carrier and passenger extended to the fetus, the carrier's duty only extending to the mother, and so it could not be guilty of negligence towards it, for that is the culpable failure to observe a duty owed by one to another in a particular relation, and for the same reason no action for breach of contract will lie.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 180-185; Dec. Dig. § 72.*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

Appeal from Trial Term, Kings County.

Action by Girard Nugent, an infant, by Arthur A. Nugent, his guardian ad litem, against the Brooklyn Heights Railroad Company. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, THOMAS, and CARR, JJ.

William E. Butler, of New York City, for appellant.

D. A. Marsh, of Brooklyn, for respondent.

THOMAS, J. The plaintiff has sued for injuries received 36 days before his birth on September 5, 1911, through the negligent starting

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of defendant's car, while his mother was alighting therefrom on July 31, 1911. The appeal is from the judgment for defendant on the pleadings after demurrer to the complaint. The father has brought a separate action for expenses incurred and services lost by reason of the child's injuries.

The question presented for the first time in this state is worthy of consideration, inasmuch as, if this action upon proper pleading may not be maintained, there is no remedy unless in an action by the mother for damages to her by reason of injuries to her son, and that would be inadequate. The statement in the complaint is, in effect, that the injuries to the mother affected the plaintiff's body, resulting in deformity at birth and less than normal nervous and physical condition, and otherwise injured him. The fact that the child was deformed, and would suffer thereby, would cause the mother mental pain, and, even if she could recover for that, the mental pain the child would suffer and the mere fact of deformity with its consequent diminution of the value of capacities and faculties could not be included in her recovery. The father, in case he could recover at all, could do so only so far as the injury enlarged the expense of the child's maintenance and entailed loss of service. So, however the subject be viewed, there is a residuum of injury for which compensation cannot be had save at the suit of the child, and it is a question of grave import whether one may wrongfully deform or otherwise injure an unborn child without making amends to him after birth. The identification of an unborn child with the mother, and the merger of its individuality in her own, would seem justly to be limited by her ability to recover full compensation for the injury done both to her and to him. In the case at bar certain of his injuries can be segregated, but she cannot represent him for the purposes of recovery for them. If, now, one should assault the mother, whereby violence would be transmitted injuriously to an unborn child, there seems to be no reason to deny him an action after his birth for his injuries. The inconvenience of discovering the resultant injury does not affect the present inquiry, as the naked fact of such harm is admitted by the demurrer to the complaint alleging it. It would be no answer to the trespasser that the child was concealed in the mother's womb. The wrongful act initiated by the assailant would reach the child, as it might result in tortious contact with any third person, although that was not within the purpose of the actor. So, if a tort be an act of negligence, the remedy is not confined to the person next to the act in sequence. But it may be answered that an unborn child is not an entity. Hence a trespass upon it does not invade the personal rights of a human being so as to admit of a civil remedy at its instance after birth. And so it is argued, in effect, that an unborn child is not a member of political society so as to be related to others engaged in any of the activities or subject to any of the conditions of life. From this it would be argued that no person actually born owes an unborn any duty of which there can be a culpable breach. That is, none of the rights of the person attach to him because he is not a person. It is repeating arguments several times advanced in this connection to say that an unborn child has, conditioned upon its birth,

usual rights of property, and the remedies that pertain to them for actionable injuries inflicted before his birth. The being that owns is the supreme consideration and has capacity for ownership. What is owned and the right to own are merely incidental to the living entity.

And yet shall the incidents be valued in legal cognizance and the owner not? But when in legal apprehension for the purposes of property rights does the entity begin? And what are its capacities? It is sufficient for present purposes to state that it begins before birth, and that it has all the capacities of born persons to receive property, and after birth to enjoy it, and redress prenatal injuries to it. It is in being for the purpose of measuring the valid limitation of estates. *Long v. Blackall*, 7 Durn. & East. 96. An estate may be given to it or to another person for its life (*Thellusson v. Woodford*, 4 Ves., Jr., 227), and a guardian may be appointed for it (*Marsellis v. Thalhimer*, 2 Paige's Ch. 35, 21 Am. Dec. 66). The death of its father by the wrongful act of another by culpable negligence may injure it so as to permit recovery therefor after birth. *The George and Richard*, L. R. 3 Adm. 465, noticed approvingly in *Quinlen v. Welch*, 69 Hun, 584, 23 N. Y. Supp. 963, where it is also said:

"It has been held that the civil rights of such an infant are equally respected at every period of gestation; and it is clear that, no matter at how early a stage, it may be appointed an executor, is capable of taking as legatee or under a marriage settlement, may take specifically under a general devise as a child, and may obtain an injunction to stay wastes."

In *Cooper v. Heatherton*, 65 App. Div. 561, 73 N. Y. Supp. 14, Mr. Justice Jenks discusses the status of an unborn child in regard to property rights, and says:

"In *Stedfast v. Nicoll*, 3 Johns. Cas. 18, Kent. J., notes 'a late case' (*Doe v. Clarke*, 2 H. Black. 400), where 'the court go so far as to say that it is now settled that an infant en ventre sa mere shall be considered, generally speaking, as born, for all purposes for his own benefit.'"

Is not the right to be born with normal faculties the capacities for its benefit? If so, he who takes it away deprives the child of the highest good. In *Walker v. Great Northern Railway Company* (1890) 28 L. R. (Ir.) Q. B. & Ex. Div. 69, 75, O'Brien, C. J., in commenting on the rule that a child in utero is considered as actually born when it is necessary for the benefit of such unborn child so to be considered, said with reference to a case of a person disabled from earning a livelihood by willful injury to it in the womb:

"In the case I put it would be manifestly for the benefit of the child that it should be considered as born at the time the injuries were inflicted, and that an action could be maintained."

- In that action the claim was that the mother, quick with child, was received by the defendant for safe carriage, but that the defendant so negligently conducted himself that plaintiff, thereafter born, was permanently injured and crippled, and the demurrer to the claim was sustained. The several judges wrote with much reference to the cases, statutes, and civil, ecclesiastic, and common law relating to the status of an unborn child, and, while there was diversity of view, they met

on one ground, that the plaintiff was not a passenger, and hence there was no breach of contract of carriage. The discussion suggests the usual current of thought on this subject. O'Brien, C. J., quotes the language of Mr. Justice Buller in *Thellusson v. Woodford*, 4 Ves. Jr. 335, in reference to the allegation that a child in his mother's womb was a nonentity:

"Let us see what this nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be even executor. He may take under the Statute of Distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction, and he may have a guardian. Some other cases put this beyond all doubt. In *Wallis v. Hodson*, 2 Atk. 117, Lord Hardwicke says: "The principal reason I go upon in the question is that the plaintiff was *en ventre sa mere* at the time of her brother's death, and consequently a person in *rerum natura*, so that, by the rules of the common and civil law, she was to all intents and purposes a child as much as if born in the father's lifetime." In the same case Lord Hardwicke takes notice that the civil law confines the rules to cases where it is for the benefit of the child to be considered as born; but, notwithstanding, he states the rule to be that such child is to be considered living to all intents and purposes.' And the plaintiff's counsel also rely upon a passage lower down (at the close of page 322) in Mr. Justice Buller's judgment, where he states 'In *Doe v. Clarke*, 2 H. Bl. 399, the words "that whenever such consideration would be for his benefit, a child *en ventre sa mere* shall be considered actually born," were used by me because I found them in the book from whence the passage was taken. Why should not children *en ventre sa mere* be considered generally as in existence? They are entitled to all the privileges of other persons.'"

O'Brien, C. J., also discusses the case of *Rex v. Senior*, 1 Moody, C. C. 346, where a doctor attending on childbirth was held to have been found guilty properly of manslaughter for inflicting through culpable ignorance and want of skill a wound on the child during and before its birth, whereby it died. Johnson, J., discusses ancient rules, practice, and instances decisions to the disadvantage of the plaintiff, even to indicating dissatisfaction with the reversal by the House of Lords of the decision in *Long v. Reeve*, 3 Lev. 408, to the effect that in a devise for life, remainder to his first and other sons in tail, a child born after the death of the life tenant was not in *esse* on the determination of the particular estate by his father's death. So far was it deemed helpful to go to aid the argument that at the time of the accident, "as Lord Coke says, the plaintiff was then *pars viscerum matris*," and the learned judge adds:

"We have not been referred to any authority or principle to show that a legal duty has ever been held to arise towards that which is not in *esse* in fact and has only a fictitious existence in law, so as to render a negligent act a breach of that duty."

It is to this conclusion that an unborn child is not in existence so as to be entitled to the protection of his person as well as his property that I dissent. It is not helpful to characterize its existence as fictitious as to property rights. The rights are accorded to it. The indisputable fact is that one is answerable to the criminal law for killing an unborn child who to that end is regarded as in *esse*, and the further fact is that the unborn child, so far as the property interests are concerned, is regarded as an entity, a human being with the remedies

usually accorded to an owner. But the argument then proceeds that one must respect the rights of ownership, and, so far as a civil remedy is concerned, disregard the safety of the owner. In such argument there is not true sense of proportion in the protection of rights. The greater is denied; the one lesser and dependent on the very existence of a person in esse and entitled to protection is respected. In *Walker v. Great Northern Railway Company*, O'Brien, J., says:

"The pity of it is as novel as the case—that an innocent infant comes into the world with the cruel seal upon it of another's fault, and has to bear a burthen of infirmity and ignominy throughout the whole passage of life."

And he adds:

"I would not myself see any injustice in the abstract in such an action being held to lie, or in the risks of a carrier being extended to the necessary incidents of nature," although he considered "on what a boundless sea of speculation in evidence this new idea would launch us."

In my view, justice should not be turned aside and wrongs go without remedies because of apprehension of what may happen in jurisprudence if it be decided that an unborn child has some rights of the person. But here is reached the critical stage of the inquiry. This is an action for negligence, for violation of defendant's duty as a carrier, and defendant cannot be judged as a trespasser. Negligence is culpable failure to observe a duty owed by one to another in a particular relation, and remedy is allowed for injury therefor. What duty did the defendant as a carrier owe the unborn child? The child in its distinct entity was not a passenger, and the company owed it as a separate person no duty in the matter of safe carriage. Had it, born, been carried in its mother's arms, it would have been a gratuitous passenger, but the carrier's duty towards it would not have been thereby lessened. The learned counsel for the plaintiff suggests that the duty would attach had the child been concealed in a garment. Such condition does not usually escape the observation of the carrier's servants exercising ordinary attention, and the case of mothers concealing their infants from the expectable knowledge of carriers might, under some circumstances, excuse some act of the carrier whereby it was injured. But it is not the duty of a carrier to scrutinize its passengers for the detection of unborn children, to the end that they, although latent, may be regarded as passengers. It undertakes to carry as passengers the born, and not the unborn. It carries by compulsion those visibly offering themselves. So the mother presents herself and her living children, and the carrier is bound by the law of the realm to receive and to carry them. Its duty begins with receiving and ends with discharging them, and due care is required. The plaintiff stood in no such relation to the carrier as to earn such obligation on its part, and liability to respond for injury for the negligent carriage and discharge of the mother was coincident with the limits of its duty to her. The obligation arises from implied convention with the state that the carrier shall transport persons with due care, and the remedy is given to the one injured by the breach. The obligation is the same whether the action is in form based on breach of contract or of duty to carry.

Carroll v. Staten Island R. R. Co., 58 N. Y. 126, 17 Am. Rep. 221. Thus if, for injury to a woman by a car on the street whereby her unborn child is deformed, a railway company were liable to the child after birth in its action, yet it would not be liable to the child for mere negligence in the carriage of the mother, as it would owe its duty as a carrier to the mother, and not to the child. Such was the conclusion in *Walker v. Great Northern R. Co.* (1891) 28 Irish Law Reports, Q. B. & Exch. Div. 69, which has been noticed. Much broader was the decision in *Dietrich v. Northampton* (1884) 138 Mass. 14, 52 Am. Rep. 242, where a premature birth was caused by the mother slipping by reason of a defect in the defendant's highway, whereupon the child, too little advanced in foetal life, lived a few minutes, and it was held that an action for the death in behalf of the next of kin could not be maintained by its representatives. In *Allaire v. St. Luke's Hospital* (1900) 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225, 75 Am. St. Rep. 176, affirming 76 Ill. App. 441, the action was as alleged upon the defendant's contract to deliver the child without harm, whereas the mother was negligently hurt during carriage by defendant's elevator to the obstetrical part of the hospital, so that at its birth it had resultant injuries. It was decided that the action could not be maintained, but Boggs, J., dissented in an opinion expressing independent and logical thought, although his views would preclude recovery in the case at bar.

The judgment should be affirmed, with costs. All concur.

NUGENT v. BROOKLYN HEIGHTS R. CO.

(Supreme Court, Appellate Division, Second Department. January 10, 1913.)

Appeal from Trial Term, Kings County.

Action by Arthur A. Nugent against the Brooklyn Heights Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, THOMAS, and CARR, JJ.

William E. Butler, of New York City, for appellant.

D. A. Marsh, of Brooklyn, for respondent.

PER CURIAM. Judgment unanimously affirmed, with costs on the authority of *Girard Nugent v. Brooklyn Heights Railroad Co.*, 139 N. Y. Supp. 367, decided herewith.

NORTHERN WESTCHESTER LIGHTING CO. v. PRESIDENT AND TRUSTEES OF VILLAGE OF OSSINING.

(Supreme Court, Appellate Division, Second Department. January 10, 1913.)

1. MUNICIPAL CORPORATIONS (§ 658*)—STREETS—RIGHTS OF MUNICIPALITY.

The only interest of a municipal corporation in its streets is that of the public in the highways, and it has no interest in protecting the rights of abutting owners of the fee against interference with the highway by third persons without the consent of such owners.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1430; Dec. Dig. § 658.*]

2. GAS (§ 7*)—GAS COMPANIES—"FRANCHISES."

Transportation Corporations Law (Consol. Laws 1909, c. 63) § 60, provides for the incorporation of gas companies and for naming the towns, villages, cities, and counties in which their operation is to be carried on. Section 61 provides that, if incorporated to supply gas for light, they shall have power to manufacture gas and to acquire natural gas by purchase or otherwise, and to sell and furnish gas in such quantities as may be required in each city, town, and village named in the certificate of incorporation for lighting the streets and public or private places, or for other purposes, and to lay conductors for conducting gas through the streets of each such city, village, and town with the consent of the municipal authorities, and under such reasonable regulations as the authorities may prescribe. *Held*, that the statute constitutes the franchise of the company, and the consent of the municipal authorities merely makes it operative within that municipality.

[Ed. Note.—For other cases, see *Gas*, Cent. Dig. § 2; Dec. Dig. § 7*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2929-2942; vol. 8, p. 7666.]

3. GAS (§ 7*)—GAS COMPANIES—CONSENT TO USE OF STREETS—EFFECT.

When the municipal authorities consent to the use of its streets by such company, the company is entitled to exercise within the municipality all the powers given by the statute during the whole term of its corporate existence, and hence may lay conductors in the streets for the purpose of supplying gas, not only in that particular municipality, but in other towns and villages mentioned in the charter.

[Ed. Note.—For other cases, see *Gas*, Cent. Dig. § 2; Dec. Dig. § 7*]

Appeal from Trial Term, Westchester County.

Action by the Northern Westchester Lighting Company against the President and Trustees of the Village of Ossining. From a judgment enjoining defendant from interfering with the laying of gas pipes in the village of Ossining, defendants appeal. Affirmed.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

T. G. Barnes, of Ossining, for appellants.

Frank L. Young, of Ossining, for respondent.

WOODWARD, J. The plaintiff, as the successor to the Northern Westchester Light and Power Company by a merger, was on the 28th day of April, 1912, engaged in laying its gas mains or conductors in the streets specified in the complaint for the purpose of supplying its customers in the village of Ossining with gas, and extending its said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gas mains beyond the limits of the village of Ossining to and through the village of Briarcliff Manor, and to and through the village of Pleasantville, when the defendant by force drove the plaintiff's employés from their work and prevented the laying of the pipes. The plaintiff thereupon brought this action to restrain the defendants from interfering with the work, and a preliminary injunction issued, which, upon the trial of the action, was made permanent, and the defendants appeal from the judgment.

[1] The defendants urge that they are unable to find any law giving the authorities of one municipality the right to grant to a gas company the power to tear up its streets, without consent of abutting owners, to lay pipes to supply gas to an outside municipality. It may be remarked, in passing, that the defendants have no interest in the question of the rights of abutting owners. Their only interest in the streets of the village of Ossining is that of the public in the highways, and, whatever rights the owners of the fee may have, these are not within the control of the officers of the municipality.

[2, 3] With this question out of the way, it is clear to our mind that sections 60 and 61 of the Transportation Corporations Law fully provides for doing just what the plaintiff was attempting to do when the defendants interfered. Section 60 provides for the incorporation of gas companies, and for naming the towns, villages, cities, and counties in which the operations of the corporation are to be carried on, and section 61 provides that, if incorporated for the purpose of "supplying gas for light," it shall have the additional powers—

"to manufacture gas, and to acquire by purchase or otherwise natural gas, and to sell and furnish such quantities of gas as may be required in each city, town, and village named in its certificate of incorporation, for lighting the streets, and public or private buildings or for other purposes; and to lay conductors for conducting gas through the streets, lanes, alleys, squares, and highways, in each such city, village, and town, with the consent of the municipal authorities thereof, and under such reasonable regulations as they may prescribe. * * * Any corporation authorized under any general or special law of this state to manufacture and supply gas shall have the like powers and privileges."

Here is clearly ample authority for the plaintiff in this action, organized, as it is, for the purpose of supplying gas for light, to make use of the streets of the village of Ossining, either to supply that municipality with gas, or for the purpose of supplying any of the other villages or towns named in its certificate of incorporation, provided it has the consent of the municipal authorities. There is no dispute that on or about the 7th day of March, 1905, the defendant granted to the Northern Westchester Light & Power Company (the plaintiff being its successor) the right to lay its conductors for conducting gas through the streets of Ossining, without limitation, but it is contended by the defendants that this consent did not operate to give the plaintiff the right to run its conductors through said village for the purpose of supplying other municipalities. We are clearly of the opinion that the resolution adopted by the defendants in March, 1905, could not have the restricted effect which is here contended for, because the statute under which the consent was given constituted the franchise

of the corporation, and gave it the power to run its conductors through "each such city, village and town," referring to the cities, villages, and towns named in its charter where the business was to be carried on. When the village of Ossining gave its consent, it merely made the franchise operative in that municipality, and it became entitled to exercise within that village all of the powers given by the statute during the whole term of its corporate existence. *People ex rel. Woodhaven Gas Co. v. Deehan*, 153 N. Y. 528, 47 N. E. 787. The statute clearly contemplated that the gas need not be manufactured in each community, for it is expressly provided that the corporation shall have the power to "acquire by purchase or otherwise natural gas and to sell and furnish such quantities of gas" as may be necessary, thus clearly indicating that the conductors were for the purpose of distributing to the various villages and towns which might be included in the certificate of incorporation.

In this view of the matter, it is clearly immaterial that the court excluded evidence of admissions on the part of the plaintiff's superintendent that the work being done was for the purpose of supplying the other towns and villages mentioned in its charter, and the evidence of such superintendent, called by the defendants, assuming that it established the fact, would have no bearing upon the proper disposition of this appeal.

The judgment appealed from should be affirmed, with costs. All concur.

SINGER et al. v. NATIONAL FIRE INS. CO. OF HARTFORD, CONN.

(Supreme Court, Appellate Division, Second Department. January 10, 1913.)

1. APPEAL AND ERROR (§ 171*)—REVIEW—THEORY ON WHICH PRESENTED BELOW.

A case must be determined in the appellate court upon the same theory on which it was presented below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1069, 1161-1165; Dec. Dig. § 171.*]

2. INSURANCE (§ 136*)—DELIVERY AND ACCEPTANCE OF POLICY—EFFECT.

A delivery of an insurance policy to an agent for the insured and his delivery to the insured constitutes a good delivery by the insurer, with an intent to become bound thereby.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 219-230; Dec. Dig. § 136.*]

3. INSURANCE (§ 559*)—WAIVER—NOTICE OF LOSS.

An insurer who repudiates a policy, and denies liability because there was no valid policy in force at the time of the loss, is in no position to show that the insured has lost his rights thereunder by failing to give immediate notice of loss, as required by the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1391, 1392; Dec. Dig. § 559.*]

4. EVIDENCE (§ 263*)—ADMISSIONS—EVIDENCE TO EXPLAIN—CONTRACT OF INSURANCE.

Where an insurer, defending an action on a policy, which had been delivered to the agent for the insured, on the ground that it was not in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

force at the time of the loss, in order to show that the insured had refused to accept the policy, introduced letters from the insured to such agent to the effect that they had returned the policy to him because they already had insurance on the property, the insurer was in no position to object to oral communications between the insured and the agent from which it appeared that the policy was returned under a mistaken belief that the agent had previously procured insurance thereon.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1022–1027; Dec. Dig. § 263.*]

5. EVIDENCE (§ 263*)—DOCUMENTARY EVIDENCE—BRINGING OUT WHOLE TRANSACTION.

Where a part of a communication is put in evidence, the party against whom it is used has a right to have the entire matter brought out.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1022–1050; Dec. Dig. § 263.*]

Appeal from Trial Term, Kings County.

Action by Samuel J. Singer and others against the National Fire Insurance Company of Hartford, Conn. From a judgment for plaintiffs, and from an order denying a new trial on the minutes, defendant appeals. Affirmed.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, WOODWARD, and RICH, JJ.

Lewis H. Freedman, of New York City (Albert Stickney, of New York City, on the brief), for appellant.

Charles G. F. Wahle, of New York City, for respondents.

WOODWARD, J. The plaintiffs, as copartners, bring this action to recover an alleged loss under a policy of fire insurance issued to them by the defendant, and the defendant urges that it is not liable under such policy, on the ground that it never became operative; the plaintiffs having refused to accept the same.

[1] This was the issue tried and submitted to the jury, and, while other matters are urged upon this appeal, we are of opinion that the case must be determined here upon the theory on which it was presented before the trial court. It was stipulated on the part of the defendant that Messrs. Lustig & Marx, insurance brokers, on behalf of the plaintiffs, applied on or about the 14th day of October, 1909, to the National Fire Insurance Company of Hartford, Conn., defendant herein, for a policy of fire insurance insuring S. J. Singer & Sons, plaintiffs herein, and covering certain property in premises No. 113 Market street, Newark, N. J., and that, in response to such application, the National Fire Insurance Company of Hartford, Conn., defendant herein, executed the policy in suit, and that said policy was countersigned by Messrs. Lowy & Berger, duly authorized agents of the defendant company at Newark, N. J., and delivered to Messrs. Lustig & Marx, and mailed by Lustig & Marx to the plaintiffs, on or about November 16, 1909; that a fire occurred in the premises of the plaintiffs at No. 113 Market street, Newark, N. J., on the 2d day of December, 1909, by which certain of said property mentioned in the complaint was damaged and destroyed to the extent of \$4,652.20; and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the said fire did not happen from any of the causes excepted in the policy, and that the policy so made and delivered to Lustig & Marx had never been returned to the defendant.

[2] There does not appear to be any question that Lustig & Marx, insurance brokers, were the agents of the plaintiffs in this transaction, and that a delivery to these agents, and an admission that the policy was by them handed on to the plaintiffs would constitute a good delivery of the policy on the part of the defendant, with an intent to become bound by its terms and conditions, and involving an obligation on the part of the plaintiffs to pay the premiums on such policy, while the stipulations in reference to the happening of the fire, the amount of the loss, and that the fire was not due to any of the excepted causes would seem to constitute a waiver of a strict performance of the conditions of the policy, assuming that the rather equivocal pleading on the part of the defendant raised an issue.

[3] The object of a condition in a policy that there shall be an immediate notification of the fire is for the benefit of the insurer, that it may investigate the causes, and, where upon the trial it is stipulated that none of the causes exist which would vitiate the policy, it is difficult to conceive of the defendant being aggrieved by the failure to show that such notice was given, especially where it insists from the start that it is not liable because there was no valid policy in being at the time of the fire. If there was no policy, then the plaintiffs owed no duty to the defendant, and the defendant, having repudiated the policy, is not in a position to say that the plaintiffs have sacrificed their rights because of a failure to perform the conditions of a policy which the defendant says does not exist, and in the case now before us we are of the opinion that the pleadings do not squarely raise the issue now sought to be urged.

[4, 5] What, then, is the foundation of the claim on the part of the defendant that this policy, concededly made, executed, and delivered to the agents of the plaintiffs, was not in force at the time of the fire? The contention is that the plaintiffs refused to accept the policy in suit, and this contention is based upon two letters written by an employé of the plaintiffs and addressed to Messrs. Lustig & Marx, who, it will be remembered, were not the agents or representatives of the defendants, but were the brokers engaged by the plaintiffs to procure the insurance. The first letter (Defendant's Exhibit 1) bears date of November 17, 1909, is addressed to Messrs. Lustig & Marx, and is stipulated by the plaintiffs to have been received by that firm. This letter reads:

"We herewith return you bill and policies. We do not know who authorized you to issue same. Our insurance on our store at No. 113 Market street, was placed before the store was opened."

To this letter the firm of Lustig & Marx replied, acknowledging the receipt of the plaintiffs' letter of the 17th, and saying:

"We beg to say that the policies covering your stock in the Newark store, to the amount of \$3,500.00, were issued at the request of your Mr. Meyer Singer, before the store was opened. Kindly advise us what to do in this matter."

To the above, the plaintiffs, through an employé, wrote, saying:

"Answering your letter of November 18th, beg to state that our Mr. Meyer Singer has no knowledge of having placed insurance with you to cover our branch store. There must be some mistake in the matter. Our insurance was placed, as we stated in a previous letter, before the store was opened. Otherwise we should have been glad to have given you the business."

The defendant knew nothing of this correspondence, and took no action looking toward the cancellation of the policy in question before the fire on the 2d day of December, 1909. The communications were entirely between the plaintiffs and their broker, and, except for the fact that the defendant in some unexplained manner got possession of these letters, there would be no possible foundation for the defense now urged. With these letters in evidence, the plaintiffs called witnesses who testified to communications passing between the plaintiffs and their brokers in reference to this policy, from which it was made to appear that Meyer Singer was the active manager of various stores owned by the plaintiffs, and that he had arranged for the policy in question some time in September, before the opening of the Newark store, but that the policy was not delivered until some time in November, and that he assumed in dealing with the matter, as shown in the correspondence, that the policy then offered was additional insurance, and it was this additional insurance which he supposed he was rejecting; that he subsequently communicated, through one of the employés of the firm, with the brokers, and it was then understood and agreed that, if the policy was the one which had been contracted for in September, the plaintiffs wanted it; and that it was in fact held in the custody of the brokers, who assured the plaintiffs, through the employé, that, when the premiums were due, the plaintiffs would be expected to pay the same. Objection is urged to this line of testimony, showing the conversation between the brokers and the employé of the plaintiffs, on the ground that the defendant was not present at such conversations, and that it is hearsay, but we are of the opinion that the defendant, having opened the door by the introduction of letters passing between the plaintiffs and a third party, in no wise related to the defendant, that it is not now in a position to object to testimony tending to explain this correspondence. It is a rule of general application that, where a part of a communication is placed in evidence, the party against whom it is used has a right to have the entire matter brought out, and that rule is applicable here, where only a part of the communication between the brokers and the plaintiffs is in writing.

The judgment and order appealed from should be affirmed, with costs. All concur.

MATTOS v. FELGENHAUER et al.

(Supreme Court, Appellate Division, Second Department. January 10, 1913.)

1. MASTER AND SERVANT (§ 278*)—ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE—BELT FASTENING.

Evidence in a servant's action for injuries by being caught by a belt and a revolving shaft while trying to put the belt on a pulley *held* not sufficient to show the master's negligence as to the belt and its fastenings.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954-972, 977; Dec. Dig. § 278.*]

2. MASTER AND SERVANT (§ 152*)—MASTER'S DUTY—INSTRUCTING SERVANTS.

A master was under no duty to instruct a servant as to the proper way of putting on a belt over a pulley, where the servant had worked around machinery for seven years, and in defendant's shop for a year and a half, and had frequently put belts over pulleys.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 313; Dec. Dig. § 152.*]

3. MASTER AND SERVANT (§ 281*)—ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

Evidence in a servant's action for injuries by being caught in a belt revolving over a pulley and drawn around a revolving shaft *held* to establish the servant's contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987-996; Dec. Dig. § 281.*]

Appeal from Trial Term, Kings County.

Action by Edward Mattos against Edmund Felgenhauer and others. From a judgment of the Supreme Court in favor of the plaintiff, and from an order denying their motion for a new trial, defendants appeal. Judgment and order reversed, and a new trial granted.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, THOMAS, and CARR, JJ.

John C. Robinson, of New York City, for appellants.

William E. Butler, of New York City, for respondent.

BURR, J. Plaintiff while in defendants' employ attempted to shift a belt upon a pulley on a revolving shaft. Upon this shaft and distant 2½ inches from said pulley was a coupling. Upon the side of the coupling nearest to the pulley certain bolts projected a distance of about $\frac{3}{16}$ of an inch, and they were unguarded. According to plaintiff's evidence, the belt consisted of several pieces of leather, not all equal in width, which were fastened together by clips or fasteners, and one of plaintiff's witnesses testified that on one of them "the teeth were sticking out, and the others there were hooks. They were bent over and they were sticking up." Upon the day of the accident the belt had stretched, and, under direction of defendants' foreman, plaintiff had cut out a piece about two inches wide, fastened the ends together, and was attempting to replace the belt over the pulley. The shaft was some distance above the floor, and, in order to reach the pulley, it was necessary for plaintiff to go upon a ladder. He placed this against the shaft, between the machine and the pulley, and upon

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the side of the shaft toward which the pulley was revolving. In order from this position to reach the belt, it was necessary for him to extend his arm across the shaft and either above or beneath it. At first he said that his arm was above the shaft, and then that it was underneath. It was certainly in one position or the other. While his arm was in this position, it was caught in the belt and drawn around the shaft, and severe injuries resulted therefrom.

Plaintiff charged defendants with negligence (1) in allowing the ends of the bolts upon the coupling to be unguarded; (2) with respect to the belt and its fastenings; (3) because of the close proximity of the coupling to the pulley; and (4) in not providing some appliance by which the belt might be put on other than by hand.

[1] With respect to the second ground of alleged negligence the proof fails. There is nothing from which a jury could find that the fact, if it is a fact, that the belt consisted of several pieces of leather of unequal width caused it to run unevenly or in any manner contributed to the accident. If the ends of the fastenings were left sticking up, it was due to plaintiff's negligence, for the testimony of the plaintiff's witness Ruggles is to the effect that:

"When any one has the belt off and repairing it, it is only the work of a minute to flatten those down. * * * They can do it as fast as they can strike with the hammer, practically."

With respect to the unguarded ends of the bolts, if there is sufficient evidence to justify a jury in believing that this was an unusual and dangerous condition, and to base a finding of negligence thereupon, it is clear that this in no degree contributed to the accident. It did not appear that the belt or any part of plaintiff's person or clothing came in contact with these. The testimony of plaintiff himself is positive to the effect that his arm was caught in the belt, and not in the projecting bolts. After the accident, the sleeve of his coat was found twisted up with the belt around the shaft. The belt had wrapped around the shaft once, then the sleeve, and then there were eight or nine additional wrappings of the belt around the shaft before it started to twist toward the coupling.

[2, 3] With respect to the other alleged grounds of negligence, while the evidence is conflicting, we think that there was enough to require the submission of these questions to the jury, and it would follow that the judgment must be affirmed but for evidence affirmatively establishing plaintiff's contributory negligence. He attempted to put the belt over the pulley from the wrong side of the shaft, and while standing between the machine and the pulley. That this was an exceedingly dangerous thing to do is established, not only by the testimony of all the witnesses for the defendants, but by every witness called for plaintiff who had any practical experience with the operation of machinery. The only evidence to the contrary comes from the lips of a paid expert called by plaintiff, and his testimony is so at variance with ordinary and well-known principles of mechanics as to be entitled to no credence whatever. The person of ordinary intelligence must know that if the arm is stretched over or under a shaft revolv-

ing toward him, and any portion of his personal clothing is caught between the shaft and the pulley, it must be drawn around the shaft, instead of being quickly released. On the other hand, if the direction of the revolution is away from the person, and anything catches between the belt and the shaft, the quicker the revolution is made the sooner release is effected. In addition, the probability of being caught is greatly diminished if the shaft is approached from the proper side, since, in that case, it is unnecessary to put any portion of the hand or arm over the shaft itself.

The plaintiff attempted to show that he could not place the ladder on the other side of the shaft, for the reason that certain columns interfered therewith, but it appeared that these columns were no part of the building itself, but were manufactured material lying on the floor of the machine shop, awaiting removal. There is nothing to indicate that these might not have been moved in order to enable the proper location of the ladder.

Plaintiff also sought to convince the jury that he was ignorant of the proper method of approaching the shaft in order to place the belt over the pulley. It appeared that he had been working around machinery for seven years, and had worked in defendants' shop for a year and a half prior to the date of his injury, had frequently put belts on before, had safely performed the operation with other belts eight times on the preceding day, and had adjusted this same belt over the same pulley about three weeks before. The jury were not justified in finding that his alleged ignorance excused his culpable carelessness, and the learned trial court very properly told it that defendants were under no duty to instruct plaintiff as to the proper method of putting on the belt. It may be that, in view of the testimony of the expert above referred to and in accordance with the provisions of the act relating to employers' liability, it was the duty of the trial court to submit the question of plaintiff's freedom from contributory negligence to the jury. But a verdict based upon an affirmative finding upon that point is so clearly against the weight of the evidence that it should not be permitted to stand.

The judgment and order denying a motion for a new trial should be reversed and a new trial granted, costs to abide the event.

JENKS, P. J., and HIRSCHBERG and CARR, JJ., concur.
THOMAS, J., concurs upon the ground that the only issue relating to defendants' negligence is that the coupling was too near the pulley.

CROCKER v. MULLIGAN.

(Supreme Court, Appellate Division, Second Department. January 10, 1913.)

DESCENT AND DISTRIBUTION (§ 47*)—EFFECT OF WILL—PRETERMITTED CHILD.

Decedent Estate Law (Consol. Laws 1909, c. 13) § 26, provides that whenever a testator has a child born after the making of his last will, and dies leaving such child neither provided for nor mentioned in the will, such child shall succeed to the same part of his estate as would

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

have descended to him. A will giving the residue of testator's estate to his wife neither mentioned any of their children nor gave any part of the estate to them because of his pronounced confidence that the wife would provide for them. At the time of executing the will, the testator had three daughters living, and prior to his death another daughter was born. *Held*, that the will referred only to the children then living, and that the after-born daughter took one-fourth of the estate.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 126-130; Dec. Dig. § 47.*]

Action by Carrie W. Crocker against Ralph R. Mulligan. Submission of controversy on agreed statement of facts. Judgment for defendant.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

Alfred R. Bunnell, of New York City, for plaintiff.

Thomas M. Smith, of Yonkers, for defendant.

THOMAS, J. The question is whether a child is in any way mentioned in a will made before its birth. The second paragraph is:

"All the rest, residue and remainder of my estate, both real and personal of every kind and nature, I give, devise and bequeath to my beloved wife, Carrie W. Crocker, I have not mentioned any of our children or given to them, any portion of my estate, for the reason that I have the fullest confidence in my wife, that she will, out of the estate hereby given to her, provide for our said children, supplying their need so far as in her power lies."

At the date of execution of the will, September 16, 1904, the testator had three living daughters, and another daughter was born in March, 1906, prior to testator's death in February, 1911. The defendant in a contract to purchase land devised refuses to take title upon the ground that the last born takes one-fourth of the same under the statute. Section 26, Decedent Estate Law (Consol. Laws 1909, c. 13). The testator in the gift to his wife states that he has "not mentioned any of our children, or given to them, any portion of my estate," and the reason assigned for the omission is his confidence that his wife will out of the estate given her "provide for our said children, supplying their need." The "said children" are those earlier described. When he said that he had "not mentioned any of our children," he meant that he had not mentioned any one of the children then possessed by his wife and himself. In this way he individualized each child as a living person, and thereby shows that in his mind he had considered his living children one by one, and concluded that their interests and necessities, joint or several, did not require that he should make any reference to them, or give to them anything. The word "them" refers to the word "children," and that word defined the class whereof "any one" defined the number. When he said, "I have not mentioned any of our children," he could not be deemed to have said, "I have not mentioned any one of our children unpossessed in *præ-senti* and procreable in *futuro*." Each child in his mind was capable of being mentioned by name, and he thought of each one, and then confided the group to the affection and wisdom of his wife. En-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

grossed by consideration of those who were realities in his solicitude, he forgot the possibilities of the future. Of course, if he had mentally forecast the indefinite issue of his marriage, he would have provided for such unknown children nothing beyond committing them to the care of his wife. So that the statute works out this—the living objects of his love take nothing; the child, unborn, unconsidered, takes one quarter of the estate although, if considered then whether born or not, she would have received nothing. For it is beyond reason that the father would have denied a gift to any one of his three daughters and given something to issue that might be born.

The defendant should have judgment that Willette A. Crocker has title in fee to an undivided one-fourth interest in the land as if her father had died intestate, and that the plaintiff cannot convey the same. All concur.

L'ECLUSE v. FIELD.

(Supreme Court, Appellate Division, Second Department. January 10, 1913.)

BROKERS (§ 88*)—ACTION FOR COMMISSION—JURY QUESTION.

In an action for a real estate broker's commission for procuring a purchaser, a question of defendant's good faith in canceling the broker's authority to sell just before the sale was effected through another broker to a purchaser produced by plaintiff *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 121-130; Dec. Dig. § 88.*]

Appeal from Trial Term, Suffolk County.

Action by Milton L'Ecluse against Richard C. Field. From an order setting aside a verdict for plaintiff, and granting a new trial, he appeals. Reversed, and verdict reinstated.

Argued before HIRSCHBERG, BURR, THOMAS, CARR, and RICH, JJ.

Willard N. Baylis, of New York City (Frederick H. Sanborn, of New York City, on the brief), for appellant.

Edward P. Lyon, of New York City (Percival C. Smith, of New York City, on the brief), for respondent.

HIRSCHBERG, J. The appeal is from an order setting aside the verdict of a jury rendered in the plaintiff's favor. The action was instituted to recover broker's commissions alleged to have been earned by the plaintiff's assignor, a corporation of which the plaintiff was an officer, in connection with the sale of real estate owned by the defendant on Long Island. Evidence was adduced from which the jury would have been warranted in finding the following facts: The plaintiff had a client, a Mrs. Palmer, who was desirous of purchasing a home, and to whom on behalf of his corporation he showed the defendant's place. Mrs. Palmer stated that she was much pleased with the property, and offered to pay \$75,000 for it. Plaintiff communicated this offer to the defendant, who refused it, but authorized the plaintiff to put the property on the corporation's books for sale at

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

\$87,500. Thereupon the plaintiff disclosed the name of his client to the defendant because he thought he could trust the defendant, who was an old friend of his. Subsequently plaintiff succeeded in getting Mrs. Palmer to offer \$80,000, which offer was also refused by the defendant. Finally, after considerable labor by the plaintiff, Mrs. Palmer, on May 6, 1910, told him that she realized that she must pay \$87,500 to get the property; that she would see her adviser, a Mr. Livingston, in a few days upon his return from Atlantic City; and that, if he did not object, she believed that she would take the property at \$87,500. On May 9th the defendant telephoned the plaintiff and inquired about the situation, and was then informed that Mrs. Palmer would purchase the property when Mr. Livingston returned; his return being expected the following day. On the 10th of May defendant sent plaintiff's assignor a letter, stating that, as it had been unable to sell the property, he would occupy it during the summer, and wished it withdrawn from the market. On the 11th of May the defendant authorized another broker, named Medbury, who also had been acting for Mrs. Palmer, to sell the property, giving him until the following day to effect the sale. On the 12th of May Mrs. Palmer bought the property from Medbury, who, she was informed, was the only broker authorized to offer it for sale. The price mentioned in the contract of sale was \$90,000. Mrs. Palmer, however, paid only \$87,500 for the property. The explanation offered on behalf of the defendant for this discrepancy is that Medbury gave Mrs. Palmer \$2,500 from his commission of 5 per cent., and that the defendant received \$85,500, after deducting the balance of Medbury's alleged commission, whereas, if plaintiff's assignor had sold the property for \$87,500, defendant would, after deducting its commission of 2½ per cent., have received only \$85,312.50. The difference of \$287.50 in the transaction seems to be claimed by the respondent as the real reason for transferring the matter to Medbury, although the respondent's letter stated that he had decided to withdraw the property from the market and reside there during the summer. On the other hand, the plaintiff claimed that the sum of \$90,000 was inserted in the contract of sale as a "blind," the better to effectuate the defendant's scheme to fraudulently deprive the plaintiff's assignor of its commissions on the eve of the successful termination of its efforts to induce Mrs. Palmer to purchase at the defendant's figures.

I think the determination of defendant's good faith in canceling the authority of plaintiff's assignor and almost immediately thereafter selling through Medbury to Mrs. Palmer was, on the conflicting evidence in the case, a question of fact for the jury, and that their verdict should not have been disturbed. In its opinion setting aside the verdict the learned Special Term cited the cases of *Willard v. Ferguson*, 125 App. Div. 868, 872, 110 N. Y. Supp. 909, *Cole v. Kosch*, 116 App. Div. 715, 102 N. Y. Supp. 14, and *Gardner v. Pierce*, 131 App. Div. 606, 116 N. Y. Supp. 155. The facts in those cases differ essentially from those herein presented. In *Willard v. Ferguson*, *supra*, the broker did not introduce the purchaser to the seller, and was not employed by the seller to negotiate the sale. In *Cole v. Kosch*, *supra*, the court merely held that the listing of the property by the

owner, with one broker, did not preclude him from offering it for sale through another. In *Gardner v. Pierce*, supra, the court restated the well-settled rule that a real estate broker's commissions are not earned until the broker brings the minds of the parties to an agreement for a sale upon definite terms. There it was held that an offer of \$35,000, unaccepted, did not preclude the vendor from subsequently selling his property for \$75,000 to another broker. There was no fraud in the case, nor any evidence upon which a finding of fraud could have been based.

On the facts in the case at bar, the jury might have found that the withdrawal of the property from plaintiff's assignor, followed by its almost immediate sale to the same client produced by plaintiff's assignor and on the original terms of sale, was merely a dishonorable device, designed to deprive the plaintiff's assignor of its commission, or, as was well expressed by Judge Pryor in the former New York Court of Common Pleas in *Ames v. McNally*, 6 Misc. Rep. 93, 95, 26 N. Y. Supp. 7, 8, they might have found "that the pretended withdrawal of the property, and the subsequent sale to the very purchaser produced by plaintiffs and on substantially the terms proposed through them, were nothing more than an expedient for cheating them of their commission."

In any view which can reasonably be taken of the case, it would seem that the issue of good faith on the part of the defendant was one of fact for the jury, and not of law for the court.

The order should be reversed, with costs, and the verdict of the jury reinstated, with costs. All concur.

RUMETSCH v. JOHN WANAMAKER, NEW YORK, Inc.

(Supreme Court, Appellate Division, Second Department. January 10, 1913.)

1. CARRIERS (§ 280*)—ELEVATORS IN BUSINESS BUILDINGS—DUTY OF OWNERS—INVITEES.

AN owner or occupier of a retail store building, maintaining an elevator therein for the use of customers, is not an insurer of the safety thereof, but is only required to exercise reasonable care in the character of the appliances provided, and in their maintenance and operation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1098-1106, 1109, 1117; Dec. Dig. § 280.*]

2. CARRIERS (§ 293*)—DANGEROUS APPLIANCES—ELEVATORS.

Defendant in 1907 employed high-grade elevator manufacturers of wide mechanical experience to install certain elevators in a store building, under a contract requiring the cars to sustain loads much greater than that placed upon one of them at the time a steel strap connecting the cage with an I-beam broke, on April 27, 1909, causing injury to plaintiff, a customer of the store. The strap hanger was an appliance in common use, though there was evidence that other types of suspending straps were to be preferred. The elevators were accepted after having been tested by an inspector of the department of buildings in the borough of Manhattan, who testified that he examined all parts of it, including the part of the strap that broke, and reported it good. The same inspector examined the same elevator on behalf of the city March 25, 1909, and pronounced it O. K., and it had also been inspected as to construction,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 139 N.Y.S.—25

design, size, and strength by inspectors of an insurance company prior to the accident. In October preceding the accident defendant requested the manufacturer to send its most expert and practical man to inspect the elevator system, which was done, and a report given that it was "all right." *Held*, that the breaking of the band under such circumstances could not have been reasonably anticipated by an ordinarily prudent person, and that defendant was not negligent.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1188; Dec. Dig. § 293.*]

Hirschberg and Rich, JJ., dissenting.

Appeal from Trial Term, Kings County.

Action by Matilda Rumetsch against John Wanamaker, New York, Incorporated. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, WOODWARD, and RICH, JJ.

Frank V. Johnson, of New York City (Herrick C. Allen, of New York City, on the brief), for appellant.

Herbert C. Smyth, of New York City (James B. Mackie, of New York City, on the brief), for respondent.

BURR, J. On April 27, 1909, defendant conducted a department store for the sale of merchandise in the borough of Manhattan and city of New York. For the convenience of its patrons, it maintained and operated several passenger elevators running from the basement to the upper floor of the building. On the date named, plaintiff, a customer, entered the car of one of these elevators at the third floor, to be carried to the main floor. At some point between the place of entry and the basement the car began to suddenly and rapidly descend, finally striking with great violence upon the bumpers at the bottom of the shaft. In consequence thereof plaintiff was thrown down and sustained serious injuries, for which she has recovered a verdict, and from the judgment entered thereon, and from an order denying a motion for a new trial, this appeal comes.

The elevator car was suspended from two steel I-beams by means of two steel supports or straps which were about four feet in length. The upper portion of the strap was in a vertical position above the lower flange of the I-beam, and was bolted to the web. About midway of the strap, and where it came in contact with the flange, there was a right-angle bend called a "heel." The strap continued in a horizontal direction to a point above the extreme edge or nose of the flange, where there was another right-angle bend, and the strap was again continued in a vertical direction until it met a cross-beam, to which it was fastened by bolts and nuts. There was a space between the horizontal part of the strap and the flange, starting from the heel of the strap and extending to the nose of the flange, owing to a curve in the latter. There is a conflict of evidence as to the width of this space, but there is some testimony that, starting from the heel, it gradually increased until, at the point where the second right-angle bend

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

occurred, it was from one-eighth to three-sixteenths of an inch in width. The strap, in passing over this point, did not touch the edge of the flange, and was there unsupported. After the accident it appeared that the cause of the fall of this elevator car was the breaking of each of these straps at the point called the heel. There was evidence to the effect that the operation of an elevator, hung upon straps as above described, produced a slight vibration at the point where the strap turned over the nose of the flange, and that this had an effect upon the metal, sometimes termed "crystallization" and sometimes "fatigue of the metal." In consequence thereof, in time the tensile strength of the metal deteriorated.

There was also evidence from which the jury might have found that there was in common use at this time, upon elevators employed for similar purposes, other types of suspending straps, in which the bends were not at right angles but in an oblique direction, and in which the strap was attached to the I-beam, both at the web and at the outer edge of the flange. One of these types of strap was described as the "O. G." bend. Experts testified that the advantage of this type of strap lay in the fact that it avoided the vibration above referred to. In the words of one of plaintiff's experts, the object attained was "to avoid getting or putting a leverage strain on the strap. In making a right angle your weight multiplies by leverage. In making it oblique you have a straight tensile pull." One of the experts called for defendant, while not necessarily condemning the type of strap here employed, testified that:

"In order to do the work that this strap was required to do, it ought to have been a larger strap, or else of a different shape, and that it never had the original strength which it ought to have had for that place."

He testified that a strap of the size used could be safely depended upon to carry for an indefinite period about 1,440 pounds. The contract made by defendant for the construction of the elevators called for an elevator capable of sustaining a greater strain than this, and the load placed upon it by defendant exceeded it. While such a strap might for a time successfully endure the strain put upon it, constant repetition thereof would cause it to break.

The crucial question in this case, therefore, is: Was the defendant responsible for the installation and use of the straps here employed? There was some evidence on the part of plaintiff that there was a defect in the safety appliances, by reason of which the fall of the elevator was not checked, and also that prior to the date of the accident a crack appeared in the heel of one of the straps, which indicated a dangerous condition, and which might have been discovered through careful inspection. Each of these grounds of liability was, with the consent of plaintiff, withdrawn from the consideration of the jury, and defendant's liability, if any exists, must arise from negligence in the original installation and subsequent use. It appeared, without substantial dispute, that the mechanism which in this instance proved insufficient was installed in the year 1907, and accepted by defendant in October of that year, pursuant to a contract with the Otis Elevator Company. It was conceded that this was a concern of high reputation in the manufacture, construction, and installation of elevators,

ranking among the foremost in the country. As we have pointed out, the contract called for an elevator capable of carrying a working load much greater than that imposed upon it at the date of the accident, or, so far as the evidence discloses, at any previous time. After the work was completed, and delivered to defendant by the contractors as a compliance with the contract, the elevator was tested by an inspector in the employ of the department of buildings in the borough of Manhattan, who testified that he examined all parts of it, including the "heel-hitch" and supports; that he did not report "anything as being imperfect or wrong and defective with respect to that machinery and mechanism, or the supports or straps, or anything of that kind." On the contrary, he says, "I reported it good." The same inspector examined the same elevator in behalf of the city on March 25, 1909, less than one month before the accident, and then pronounced it "O. K." Defendant also made an agreement with an accident insurance company, having a skilled corps of inspectors, to have this elevator regularly inspected every three months. This was done, and on no occasion was attention called by any of the inspectors, either of the Otis Elevator Company, the city, or the insurance company, to any fault or defect in the condition of the straps in question, either as to their construction, design, size, or strength. In October preceding the accident, in anticipation of the holiday trade, defendant, through one of its employes, communicated with the Otis Elevator Company, and requested it to send the most expert and practical man in its employ to make a general inspection of every part of the cars and machinery of every elevator system, to see if they were in good condition. This was done, and not only was no fault or criticism made upon this elevator, so far as the straps were concerned, but the Otis Elevator Company gave defendant "a clean, clear bill of health on all conditions as to any mechanical trouble with the elevator system." It reported everything "all right." In addition to this, it appeared that the elevator was at all times under the watchful care of competent mechanics employed by defendant, whose duty it was to watch for any defects which might arise from wear and tear. Inasmuch as plaintiff withdrew her contention that there was anything in the appearance of the mechanism prior to the accident which would indicate dangerous defects by reason of use, the sufficiency of their inspection in these respects may not be questioned.

[1] The duty imposed upon owners or occupants of buildings where elevators are furnished for the use of persons lawfully therein is that of reasonable care in the character of the appliances provided, and in the maintenance and operation of the same. *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630; s. c. 74 App. Div. 371, 77 N. Y. Supp. 626; *Grifhahn v. Kreizer*, 62 App. Div. 413, 416, 70 N. Y. Supp. 973, affirmed 171 N. Y. 661, 64 N. E. 1121.

[2] Upon the evidence here presented, defendant invoked the application of the rule that, if the strap broke because of a defect in the original construction thereof (and plaintiff does not contend that there is any other cause therefor shown), so far as such original construction is concerned, it had a right to rely upon the superior skill

and knowledge of the constructors, if they were a firm of high reputation for skill and ability, as is concededly the case here. *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Carlson v. Phoenix Bridge Co.*, 132 N. Y. 273, 30 N. E. 750; *Burke v. Ireland*, 166 N. Y. 305, 59 N. E. 914; *Kahner v. Otis Elevator Co.*, 96 App. Div. 169, 89 N. Y. Supp. 185, affirmed 183 N. Y. 512, 76 N. E. 1097; *Cochran v. Sess*, 168 N. Y. 372, 61 N. E. 639; *Abramovitz v. Tenzer*, 144 App. Div. 172, 128 N. Y. Supp. 951. Conceding the correctness of the general rule, plaintiff contends that the facts in this case bring it within an exception thereto, namely, that there was such a defect in the work of original construction that reasonably prudent men knew, or should have known, that it was of a character which made the elevator and its appliances a menace or danger to human life or safety. *Cochran v. Sess*, supra. We think that the evidence fails to establish this. The defect alleged is that either a strap of the form here employed should not have been used at all, or, if it was, that the weight of the steel should have been heavier, so as to avoid the consequences of possible vibration. But how was the defendant to know this? Its officers and agents were merchants, and not scientific men. They were neither engineers nor mechanics. Its business was of a commercial character only. It does not appear that the only form of strap then in common use was that having the bend described as the O. G. bend. On the contrary, it appears from the testimony of the experts called by plaintiff, either upon her direct case or in rebuttal, that there were several different types of strap in use upon some of the largest and presumably best constructed buildings in the borough of Manhattan, some of which were bent very nearly at right angles and in some of which there was a space between the horizontal part of the strap and a portion of the flange. It does not appear that there was any perceptible vibration in the horizontal part of the strap used at the nose of the flange. So far as there is any evidence on the subject, it is to the contrary. The space between the bent portion of the strap and the nose of the flange, variously stated to be from one-eighth to three-sixteenths of an inch in size, was hardly of a character to attract the attention of an unscientific man, even if he could be expected to know the consequences resulting therefrom.

But it may be urged that the size of the strap is something which any careful, observant man could perceive, and that the evidence is that it should have been of greater weight and thickness. But is the ordinarily prudent man, not scientifically trained, to be chargeable with negligence in failing to know the tensile strength of this band of steel, in the face of testimony by plaintiff's expert to the effect that "there is no man living that can say what strain it would take to break that piece of iron" (referring to a strap of similar construction and manufacture as the one that broke), and in the face of the further testimony that by actual experiment upon six other straps of similar size and construction the breaking load varied from 6,200 pounds to 32,000 pounds. But respondent contends that this defect in construction was so open and obvious that at least it should have been apparent to defendant's employes, its chief engineers, its superintend-

ent of mechanical construction, and the engineer whose duty it was to inspect the mechanical part of these elevators twice in every week, and who did so, and for their failure to discern this defect in construction and to advise its remedy defendant is responsible. The application of such a rule in this case would lead to this result. If defendant had taken no pains to exercise constant supervision over its elevator systems, it could have safely relied, so far as liability for negligence arising out of original construction is concerned, upon the fact that the elevator was constructed and furnished to it by a competent and skilled contractor, without suggestion or interference upon its part. But, having employed mechanics to examine as to depreciation by wear and tear, it must be held liable for insufficient inspection by such employes in respect to original construction, a matter about which they had no concern. But, suppose that these mechanics had advised defendant that the original construction was dangerous, must it at its peril accept their opinion as against that of the skilled engineers of the contractor who had pronounced it safe? If it had called upon still a third engineer for an opinion upon a subject upon which it had no knowledge, and he had advised that the appliance was safe and efficient, could it rely upon this, or must it seek the advice of a fourth or a fifth expert? And, if the experts differ, who is to decide between them? Must defendant, at its peril? But each of these mechanics when called as a witness testified, as did also the inspectors sent in behalf of the city and the insurance company, that he carefully examined the I-beams, straps, and bolts, and that there was nothing in the form or construction thereof which appeared to him to be defective or which was not right and proper. We fail to find any evidence on the part of either plaintiff or defendant that the ordinary layman, or even the skilled mechanic who was not a mechanical engineer, did or could be expected to condemn the form of construction employed, or the size of the strap used as one openly or obviously dangerous.

The learned trial justice submitted this question to the jury:

"Was that [referring to this form of construction] so openly and obviously unfit for the purpose, incapable of supporting the burdens which would ordinarily be imposed upon it, that the owner of the building, the defendant here, should by the exercise of reasonable care ascertain that fact?"

A verdict based upon an affirmative answer to that question is without evidence to support it.

Respondent contends that the case of *Stott v. Churchill*, 15 Misc. Rep. 80, 36 N. Y. Supp. 476, affirmed without opinion, 157 N. Y. 692, 51 N. E. 1094, is a conclusive authority in support of the contention that while the rule that if the elevator and its machinery were built by reputable manufacturers, and the defendant had it regularly inspected by experts in that business and promptly executed the repairs and changes suggested by them, it performed its duty, and is not liable for any injury caused by the breaking of the machinery, may be applicable in the case of a servant against master, it does not apply in the case of a guest of a hotel making use of the elevator service, and that plaintiff occupies a similar relation to defendant. If this case is support for the contention that the highest degree of care,

such as is required of a railroad company with regard to its tracks, cars, and appliances, obtains in such a case as this, as distinguished from the rule of reasonable care, the later case of *Griffen v. Manice*, supra, must be held to control. But in that case (*Stott v. Churchill*, supra) it appeared that the defect which caused the injury, namely, the corrosion of rods in the cylinder heads, "was palpable to any one of common observation and intelligence had the rods been examined at the place where it existed," and therefore in that case it was properly left to the jury under the circumstances to determine the question of prudence and care. Defendant's liability does not turn upon the question whether the jury believed the experts who pronounced the device inadequate, but upon the question whether it was culpably negligent in supplying the same. *Rath v. Transit Development Co.*, 150 App. Div. 750, 135 N. Y. Supp. 229. To hold defendant responsible under the circumstances here disclosed would, in effect, make it liable as an insurer, rather than because of the want of exercise of reasonable care.

The judgment and order should be reversed, and a new trial granted, costs to abide the event.

JENKS, P. J., and WOODWARD, J., concur. HIRSCHBERG and RICH, JJ., dissent.



MACK v. WANAMAKER (two cases).

(Supreme Court, Appellate Division, Second Department. January 10, 1913.)

Appeal from Trial Term, Kings County.

Actions by Margaret Mack and by J. Stewart Mack against John Wanamaker. From a judgment for plaintiff in each case, and from orders denying defendant's motions for a new trial, he appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, THOMAS, and CARR, JJ.

Frank V. Johnson, of New York City (Herrick C. Allen, of New York City, on the brief), for appellant.

Robert H. Roy, of New York City, for respondents.

BURR, J. The main question in the above-entitled actions is the same that has been considered by this court in the case of *Rumetsch v. Wanamaker*, 139 N. Y. Supp. 385, decided herewith. In these cases, as in that, plaintiff sought to establish defendant's negligence, based not only upon faults of original construction in the straps supporting the elevator, but defects in the mechanism arising from the use thereof, which careful inspection should have disclosed. These alleged defects related to the condition of the safety appliances and of the straps themselves. With regard to the latter, plaintiff contended that the appearance of the straps subsequent to the break indicated the previous existence of a very slight crack at the point of

fracture. By consent of plaintiff the failure of the safety devices to work, as a ground of liability, was withdrawn from the consideration of the jury. If there was any competent evidence of a previously existing crack in the straps or either of them, it is of so vague a character, and was so completely overcome by the testimony on the part of the defendant, that a verdict based upon an affirmative finding thereon cannot be permitted to stand.

The conclusion which we have reached upon the main question renders it unnecessary to consider the exception to the admission of opinion evidence, to the effect that the construction of the strap in question was unsafe, or to the refusal of the court to charge as requested by defendant's counsel with respect to the extent to which defendant could rely upon the superior knowledge and skill of the elevator constructors without being chargeable with negligence for so doing.

Judgments and orders reversed and new trial granted, costs to abide the event.

JENKS, P. J., and THOMAS, and CARR, JJ., concur. HIRSCHBERG, J., dissents.

DUTCHER v. WANAMAKER.

(Supreme Court, Appellate Division, Second Department. January 10, 1913.)

Appeal from Trial Term, Kings County.

Action by Rachel Dutcher against John Wanamaker. Judgment for plaintiff, and defendant appeals. Reversed, and new trial granted.

Frank V. Johnson, of New York City, for appellant.

Robert H. Roy, of Brooklyn, for respondent.

PER CURIAM. Judgment and order reversed, and new trial granted, costs to abide the event, upon the authority of *Rumetsch v. Wanamaker*, 139 N. Y. Supp. 385, and *Mack v. Wanamaker*, 139 N. Y. Supp. 391, decided herewith.

JENKS, P. J., and BURR, THOMAS, and CARR, JJ., concur. HIRSCHBERG, J., dissents.

PEOPLE v. DELAWARE & HUDSON CO.

(Supreme Court, Appellate Division, Third Department. December 30, 1912.)

Appeal from Special Term, Albany County.

Action by the People against the Delaware & Hudson Company for an injunction. From a judgment in favor of the plaintiff entered after a trial by the court (75 Misc. Rep. 322, 135 N. Y. Supp. 339), defendant appeals. Modified and affirmed.

Argued before SMITH, P. J., and KELLOGG, HOUGHTON, BETTS, and LYON, JJ.

Lewis E. Carr, of Albany, for appellant.

Thomas Carmody, Atty. Gen. (Wilber W. Chambers, Deputy Atty. Gen., of Albany, of counsel), for the People.

PER CURIAM. Ordered that the judgment be modified to read as follows:

Adjudged that the plaintiffs, the People of the State of New York, have judgment that the defendant, the Delaware & Hudson Company, be and hereby is perpetually restrained and enjoined from continuing to use the trestle erected by it across Island creek, in the county of Albany, from and after the six months hereinafter mentioned, and is perpetually restrained and enjoined from continuing to encroach upon the bed and waters of said creek; and defendant is required and directed to remove the trestle and piles driven into the land under water underneath it within the bulkhead lines as established by chapter 689 of the Laws of 1906 within six months after service upon its attorney of a copy of this judgment with notice of entry. And it is further adjudged that defendant remove and take away, within six months, all the stone, cinders, and other substances with which defendant filled in the land under water of said creek between said bulkhead lines. And it is further adjudged that the plaintiffs recover of the defendant the sum of \$125.91, costs of this action, as taxed by the clerk of this court. And it is further adjudged that the defendant as a condition of being required to remove its said bridge and trestle and the piles supporting it and of restoring Island creek to its former depth and width be permitted when that is done to build a draw, lift, or suspension bridge at the place of the present bridge which will not interfere with the navigation of said creek, and which will afford necessary railroad connection to Rensselaer Island, or, at its election, to build a bridge supported upon piers at practically the place of the old bridge, which shall leave an open clearance over the thread of the stream of not less than 50 feet in width and at least 2 feet greater in height than the present bridge, and that, in case the appellant shall elect to build a bridge other than a drawbridge, the respondents shall have the right at any time, should the reasonable use of the stream for navigation require, to apply to the court for a modification of the decree entered hereon by requiring the defendant, its successors and assigns, to so change the bridge as the public interests may seem to demand. And it is further adjudged that, in the event the defendant is unable to comply with the terms of this judgment within the six months mentioned, it is to have the privilege of applying to the court, upon due notice to the Attorney General, for an extension of such time.

And, as so modified, the judgment is affirmed, with costs to respondents. All concur, except BETTS, J., dissenting in opinion.

BETTS, J. (dissenting). Island creek, in the county of Albany, is a navigable stream, having its source and mouth in the Hudson River. It begins in the southern part of the city of Albany, runs west for a short distance, and then runs south about four miles, nearly parallel to the Hudson, to which it then returns. The case has to do with the northern part of Island creek shortly after it leaves the Hudson. It is or was a navigable stream, being an arm of the Hudson River, and the tide flows and ebbs therein.

Plaintiff brought this action, alleging such facts, and that the defendant had unlawfully erected various encroachments upon the bank and in the bed of this creek upon both the north and west sides, and also upon the east side, which east side is an island created by the flowing of this stream upon three sides of it and the Hudson River upon the east side. It was alleged that such action of the defendant constituted a public nuisance, and purprestures and obstructed navigation in the stream, and the prayer for relief was that the defendant be perpetually restrained and enjoined from continuing to encroach upon this stream, and compelled to forthwith remove these encroachments and obstructions, and to restore the stream to the same condition in which it was prior to the erection of them. The answer was a general denial, except that it admitted that the stream was a navigable one, in which the tide ebbs and flows, and that it had been used from time immemorial by the public for navigation. No affirmative defense was alleged, nor was it alleged that the encroachments and embankments and trestle placed in the stream by the defendant were erected by the authority of the state.

The case came on for trial before the trial court without a jury. The court found in favor of the plaintiff. See opinion, 75 Misc. Rep. 322, 135 N. Y. Supp. 339. Judgment was entered, and from it the defendant appeals to this court.

It appeared upon the trial that originally there was a single railroad track laid along that portion of the west shore of this Island creek in question here by the Albany & Susquehanna Railroad Company. This was about 1871. Subsequently that company leased the railroad property to the defendant. One or both of these railroad companies acquired some real estate on the east of this Island creek on the west shore of the island. A long time ago the defendant or its predecessor erected a trestle work and bridge on piles crossing this stream at an angle of 45 degrees from the mainland to this island. There were some iron industries on the island at that time, and a switch or branch of the railroad was laid across this trestle for the convenience of the railroad in serving these parties. A single track of railroad only was placed upon this bridge. Matters continued this way for some time, when the defendant took down this trestlework, sawing off the piles on which it was erected at about the level of the water as it then was at low tide and leaving the piles then sticking up without pulling them out of the stream, and alongside of it and just a little south placed in another trestle, and constructed a bridge at about the same angle as the first one was constructed, upon which it placed two tracks. It was shown that these piles and this trestle were placed in such a way that it was impossible now, and had been for some time, to get through there with a rowboat at high tide, and difficult to go through at low tide. Prior to the erection of this trestle there had been two boats at least, one by the name of "Maggie" and the other the "E. Corning," which ran on and in this Island creek. The Maggie was from 55 to 60 feet long, and the E. Corning was somewhat similar. They drew about four or five feet of water. Above the place where the contention between the plaintiff and the defendant arises, and at the foot of

Green street, in the city of Albany, was and is a bridge known as the Green Street bridge. These boats would run up and down through this Island creek, down as far as The Abbey, which was a hotel and popular resort upon the west bank, which has been there for a long time, and which is there yet. The people of the vicinity when they chose rode upon the Maggie and E. Corning for pleasure or fishing or for any purpose that they desired. Canal boats were also used in this creek at different times for the purpose of carrying away cabbage and other produce raised upon the island. This stream was used by various small crafts such as rowboats and the like, and the people of the southern section of the city of Albany and that vicinity used the stream for fishing and for pleasure; in fact, the action apparently was commenced on the petition of quite a large number of citizens of that vicinity to the Commissioners of the Land Office asking that the obstructions placed in this stream by the defendant be removed.

In addition to placing these trestles and bridges across this stream, the defendant filled in for 20 or more years stone, sand, cinders, dirt, and other materials upon the bank on both sides from this trestle and a short distance south of it north to nearly or quite to this Green Street bridge, and upon the land so created as fast as created it placed and erected other railroad tracks, so that now the evidence shows that in what was formerly this creek and the bank of the creek the defendant has several railroad tracks in constant use in its business as a railroad company, and that it has acquired no title from the state for the said user. It was shown that many years ago it brought many car loads of large stone, marble, or granite blocks weighing from one to three tons, and dumped them down this bank, and placed other material on top of them; in fact, photographs were submitted on the trial of men wheeling cinders and filling in the creek which it was testified to was done during the progress of the trial by the defendant. The plaintiff brought many witnesses to testify to the fact of the filling in and the encroachment by the defendant upon this stream upon both sides of it, and that as a result of this filling in of the stream it became unnavigable, particularly where this trestle was, and at low tide some witnesses had walked through it unharmed, where before had been many feet of water. It was shown that high water and the tides washed through this stream and cleaned it out, and kept it clear, and that with these obstructions the tide could not so act, as there was very little tide there now, and the stream was gradually shallowing from the defendant's filling it up. Not one word of testimony in denial of these acts of the defendant was introduced on the trial.

The plaintiff produced a copy of the original map that was filed when the Albany & Susquehanna Railroad was built showing the shore line of this creek; also a map showing the amount of filling in of the banks of the stream and obstructing the same that had been done by the defendant on both sides of the stream. This filling had continued for many years, and an immense quantity of material had been thus dumped in this stream. In the meantime the manufacturing plants upon the island had gradually increased. The Standard Oil Company has an immense plant there, as has the Texas Oil Company, and there

are foundries there doing a large amount of business, and employing a large number of men, and having a great amount of business for the railroad company. These parties have no other railroad track which they can use on the island, and there is no way for them to get to this island except by being carried across this creek in some way.

The defendant introduced in evidence chapter 689 of the Laws of 1906, which is entitled "An act to provide for the improvement of the river front in the city of Albany." Section 1 of that act is as follows:

"Section 1. The bulkhead line of the westerly shore of the Hudson River, the Albany Basin and Island creek, in front of the city of Albany is hereby fixed and established according to a map made by the city engineer of the city of Albany, dated May twenty-second, nineteen hundred and three, and on file in the office of the superintendent of public works of the state of New York."

It will be seen that section 2 of this chapter 689, Laws of 1906, *supra*, gives authority to the Commissioners of the Land Office in their discretion to grant, release, and convey by letters patent to the owner of any land and wharfage rights upon the westerly side of the Hudson River and Albany Basin, all the right, title, and interest of the state of New York of, in, and to the land under water in front of or adjacent to the land of such owner to said bulkhead, and gives no such rights to landowners on the westerly shore of the Island creek.

A portion only of this Island creek is in the city of Albany, although the line of the city of Albany and the adjoining town is not shown upon the map submitted, or at least on the maps left with me, and this statute only attempts to fix the bulkhead line in the city. The plaintiff claims no map of the kind referred to in the statute is on file in the office of the superintendent of public works, or has ever been there. The former city engineer of the city of Albany testifies that he took such a map and left it there for filing, but he did not know to whom it was given, or whether it was in fact filed or not, and there is nothing there to show that it was ever filed; no index nor any entry of any kind of any such map there. This defendant claims that it was entitled to fill in to this bulkhead line which was low-water mark; that is, it was entitled to fill in from high-water mark out to low-water mark. The plaintiff claims that this statute gave to the defendant no right to fill in between these points named in any event; that the only right that could be claimed under this act would be for an adjacent landowner to fill out to this bulkhead line a wharf or dock for the purpose of using this stream for the purpose of navigation; that the defendant had no idea whatever of using this stream for the purpose of navigation; that what it was trying to do and the evidence bears it out was to unlawfully appropriate all this land belonging to the state that it could for the purpose of placing its railroad tracks thereon, and adding to the value and capacity of its railroad, and I think this is correct.

The defendant farther argues that, since the railroad was used for a public purpose, the kind of public purpose for which it filled up this stream was immaterial, whether for navigation or for railroad

commerce, but I do not think this contention is sound. The defendant also claims that the state should not be permitted to assert this right to put it off this land because of the laches of the people, but the decisions are uniform that no right can thus be obtained against the state. The judgment entered upon the findings provided that the defendant should within six months after the close of the trial remove and take away all the stones, cinders, and other substances with which it filled in the land under water of the said creek, as shown on the map annexed to the complaint, so that the shore line be restored to its original condition as shown upon the dotted lines on that map, which dotted lines were the original shore lines, and that the creek be restored within said six months to the same condition as it existed before the erection of the said bridge and trestle, the driving of the piles in the land under water and the filling in of the creek, and an injunction was granted perpetually restraining the defendant from continuing to use the trestle from a period six months after service upon its attorney of a copy of this judgment with notice of entry, and then the court further—

"adjudged that the defendant, as a condition of being required to remove its said bridge and trestle and the piles supporting it, and of restoring Island creek to its former depth and width, be permitted, when that is done, to build a draw, lift, or suspension bridge at the place of the present bridge, which will not interfere with the navigation of such creek and which will afford necessary railroad connection to Rensselaer Island. And it is further adjudged that, in the event the defendant is unable to comply with the terms of this judgment within the six months mentioned, it is to have the privilege of applying to the court upon due notice to the Attorney General for an extension of such time."

It would seem that this provision was as fair to the defendant as it could ask or claim from the facts proven in this case. It was deliberately attempting to absorb the lands under the waters of this creek, and it has been restrained by the arm of the law from so doing, and directed to restore that which it removed, and compelled to undo that which it had done, and then, in order to protect its transportation business and to protect the people on the island who had built up their business relying on railroad service, this six months time is given for the erection of this bridge which I think is as much as equity is called upon to do for this defendant.

The defendant also tries to make the point that the extent of the dirt and obstruction which it is required to take out is not sufficiently clearly set forth in the findings and judgment to enable it to act intelligently, and it is fearful that it may be compelled to remove too much dirt. Naturally the defendant knows what it placed in this stream better than any one else can know that which it placed therein. It has been directed to remove all it placed there, and it was not shown that any one else had done any filling in along these shores. If that be the fact here, the defendant could well tell when it came to the original soil, as can any person tell the difference between the natural soil and the filled in soil, so I think that objection is entitled to no weight as against this judgment.

There may be some doubt as to whether a court of equity could grant permission to this defendant to put a bridge of any kind over this navigable stream. The plaintiff, however, has not appealed from that part of the judgment and *Ft. Plain Bridge Co. v. Smith*, 30 N. Y. 44-63, seems to be sufficient authority for that proposition, as the state is not objecting to that provision of the judgment.

Therefore the judgment appealed from should be affirmed, with costs.

POCKRASS v. KAPLAN.

(Supreme Court, Appellate Division, Second Department. January 17, 1913.)

1. MASTER AND SERVANT (§ 121*)—INJURIES TO SERVANT—DANGEROUS MACHINERY—GUARDS—DUTY TO REPLACE.

Where a statutory guard had been removed from a circular saw by an employé because its presence was impracticable for a particular kind of work, the master was under an absolute duty to promptly replace the guard on the finishing of the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.*]

2. MASTER AND SERVANT (§ 126*)—INJURIES TO SERVANT—DANGEROUS MACHINERY—GUARDS.

Where a statutory guard over a circular saw had been removed by a servant without the direction or knowledge of the superintendent or foreman, the master was entitled to a reasonable time in which to discover the absence of the guard by inspection, and cause it to be replaced, before he would be liable for injuries resulting from its absence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 253; Dec. Dig. § 126.*]

3. MASTER AND SERVANT (§ 125*)—INJURIES TO SERVANT—DANGEROUS APPLIANCES—GUARDS—DUTY TO REPLACE—TIME—INSTRUCTIONS.

Plaintiff received injuries from which he died by being struck by a piece of lumber thrown from a circular saw from which a statutory guard had been removed by a coemployé without the knowledge of defendant's superintendent or foreman about one-half hour before the accident. *Held*, that defendant was entitled to an instruction that the absence of the guard for one-half hour was not an absence for such length of time as would necessarily charge defendant with notice that the guard was not being used on the machine, so as to charge defendant with liability for failure to cause the guard to be replaced within a reasonable time.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.*]

Appeal from Trial Term, Kings County.

Action by Annie Pockrass against Louis Kaplan. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

E. Clyde Sherwood, of New York City (Joseph F. Murray, of New York City, on the brief), for appellant.

Thomas J. O'Neill, of New York City (L. F. Fish, of New York City, on the brief), for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CARR, J. The plaintiff has recovered a judgment against the defendant for damages resulting from the death of her decedent, through the alleged negligence of the defendant, and from this judgment the defendant appeals.

There is but little dispute as to the main facts of the case, and the arguments on this appeal by the appellant are confined principally to questions of law. On March 24, 1910, the decedent, Jacob Pockrass, was at work in the employment of the defendant in a cabinet-making shop in the borough of Brooklyn. While so at work, he was located some 18 or 20 feet away from a bench on which was being operated a circular saw that protruded for several inches above the level of the bench. This saw was operated by steam, and its speed was about 2,200 revolutions a minute. Another employé of the defendant, one Padone, was engaged at the saw bench, ripping a plank into narrow strips. While so engaged, Padone lifted up one of the strips which had been ripped from the plank, in order to place it on a pile of strips near by. This particular strip fell from his hand, and struck the top of the revolving saw. The speed of the revolution of the saw caused it to be hurled in the air with great force, and to come in contact with body of Pockrass, causing him such a severe injury that he was thrown from his feet, and died in a few minutes thereafter.

The plaintiff claimed that the defendant was negligent in two particulars, either or both of which caused the injury to the decedent. One of these claims was to the effect that Padone was a physically incompetent servant, and that the defendant had notice of such incompetence, and was thereby guilty of negligence in continuing him in his employment. The other claim was that the circular saw in question was not properly guarded within the requirements of section 81 of the Labor Law, and that through the failure to so guard said saw the strip of wood in question was permitted to come in contact with its top as it revolved, and thus to receive such force of propulsion as to cause the injury and death of Pockrass. There is no question in the case that at the time of the accident there was no guard on or about the revolving circular saw, and that the narrow strip of wood did fall from the hand of Padone and come in contact with the saw, and was thus hurled through the air so violently as to strike Pockrass, who, as before stated, stood a considerable distance away from the saw table.

The case was submitted to the jury on the theory that, if it found that Padone was physically incompetent for the work in question to the knowledge actual or imputable of the defendant, and such incompetency caused the accident in question, then a verdict might be rendered in favor of the plaintiff. It was likewise charged that if the circular saw was at the time of the accident unguarded, and that by reason of the lack of such guard the accident in question was caused wholly or partly, then a verdict might be rendered against the defendant, if the proofs disclosed a lack of reasonable care on the part of the defendant in permitting the saw to be used without a guard. It appeared from the proofs that the defendant had furnished a guard for use on this circular saw, which, if it had been employed at the time

of the accident, would have been sufficient to prevent the falling strip of wood from coming in contact with the top of the saw, but which had been removed from the saw about one-half an hour before the accident by one Andersen, a fellow workman, and which had not been replaced by Andersen after he got through the performance of the special work that he was then engaged in, and which had been permitted to lay by by Padone without being replaced, while he undertook to use the saw. The use of the guard would in no way interfere with such use of the saw as Padone was making. The space of time during which the guard was left off the machinery prior to the accident was described by the witnesses as being about a half hour.

Section 81 of the Labor Law (Consol. Laws 1909, c. 31) provides in part as follows:

"All vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws and machinery, of every description, shall be properly guarded. No person shall remove or make ineffective any safeguard around or attached to machinery, vats or pans, while the same are in use, unless for the purpose of immediately making repairs thereto, and all such safeguards so removed shall be promptly replaced."

The respondent now contends that the duty of the defendant under this provision of the statute was an absolute one, and called upon him to keep the machine in question guarded at his peril during every moment of its use. This, however, was not the theory upon which the trial court submitted the case to the jury, as appears from the following request to charge and its acceptance by the trial court:

"Defendant's Counsel: I ask your honor further to charge that if the defendant furnished a suitable guard, and used reasonable care in seeing to it that that guard was used upon the machine for which it was furnished, that the temporary absence of the guard, removed by a fellow servant, cannot be chargeable to this defendant.

"The Court: I so charge."

To this statement of law the respondent's counsel took no exception. The record shows a further request to charge and a ruling of the trial court thereon as follows:

"Defendant's Counsel: I ask your honor further to charge that the absence of the guard for a half an hour or thereabouts from the machine is not such a length of time as would necessarily place the defendant upon notice that the guard was not being used upon the machine.

"The Court: I decline to so express myself."

The refusal of the court to charge this request is claimed to have been reversible error.

[1, 2] The proofs show that Andersen had removed the guard, not for the purpose of making repairs of any kind, but to use the saw for a kind of work in which the presence of the guard was impracticable, according to his claim. When he finished this work, he negligently failed to replace the guard. Although Padone was his helper, he gave him no directions to replace the guard, which stood near by ready for use. The duty of replacing the guard "promptly" was imposed upon the master by the statute and was not delegable (*Pinsdorf v. Kellogg & Co.*, 108 App. Div. 209, 95 N. Y. Supp. 617), but, where the guard had been removed without his direction or knowledge, then

he was entitled to a reasonable time in which either he or his superintendent or foreman by the exercise of ordinary care in inspection could have discovered its absence and caused it to be replaced.

[3] What should be a reasonable time would depend upon the surrounding circumstances. There is no proof in this case that the master or his superintendent, one Stefano, had actual knowledge that the guard was not in use when Padone was at work at the sawing bench. Hence the charge of the court should have instructed the jury clearly as to the circumstances under which notice was imputable to the master. The defendant requested an instruction to the jury to the effect that the lapse of a half hour would not in itself necessarily charge the master with notice. This request was proper. It was not obligatory upon the trial court to adopt the very language of the request. Yet the request was refused by the trial court without any attempt to convey the same idea in other or better terms, and its refusal might well have been understood by the jury as a rejection by the trial court of the fundamental proposition contained in the request itself. If the main charge had been sufficiently explicit on this point, this court might be slow to see error in the refusal to charge as requested. But, considering the main charge together with this request to charge and its refusal, we think that prejudicial error resulted.

In view of our conclusion on this point, we deem it unnecessary to discuss the other points raised by the appellant.

The judgment and order should be reversed, and a new trial granted, costs to abide the event. All concur.

LUMB v. LUMB et al.

(Supreme Court, Appellate Division, Second Department. January 17, 1913.)

Appeal from Special Term, Dutchess County.

Action by Charles L. Lumb against George J. Lumb and others. From an interlocutory judgment on a decision overruling a demurrer to the amended complaint, defendants, other than the defendant executor, who was also plaintiff, and his wife, Minnie E. Lumb, appeal. Affirmed.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, WOODWARD, and RICH, JJ.

William L. Gellert, of Poughkeepsie, for appellants.

Morschauser & Mack, of Poughkeepsie, for respondent.

PER CURIAM. Interlocutory judgment affirmed, with costs.

BURR, J. I dissent. Whether plaintiff has actually stated two causes of action or not, he has attempted to do so, and that is enough to make the complaint demurrable if such causes of action may not be united. *Todaro v. Somerville Realty Co.*, 138 App. Div. 1, 122 N. Y. Supp. 509. Neither does the fact that in form the complaint does not separately state two causes of action control, if it does so in substance. *O'Connor v. Virginia Passenger & Power Co.*, 184 N. Y.

46, 76 N. E. 1082; *Goldberg v. Utley*, 60 N. Y. 427; *Todaro v. Somerville Realty Co.*, *supra*. As to parcels numbered 1 to 14, inclusive, plaintiff clearly attempts to state a cause of action for partition among tenants in common. This is not the case as to parcels numbered 15 to 21, inclusive. On the contrary, according to the allegations of the complaint, this property belonged to a partnership between plaintiff and one George W. Lumb, although the title was taken in the name of the latter only, and not only the complaint fails to state the rights, shares, and interests therein of defendants (Code of Civil Procedure, § 1542), but alleges that they have no interest in these parcels as real property, and the relief prayed for is that it be adjudged that these parcels of land belonged to plaintiff as surviving partner of said firm, and that the same shall be sold to pay partnership debts, and that the residue of the proceeds of sale be held subject to a partnership accounting between plaintiff and the representatives of the deceased partner, and that the balance of such proceeds, if any, after such accounting, shall be paid to the parties entitled thereto. These causes of action may not be united, because they do not arise under either one of the 12 subdivisions of section 484 of the Code of Civil Procedure. There is no suggestion that it can be included in any of these subdivisions unless it be subdivision 9, which relates to "claims arising out of the same transaction, or transactions connected with the same subject of action." But the claim of plaintiff here as to parcels 1 to 14, inclusive, arises out of the absolute ownership of said land by George W. Lumb in his lifetime, his death, and the devise thereof to plaintiff and the defendants George J. Lumb, Jessie B. Lumb, and Maud D. Lumb, in his will. The claim of plaintiff to parcels 15 to 21, inclusive, is based upon an allegation that these lands never did belong to George W. Lumb absolutely, but was impressed with a trust in favor of the creditors of the firm of which he was a member, and in favor of plaintiff as surviving partner thereof, and plaintiff claims his interest in this land not as a devisee of an undivided part thereof through the will of the said George W. Lumb, but as the owner of the legal title thereto under a contract made by plaintiff and said deceased in the lifetime of the latter.

JENKS, P. J., concurs.

WISTINETZ v. GOLDMAN et al.

(Supreme Court, Appellate Division, Second Department. January 17, 1913.)

1. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ASSUMED RISK.

Where plaintiff had been in defendants' employ for some years before the accident, during which he operated a machine for cutting lumber, and continued to operate it without protest or objection after a stopping device had been removed therefrom, because it interfered with the speed of the work, he assumed the risk of injury because of the absence of the device.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MASTER AND SERVANT (§ 163*)—INJURIES TO SERVANT—PROMISE TO PROVIDE ASSISTANCE.

Defendants were not liable for failure to provide plaintiff with a helper to do certain work, in accordance with the promise of their foreman, until a reasonable time had elapsed within which the foreman could give the necessary directions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 328-330; Dec. Dig. § 163.*]

3. MASTER AND SERVANT (§§ 101, 102, 163*)—INJURIES TO SERVANT—MASTER'S DUTY.

A master is bound to furnish his servant a safe place in which to work and reasonably safe tools to work with, and a sufficient number of efficient fellow servants to perform the work required.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 172, 180-184, 192, 328-330; Dec. Dig. §§ 101, 102, 163.*]

4. MASTER AND SERVANT (§ 190*)—INJURIES TO SERVANT—DESIGNATION OF HELPER—NEGLIGENCE OF FELLOW SERVANT.

Plaintiff, having been directed to run certain cypress boards 12 feet long through a machine, told his foreman that it was impossible to handle boards of that length without a helper, and the foreman promised to send a helper to assist plaintiff. *Held*, that the designation of a helper was a mere detail of the work, and that the foreman's negligence in failing to provide a helper was the negligence of plaintiff's fellow servant, for which defendants were not liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. §§ 190.*]

Hirschberg and Burr dissenting.

Appeal from Trial Term, Kings County.

Action by Wolf Wistinetz against Jacob Goldman and another. From a judgment for plaintiff, defendants appeal. Reversed, and new trial granted.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, WOODWARD, and RICH, JJ.

Edward M. Grout, of New York City (Charles B. La Voe, of New York City, on the brief), for appellants.

Henry M. Dater, of Brooklyn (Jay S. Jones and Louis Pleshet, both of Brooklyn, on the brief), for respondent.

RICH, J. This action is brought by the plaintiff, an employé, against the employer to recover on the common law for personal injuries. This appeal is from a judgment in favor of the plaintiff, and from an order denying defendants' motion for a new trial.

[1] The plaintiff had been in defendants' employ some years before the accident, and during the time of his employment had operated a machine used for cutting lumber. At one time the machine was equipped with a stopping device by which the motion of the chain to which the cutting knives were attached could be suspended, and it was the practice to suspend the operation of the knives while the lumber was being clamped to the table preparatory to cutting. This device had been removed by defendant some time before the accident, because it interfered with the rapidity with which the work could be accomplished. The plaintiff, without protest or objection, continued to operate the machine, and in doing this he assumed the risk of injury.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

From the time the plaintiff commenced operating this machine to the morning of the accident, the lumber he was engaged in cutting was cypress boards not exceeding four or five feet in length, which he was able to handle without assistance and without danger. On the morning of the accident, and just prior to its happening, plaintiff called the attention of the foreman in charge to the fact that the lumber to be worked that day was 12 feet long, and told him that because of its length it was impossible for him to handle it alone, to which plaintiff says the foreman replied, "You go ahead, I will send you another man here." A witness called by plaintiff testified that the foreman said, in reply to the request, "Told me to wait awhile. 'I will send you one.' " On his cross-examination this witness testified that it was said, "I will give you a man right away; work along." The plaintiff seems to have proceeded with the work without waiting for a helper, and while engaged in planing one of these long boards it turned over, drawing plaintiff's hand into contact with the knives, and inflicting the injury for which he has recovered.

The negligence upon which plaintiff relies is the failure of the foreman to furnish him with a helper as promised. The time is not definitely given, but the accident occurred within an hour after the alleged promise was made. It does not appear whether sufficient time had elapsed after the promise and before the accident to have enabled the foreman to provide the services of a helper. It is not shown that any appreciable time elapsed after the request to the foreman and before the accident.

[2] No liability was created by the failure to provide a helper until a reasonable time had elapsed within which the foreman could give the necessary direction.

[3] The defendants' duty to the plaintiff was to furnish him a safe place in which to work, reasonably safe tools to work with, and a sufficient number of efficient fellow workmen to safely perform the work required of him. The questions of a safe place and the efficiency of plaintiff's coemployés are not in this case.

[4] It is contended on the part of appellants that there was a sufficient number of coemployés in the factory at the time to have assisted the plaintiff, and that the failure of the superintendent to assign one to this duty was negligence of a fellow workman in the performance of a detail of the work. It is pointed out, however, by respondent that there is no evidence of the presence and availability of other employés except such as may be implied from the promise of the foreman. The burden of showing an omission of duty in this respect, if there was any, was upon the plaintiff, and, in the absence of evidence to the contrary, the presumption is that competent and sufficient servants were employed. *Potter v. N. Y. C. & H. R. R. Co.*, 136 N. Y. 77-81, 32 N. E. 603. Plaintiff was capable of doing the work without the aid of a helper so long as the boards were of the length that he had handled before the accident. It was only when the length of the boards was increased that the use of the machine by one person without an assistant became dangerous. That was a detail of the work for which the foreman was solely responsible. *Dair v. N. Y. & P. R. Steamship Co.*, 204 N. Y. 341, 350, 97 N. E. 711; *Cullen v.*

Norton, 126 N. Y. 1, 26 N. E. 905; Loughlin v. State of New York, 105 N. Y. 159, 11 N. E. 371; Besel v. N. Y. C. & H. R. R. Co., 70 N. Y. 171; Madigan v. Oceanic Steam Nav. Co., 178 N. Y. 242, 70 N. E. 785, 102 Am. St. Rep. 495; Vogel v. American Bridge Co., 180 N. Y. 373, 73 N. E. 1, 70 L. R. A. 725.

It seems from the evidence that, if there was negligence in the failure to provide an assistant, it was that of a fellow servant with regard to a detail of the work, and it follows that the judgment must be reversed on the law and facts.

Judgment and order reversed and a new trial granted, costs to abide the event.

JENKS, P. J., and WOODWARD, J., concur. HIRSCHBERG and BURR, JJ., dissent.

MALCOMSON v. MONATON REALTY INVESTING CORPORATION.

(Supreme Court, Appellate Division, Second Department. January 17, 1913.)

1. CORPORATIONS (§ 82*)—SALE OF STOCK—REPURCHASE—EVIDENCE—SUFFICIENCY.

In an action against a corporation to recover the purchase price of corporate stock under its agreement for repurchase, evidence *held* sufficient to sustain the verdict on the theory of the corporation's ratification of the agreement and acceptance of benefits.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 285-295; Dec. Dig. § 82.*]

2. APPEAL AND ERROR (§ 1050*)—RECEPTION OF EVIDENCE—OBJECTIONS.

A party cannot complain of the reception of evidence over his objection, where similar evidence is later admitted without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

3. TRIAL (§ 76*)—RECEPTION OF EVIDENCE—OBJECTIONS.

An objection to testimony sought to be elicited by a question on the ground that it calls for a conclusion should be made before answer.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 183-190, 237; Dec. Dig. § 76.*]

4. APPEAL AND ERROR (§ 179*)—OBJECTIONS TO EVIDENCE—INSTRUCTIONS.

Where a party did not request an instruction directing the jury to disregard certain testimony, the improper refusal of the court to strike it is not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1137-1140; Dec. Dig. § 179.*]

5. EVIDENCE (§ 314*)—HEARSAY—ADMISSIBILITY.

Where a corporation sold its stock with the agreement that, if the purchaser's brother deemed the investment unwise after a careful analysis of the corporation, it would repurchase the stock, evidence in an action upon the guaranty as to hearsay statements made to the brother concerning the value of the stock is admissible, as furnishing a basis for his rejection of the investment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1168-1173; Dec. Dig. § 314.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, Nassau County.

Action by A. Sidney Malcomson against the Monaton Realty Investing Corporation. From a judgment for plaintiff, and an order denying defendant's motion for new trial, defendant appeals. Affirmed.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, WOODWARD, and RICH, JJ.

Harry E. Shirk, of Brooklyn, for appellant.

Henry L. Maxson, of Hempstead, for respondent.

HIRSCHBERG, J. The action is on contract to recover the purchase price paid for certain stock of the defendant's under the terms of a guaranty agreement between the purchaser, plaintiff's assignor, and the defendant acting through its agent.

On July 3, 1911, Mabel A. Maxson, plaintiff's assignor, a young unmarried woman residing with her widowed mother and supporting herself by teaching music, was induced by C. McKay Smock to purchase seven shares of the defendant's preferred stock for \$1,050. Smock gave Miss Maxson a receipt written on defendant's stationery, and signed by him, "C. McKay Smock, Agent at N. Y. City." Before agreeing to purchase the stock, Miss Maxson obtained a guaranty, written by Smock on the reverse side of the receipt, and reading as follows:

"July 3, 1911. I hereby guarantee to resell the seven shares (7 shares) of Monaton Realty Investing Corporation preferred stock, and repay to Mrs. Amanda T. Maxson or her daughter, Mabel Maxson, the sum of ten hundred and fifty dollars (\$1050.00) on or after the fifteenth day of August, 1911, on demand, after thirty days' notice, provided Henry L. Maxson deems the investment to be unwise, after a careful and complete analysis of the operation, and general character of the business of the Monaton Realty Investing Corporation.
C. McKay Smock."

[1] Miss Maxson paid for the stock by two checks, one for \$1,000 payable to her order, which she indorsed in blank and delivered to Smock, and one for \$50 payable to the order of her mother, which was indorsed in blank by the mother and delivered to Smock. The check for \$1,000 was subsequently indorsed in these words, "Pay to Bryant Park Bank, New York, or order, Monaton Realty Investing Corporation, George Reichard, Treas.," and, so indorsed, it was deposited to the credit of the defendant corporation. The check for \$50 was subsequently indorsed by Charles E. Nash, the head of defendant's department for the sale of its bonds, and deposited by Nash to his credit. During the times in question Smock was employed under Nash. On July 6, 1911, Henry L. Maxson, the brother of Miss Maxson and the individual mentioned in the guaranty, wrote a letter to the defendant corporation, informing it of the guaranty, and asking for information regarding the defendant's financial condition, stating that he desired such information in order to facilitate the investigation he must make pursuant to the guaranty. On the 7th of that month Smock wrote Maxson a letter, stating that Maxson's communication had been referred to him for attention. A letter dated July 7, 1911,

addressed to Miss Maxson and signed on behalf of the defendant by its auditor, was admitted in evidence on the trial. It stated, in substance, that the defendant took pleasure in issuing its preferred stock certificate to her pursuant to her application received through Mr. C. M. Smock. There is some conflict in the evidence as to whether this letter was actually sent before its date, but the jury would have been warranted in finding that it had been mailed subsequently to the receipt of Henry L. Maxson's letter of the 6th, as the envelope in which it was mailed bears the post office time stamp of July 7, 1911, at 7 p. m., and Maxson's letter, in the usual course, should have been delivered to the defendant not later than the morning of the 7th. About the 13th of July Maxson notified the defendant that he deemed his sister's investment an unwise one, and made a demand on her behalf for the return of the purchase price of the stock, which demand the defendant refused. This action was then instituted by the plaintiff as Miss Maxson's assignee to recover the purchase money, and the stock certificate has been duly deposited with the clerk of the court for delivery to the defendant.

On the trial the defendant contended that Smock was not its agent for the sale of the stock, and that it owned no stock for sale, but that the stock in question belonged to Nash, who had sold it through Smock as his agent. The learned trial court ruled that there was not sufficient evidence in the case to establish that Smock was the defendant's agent for the sale of the stock, but submitted the case to the jury to determine if the defendant, with knowledge of Smock's action, was bound by his guaranty by ratification of the same, and by having received the benefits of the transaction. The jury found for the plaintiff, and from the judgment entered on that verdict awarding the plaintiff the purchase price of the stock, and from the order denying the defendant's motion for a new trial, this appeal has been taken.

While the issue so submitted is a narrow one, and the evidence bearing thereon meager, I think there is sufficient in the record to sustain the verdict. The defendant's witnesses testified that the defendant merely accommodated Nash by cashing the thousand dollar check for him. The jury, however, was warranted in disbelieving this in view of the fact that the check was deposited to the credit of the defendant without requiring Nash to identify himself with the transaction by indorsing it, and the fact that Nash had a bank account of his own in which he seems to have deposited the check for \$50. The transfer of the stock by the defendant, with apparent knowledge of the guaranty made by Smock, and the retention by it of the thousand dollars, are sufficient, if true, as the jury was warranted in believing, to constitute a ratification on the part of the defendant of the guaranty made by Smock in selling the stock.

[2] The appellant urges that the learned trial court committed reversible error in permitting the witness, Henry L. Maxson, called on behalf of the respondent, to testify that he found the value of the stock in question to be \$75 a share, or one-half the price paid by his sister. I do not think that the objection to this testimony was properly raised

below. The record shows the following from the testimony of the witness Henry L. Maxson:

"I know the value of the seven shares of stock. Have ascertained the same by advertising in the Brooklyn Eagle and by communications with brokers dealing in stocks.

"Mr. Shirk: I object to this, if the court pleases, on the ground that it is not binding on this defendant.

"The Court: Aren't you relying on the tender?

"Mr. Maxson: Yes. I want to show this is one of the reasons why I deemed it unwise, the value, that is all.

"Mr. Shirk: On the further ground it is not competent and admissible. The witness has failed to qualify as an expert as to stock.

"The Court: Proceed.

"Mr. Shirk: Exception.

"By Mr. Maxson: Q. What did you find that value to be? A. I found that value to be not exceeding \$75 per share.

"By the Court: Q. You say your value is \$75 a share. A. Yes.

"Q. He is not bound to take your conclusion. A. Not at all.

"Q. How did you find it out? A. By my communication with brokers; brokers whom I know dealt in active stocks.

"Q. Did you have any offer for it? A. No; I never received any offers for it.

"Q. Did you offer it at any price? A. No. I didn't offer it except to the company or Mr. Smock; that was all. I wrote to ascertain the value. That is, I stated the purchase price of the stock, and offered to sell for less than a certain amount, and then I received from them the letters which I have here.

"Mr. Shirk: I move to strike out the answer as calling for a conclusion.

"The Court: I will let it stand.

"Mr. Shirk: Exception."

Thus it appears that the appellant's first objection was not made to any specific question, but that, after the witness stated that he had ascertained the value of the stock by communicating with certain brokers and advertising in the Brooklyn Eagle, the appellant's counsel objected to such testimony, and excepted to the court's direction to proceed without striking the same from the record. Thereafter the witness was asked what he found the value of the stock to be, and was allowed to answer without objection or exception.

[3, 4] Finally, the appellant's counsel moved to strike the answer to the last question from the record, as calling for the witness' conclusion, and excepted to the court's refusal to sustain the motion. The appellant's objection should have been made after the question regarding the value of the stock was put and before the answer was given (see *Mollineaux v. Clapp*, 99 App. Div. 543, 90 N. Y. Supp. 880, and *Smith v. Nassau Electric R. R. Co.*, 57 App. Div. 152, 67 N. Y. Supp. 1044), and a reversal is not necessitated because of the refusal to strike the testimony from the record, as the appellant should have requested the court to instruct the jury to disregard the answers. *Smith v. Nassau Electric R. R. Co.*, supra.

[5] In any event, I do not deem the evidence inadmissible. Of course, the statements made to the witness by others were not competent evidence of value, nor does the witness appear to have qualified as an expert on that subject. According to the guaranty, however, the witness was only authorized to reject the investment if he deemed it unwise "after a careful and complete analysis of the operation, and

general character of the business" of the defendant. Manifestly he could not under that agreement reject the investment upon his mere whim or wish. His rejection must be based on a careful investigation made in good faith (see *Smith v. Robson*, 148 N. Y. 252, 42 N. E. 677); and it was therefore necessary for the plaintiff to establish that such investigation had been made. In order to do so, it was competent to show that the witness had written to the defendant for information, and had investigated the value of the stock in the market. The purpose of the evidence regarding value, as thus limited, was carefully explained to the jury by the learned trial court, and no exception was taken by the appellant.

The judgment and order appealed from should be affirmed, with costs. All concur.

SHANAHAN v. FELTMAN.

(Supreme Court, Appellate Division, Second Department, January 17, 1913.)

NEW TRIAL (§ 106*)—NEWLY DISCOVERED EVIDENCE.

Defendant should be granted a new trial, plaintiff's only witness, beside himself, having after the trial made affidavit that he did not see the accident, as he testified, though he afterwards made one that he did.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 224; Dec. Dig. § 106.*]

Woodward, J., dissenting.

Appeal from Special Term, Kings County.

Action by John J. Shanahan against Charles L. Feltman. From an order denying his motion for a new trial, defendant appeals. Reversed, and motion granted.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

Bertrand L. Pettigrew, of New York City (Joseph M. Gazzam and W. Lester Glenney, both of New York City, on the brief), for appellant.

I. R. Oeland, of Brooklyn, for respondent.

JENKS, P. J. The defendant appeals from an order that denies his motion made at Special Term for a new trial at Trial Term upon the ground of newly discovered evidence. The action is for negligence.

About midnight of April 25, 1910, the plaintiff, in attempting to cross a public street of the borough of Brooklyn, came to collision with the motor car of the defendant, and suffered personal injuries. He testified that he was run down by the car, which neither gave signal nor showed light. A man named Tunley, who was present some time near the scene of the accident, was called as a witness for the plaintiff. Tunley testified that he saw the car before the collision, coming fast; that it did not slacken speed; that he did not hear any horn blown; that he did not see any lights upon it; that the car struck the plaintiff; that it thereafter was stopped; and that he then ran to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the car and assisted in taking the plaintiff from the front of the car to which he had clung. The defendant and two companions in the car at the time of the accident were witnesses for the defense, together with the chauffeur. The testimony for the defendant is that the car was going at very moderate speed, as the pavement was wet; that the horn was blown about 100 feet from the crossing; that the car was lit; and that the collision was inevitable because of the sudden movements of the plaintiff.

Thus it appears that the question of negligence, in so far as it hung upon speed, signals, and light, was sharply contested. When I state that the first trial resulted in a disagreement of the jury and that, aside from the plaintiff, there was no witness called by him other than Tunley, who testified to the events prior to the collision or the circumstances of it, it is apparent that Tunley was a very material witness. And he was presented to the jury as a stranger to both parties and as a disinterested witness. Prior to the trials Tunley was seen by representatives of the plaintiff and made affidavit that he saw the plaintiff step from the sidewalk to attempt a crossing; that prior thereto he saw a car coming very fast; that it struck the plaintiff; that the wheels skidded; that no horn was blown; that he saw no lights that he could remember; that, after the car was stopped, he inquired of the chauffeur why the horn was not blown; and that the chauffeur was silent, and that he helped to put the plaintiff in the car. The second trial, had in April, 1912, resulted in a verdict for \$13,000.

Shortly after that trial an alleged private detective approached the defendant, told him that he knew Tunley, that he had reason to believe that his testimony was false, and offered, if the defendant would employ him, to procure evidence of this falsity. The defendant employed this man, who thereupon, with two associates, proceeded in that employment. They gained or had gained the confidence of Tunley, who represented to them that the plaintiff had promised him \$500 for favorable testimony, but had paid to him only \$40. They induced Tunley to write a letter, addressed to one of their number, to the effect that, although the plaintiff had made this promise to him, he had received but \$40 on account of his testimony, "which won the case, as Mr. Shanahan very well knows," that \$400 was due, and in that letter he authorized the addressee to collect this balance, and to deduct \$50 therefrom for collection. And "to facilitate collection," Tunley was induced to make an affidavit, said to be in his own handwriting, that, although he was present at the scene of the accident, he "did not see how the accident happened, but * * * first saw Mr. Shanahan after the automobile had stopped," and he "helped him off the fender"; that he had afterwards informed Mr. Shanahan that he had only seen that part of the accident after Mr. Shanahan had been struck; that Mr. Shanahan had said that, if Tunley would testify in his favor, he would make "it worth my (Tunley's) while," and had thereafter introduced him to a friend who promised him \$500 for favorable testimony in the case. This letter and this affidavit were not presented to the plaintiff, but were turned over to the defendant

or to his attorneys. The tergiversations of Tunley were not ended, for the plaintiff upon the motion presented an affidavit from Mr. Bolen, a reputable affiant, that he, together with a companion likewise reputable, went to see Tunley in jail, who in conversation with that companion and in the affiant's hearing admitted that he had made the affidavit for the detectives in order to collect the \$450 from the plaintiff, that he had no idea that it would be "sold" to the defendant, and that it was left practically blank so that the detectives might write in whatever they wished. And Tunley then reiterated that he had seen the accident, as he had testified at the trials of this case. And thereupon Tunley put these statements into the form of an affidavit. The companion of the said affiant, Mr. Bolen, makes his affidavit in corroboration.

The record is very voluminous. The affidavits are numerous. I have not attempted to marshal or to summarize all of them. But, stripped of all the surrounding circumstances, does not the witness out of his own mouth reveal himself? It may be quite true that he did not willingly make these self-contradictions under oath with the thought that the record thereof would confront him. But aside from whatever practices, not commendable and subject to scrutiny and suspicion, may have been used to hoodwink him, he stands forsworn. And it must be remembered these charges do not merely attack his character for truth and veracity, but trench upon the truth of his testimony upon the issues of this case. I believe that Mr. Shanahan, the plaintiff, was not a party to any conspiracy to have Tunley testify falsely, and did not promise, directly or indirectly, Tunley money or other consideration for his testimony. I think that he had no reason to believe that Tunley lied, if he did lie, when he testified that he was a witness of the accident. And I think that the plaintiff is not subject to any criticism for his relations with Tunley. There are many affidavits as to his excellent character. If Tunley did not witness the accident, it is plaintiff's misfortune that he has no witness thereof save himself. If Tunley did witness the accident, and tells the truth, it is plaintiff's misfortune that Tunley at times has recanted. But the crucial question in this case is whether this verdict should stand when the sole witness to the accident beside the plaintiff, called by the plaintiff, reveals himself as a juggler with the truth, and veers from one party to the other as he may market his evidence. Tunley undoubtedly was at the scene, but the questions in doubt are whether he came upon the scene after the accident or was an eyewitness to the accident, and, if he was the latter, whether his version of the accident is true. It seems clear enough that he sought to profit from the fact that he was on the scene, and that he realized that his testimony, as an apparently disinterested spectator, was urgent for the plaintiff. If he lied, he may have thought that none could detect him. If he told the truth, he may have thought that he nevertheless put the plaintiff under an obligation. And I do not doubt that Tunley, recognizing his importance, sought to solicit money from the plaintiff as a gratuity, as an enforced loan, and as blackmail under the threat of recantation. He gives his word the stability of a weathercock.

When I advise that there should be a new trial, I do not mean that it should be implied that I think that the plaintiff has not cause of action, and should not prevail. If my advice be taken by my Associates, the plaintiff is not deprived of his ultimate right if he possess it. He may prevail without Tunley, or despite him. The jury may decide, if Tunley reiterates his evidence, that he tells the truth. But whether the truth is in him can be best determined by a jury that can see him and can hear both him and his accusers, and sift out facts from this mass of self-contradictions.

In *Barrett v. Third Avenue R. Co.*, 45 N. Y. 628-632, the court say:

"Motions to set aside verdicts as contrary to evidence, as well as motions for a new trial upon the ground of newly discovered evidence, are not governed by any well-defined rules, but depend in a great degree upon the peculiar circumstances of each case. They are addressed to the sound discretion of the court, and whether they should be granted or refused involves the inquiry whether substantial justice has been done, the court having in view solely the attainment of that end."

In *Hammond v. Delaware, Lackawanna & W. R. R. Co.*, 140 App. Div. 810, 126 N. Y. Supp. 141, the court, per Smith, P. J., say:

"The evidence was to the effect that it was a very few minutes, except the evidence of this man Scott, and Scott himself had theretofore made an affidavit contradicting the evidence then given upon the trial. Inasmuch, therefore, as the plaintiff's case rested mainly upon this evidence, and the witness has retracted what he then swore to and shown himself wholly unworthy of belief, it became proper in the exercise of fair judicial discretion to grant a new trial."

In *Bennett v. Riley*, 82 App. Div. 639, 81 N. Y. Supp. 882, this court said:

"It is not easy to bring home the conspiracy or the perjury by the perusal of affidavits. The court should not be required to do this if there is another tribunal which can decide those questions after seeing and hearing the accused and their accusers face to face under the scrutiny of oral examination. It is no evasion of responsibility, but the desire to further justice, that impels us to send virtually these questions to a jury. * * * Out of such trial should come the truth. At least, there is no human tribunal so well adapted to elicit it. If our decision determined a right we might hesitate more than we do when we consider that it means nothing more than placing the parties as they stood before the trial."

See, too, *Chapman v. Delaware, L. & W. R. R. Co.*, 102 App. Div. 176, 92 N. Y. Supp. 304. I do not ascribe blame to the defendant. He himself was a witness. If the testimony adduced by him was true, then Tunley did not tell the truth. His attitude was protestant. He was informed that proof was procurable, not by him, that Tunley testified falsely. That proof apparently was procurable only by employment of the informant. The defendant's alternative was to suffer under what he regarded was an unjust verdict for a large amount of money, subject to his right of appeal. He did appeal, and he did employ the informant. But it does not appear that he in any way was a party to the methods whereby the proof was put into his hands or into those of his attorney.

Finally, nothing can be found which in any way casts any imputation upon the attorneys and counsel of both parties. They are of the highest standing and repute at the bar, and above even hypercriticism for their conduct.

I advise that the order be reversed, with costs, and that the motion be granted. All concur, except WOODWARD, J., dissenting.

HUNT v. HUNT.

(Supreme Court, Appellate Division, Second Department. January 17, 1913.)

1. ABATEMENT AND REVIVAL (§ 79*)—DEATH OF PARTY—STIPULATIONS.

After judgment for plaintiff in a divorce action, defendant moved to vacate the judgment on the ground of newly discovered evidence. A hearing of the motion was adjourned by a stipulation providing that defendant should not be prejudiced thereby as to any possible present or future rights in plaintiff's property, and that its status as regarded defendant should remain unchanged pending the determination of the motion. Before the motion was heard plaintiff died. On motion to revive the action and the motion to vacate against the executors and others interested under plaintiff's will, all of whom were nonresidents, they appeared specially and objected to the court's jurisdiction. *Held*, that the stipulation authorized the court to determine the motion to vacate notwithstanding its inability to substitute any one as plaintiff, but did not authorize a new motion against plaintiff's representatives, nor was such new motion necessary as the original motion would be decided as of the time when it would have been submitted except for the stipulation.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 496-498; Dec. Dig. § 79.*]

2. ATTORNEY AND CLIENT (§ 86*)—AUTHORITY—CONDUCT OF LITIGATION.

The attorney for plaintiff in a divorce action had authority to stipulate that an adjournment of the hearing of a motion to vacate a judgment for plaintiff should not prejudice defendant's rights, although plaintiff died before the motion was heard.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 155-160; Dec. Dig. § 86.*]

3. STIPULATIONS (§ 14*)—CONSTRUCTION—ABATEMENT OF DIVORCE SUIT.

Although a stipulation by plaintiff in a divorce action that the postponement of the hearing of defendant's motion to vacate the judgment should not prejudice defendant's rights in any way did not authorize a new motion after plaintiff's death against his representatives, the court on such motion had power to order that the stipulation and affidavits establishing it and proving plaintiff's death, the history of the motion, and such other papers as might be pertinent should be made a part of the proceedings in the original motion.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24-37; Dec. Dig. § 14.*]

Woodward, J., dissenting.

Appeal from Special Term, Kings County.

Action by John W. Hunt against Bessie H. Hunt. From an order (75 Misc. Rep. 209, 135 N. Y. Supp. 39) denying a motion to revive the action and a motion to vacate the judgment against the executors, trustees and others interested under the will of the deceased plaintiff defendant appeals. Modified.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

Frank Parker Ufford, of New York City (Philip Carpenter, of New York City, on the brief), for appellant.

Alfred G. Reeves and A. W. Haywood, Jr., both of New York City, for respondents Lucas and John E. Harris.

THOMAS, J. The plaintiff died in December, 1910, after final judgment for divorce, entered July 27, 1910, against the defendant, and pending a motion made by her in October, 1910, to set it aside upon the ground of newly discovered evidence of adultery on his part that, proven, would preclude judgment in his favor. In April, 1911, the defendant moved to revive the action and the motion, and to vacate the judgment. The executors and trustees and others interested under the will of the plaintiff lived out of the state and were by order of the court served by publication, and all save two, one an infant, appeared specially to object to the jurisdiction of the court. The motion was denied solely for want of power to hear it. It is stated in the opinion that the parties served were not related to the subject-matter of the action, and that the court had not acquired jurisdiction over them.

[1] The question is whether the stipulation made by plaintiff's attorneys in his lifetime to secure postponements of the hearing of the motion enables the court to decide the motion ready for submission at his death. The consent to the adjournment of the motion was upon the following agreement made with his attorneys:

"This stipulation is upon the understanding that the defendant is not to be prejudiced by this adjournment as to any possible present or future rights in the plaintiff's property, and its status as regards the defendant shall remain unchanged pending the determination of this motion."

The agreement, made in view of plaintiff's serious illness and read in the light of it, in its spirit and scope, is that, in consideration of the adjournments, the motion should not abate by his death, and that the defendant's rights in his property should be whatever should come from immediate submission. Had not the stipulation been made, the motion would have been heard with opportunity for decision favorable to the defendant. In short, the plaintiff's attorneys assumed to say to the defendant that, if she would forego the present submission of the motion, she would have the right to have it later decided and have all the benefits of its disposition. The existing opposition is that the stipulation saved nothing to the defendant in the motion, which died with the plaintiff, and that all rights dependent upon decision of the motion and which the stipulation was intended to secure disappeared. By the stipulation the plaintiff gained all what he would, and the defendant lost what it vouchsafed to her. Such is the result if the stipulation is unavailable. The defendant had been plaintiff's wife. He had judgment divorcing her, subject to the power of the court to reverse the judgment upon appeal, or to set it aside for usual causes, and amongst them upon the discovery of evidence of a defense based on

his misconduct. The granting of the motion would have vacated the judgment, restored her to the relation of wife, if he were living, and given her whatever interest in his property would flow from his death. If he died pending the determination of the motion, with the stipulation faithfully kept, a decision favorable to her would have annulled the judgment of divorce, made her his widow with whatever in his estate the law gave her. To this he through his attorneys agreed. Now, it is said that his agreement could not do what it promised because his death obliterated the motion and caused the accompanying stipulation to fail, at least in this action. But he agreed that it should not abate. Shall the rule that such an action abates override his agreement that it shall not abate? No rule or consideration of public policy requires that a man's promise, given in view of his death possible or probable, may be violated because he dies. There is nothing abnormal or impossible in the execution of the agreement. A man may obtain a judgment of divorce, and the court may reverse it, although pending the appeal he dies without wife and leaving no widow, and by such reversal the defendant become his widow. His cause of action in case of reversal is in that case lost by his death. So it was known that, if he died and the motion went against him, the case could not be retried. Here he promised that, if given an opportunity to defend the motion, no legal harm from the delay should come to defendant. If he imperiled the retrial of the action in case of his death, he knew the chance he assumed. It was a part of the consideration of postponing the submission.

[2] But it is urged that his attorneys had no authority to make the stipulation in his absence. The stipulation was continued for some time before his death, and it does not appear that he did not know of it or that he repudiated it. It was, however, within their apparent ability to say for him that she should not lose the benefit of submission and possible favorable decision if the due time of submission for determination was postponed. So it was decided in *Cox v. N. Y. C. & H. R. R. Co.*, 63 N. Y. 414. There, as here, the action would have abated without the stipulation, but the stipulation, more explicitly expressed, kept it alive. In that case the plaintiff and not the defendant died. But the action in the absence of stipulation would abate in either case, and it is not logical to say that it would abide in one case and abate in the other. But it is here, if anywhere, that the chief difficulty arises. There is no plaintiff within the possible jurisdiction of the court to be substituted. What, then, would have been the decision in the Cox Case had the defendant been a nonresident and jurisdiction of his representatives been impossible? And what would be done had there been in the case at bar an appeal from the judgment and the plaintiff died pending the appeal? Would the court be halted and made powerless thereby? It is said that Mr. Hunt's representatives have no cause of action. Peck's representative had not in the Cox Case. The action did not survive as to either. Neither could be related to the subject-matter of the action, although in either case the result would affect them. But if it be decided, as it has been, that Hunt's executors are not proper parties, that they are not

related to the subject-matter, and that the court has not and cannot obtain jurisdiction of them, then the situation must be faced. Take them at their word. If the executors and others under Mr. Hunt's will have no interest, they need not be considered, and the question then is what can be done. Has the court lost jurisdiction over its own judgment because there is no one who can legally be substituted for the stipulator dying? Does Hunt's agreement fail because his will and property and representatives are beyond the state? He invoked the jurisdiction, possessed its judgment, stipulated continuance of the motion, and the court should not in justice be defeated by the absence of those succeeding to his property. There is no living party plaintiff. There is no novelty in the proposition that the court may continue to consider its own judgment. In behalf of good faith and the fulfillment of obligation, the law finds a way, and does not yield readily to technical obstacles. Hunt fairly stipulated that the motion should continue; that is, that it should be heard and decided whether he lived or died. If the stipulation does not mean that, the argument fails. If that is its scope, the court should do what Hunt agreed that it might do. Cannot it do it? In the Cox Case it was said:

"If the plaintiffs had proceeded with the action in the name of their testator after his death, and obtained judgment the court would, I think, in view of the stipulation, have refused to set aside the judgment at the instance of the defendant. Is it an insuperable objection to the judgment here that the executors of the original plaintiff became parties to the record, and that objection was taken on the trial that the cause of action did not survive? I think not; and that the stipulation is a sufficient answer in this case, also."

In *Ames v. Webbers*, 10 Wend. 624, the trial was had after the death of the defendant in pursuance of a stipulation given during his lifetime, on an application in his behalf at a previous circuit, to put off the trial for the absence of a witness. A writ of error was prosecuted for the reversal of the judgment. The court had refused to relieve from the stipulation. 10 Wend. 576. In the Cox Case, Judge Andrews wrote of it:

"The suit proceeded to judgment against the deceased defendant (10 Wend. 624), and a writ of error brought thereon by his executors was quashed."

I judge that there was no living defendant to the suit when the trial was had and judgment taken. In *McGuire v. New York Central & Hudson River Railroad Co.*, 6 Daly, 70, there was a stipulation that, in case of the death of the plaintiff at any time before verdict, neither the cause of action nor the action should abate. It was decided that the action after plaintiff's death could be continued against his executor, but it was said that "the cause could not proceed without a plaintiff." Such statement makes against the present defendant; but as an expression of opinion it should yield to the statement in the Cox Case and the decision in *Ames v. Webbers*. In *Watson v. Watson*, 1 Hun, 267, there was no stipulation but a motion to set aside a judgment in an action for a divorce for fraud and irregularity in obtaining it was denied. The court said:

"The administrator has no power to consent to setting aside the judgment. He has no control or authority over it. There is no pecuniary recovery to be

enforced by him. The decree simply dissolves the marriage relation and disposes of the custody of the children, both of which are questions in which the administrator, as such, has no legal interest whatever. * * * We cannot avoid the conclusion that the motion was properly denied. An action, in the nature of a bill of revivor, bringing before the court all the heirs at law and other persons interested in the real estate left by the decedent, and such persons as may have taken conveyance thereof subsequent to the decree, as well as his representatives, seems to us the only mode in which the relief sought can properly be obtained."

In the absence of stipulation, such would be the proper practice, but, where the existence of the stipulation is undoubted, it can be enforced by motion in the action in which it is made. *Potter v. Rossiter*, 109 App. Div. 737, 96 N. Y. Supp. 177. In *Groh v. Groh*, 35 Misc. Rep. 354, 71 N. Y. Supp. 985, the rule in *Watson v. Watson* was followed, and there also there was no stipulation. But in the case at bar the motion under the stipulation was continued to November 25th, and on November 23, 1910, the plaintiff brought an action and stayed on ex parte application the prosecution of the motion, and before the stay could be vacated the plaintiff died. But to this court, before the plaintiff died, should have been submitted this motion for decision, and but for the stay in the action brought the decision would presumably have been made. The position now that the motion died affronts, not only the stipulation, but good conscience. Its maintenance would be a judicial declaration that the court is powerless over its own judgment, even in a case where there is a stipulation that the action shall live for the express purpose of decision—powerless because the plaintiff, after seeking this jurisdiction, has died leaving his property elsewhere to be administered by foreign executors. True, it is admitted, even contended and decided, that the executors are not related to the subject-matter of the action. Their presence as parties would be a mere formality supplying by some fiction a party having no interest in the cause of action, save as the reversal of judgment might affect indirectly the decedent's property. If a fiction is necessary, it is a better one to decide the case as of the date of its due submission, when the real plaintiff was alive, and enter the order accordingly. The foreign persons now denying jurisdiction may not complain, inasmuch as they were invited, if not legally bidden, to appear. But their presence is not necessary, and cannot be coerced, and their absence is harmless unless to themselves. It must be kept in mind that the present matter relates solely to the power of the court. What shall be done on the merits receives no attention.

[3] But what has been written has reference to the power of the court in the original motion pending before it. The present motion is an original one to obtain, with slight exception, the relief sought in the first motion. The stipulation does not authorize that. It saves the first motion. It does not authorize a new motion after death, aimed against the representatives. But no new motion is necessary, as one is pending and vitalized by the stipulation, and upon filing the stipulation, with proof of pertinent facts such as were brought to court in the motion papers herein, the original motion may be decided as of the time when submission was due. *Bell v. Bell*, 181 U. S. 175, 179,

21 Sup. Ct. 551, 45 L. Ed. 804. Hence the court has the power on the present motion to order that the stipulation and affidavits establishing it and proving plaintiff's death, and the history of the motion, and such other papers as may be pertinent, be made a part of the proceedings in the original motion, and to decide it with such further opportunity to persons to be heard as it deems just.

The present order appealed from should be modified accordingly, and as so modified affirmed, without costs. All concur, except WOODWARD, J., dissenting.

PEOPLE v. NAIMARK.

(Supreme Court, Appellate Division, Second Department. January 17, 1913.)

CRIMINAL CONVICTION—REVERSAL.

Conviction of perjury, alleged to have been committed in the trial of a civil action, and sentence for a term of not less than five nor more than ten years, reversed, and justice *held* to require a new trial.

Burr, J., dissenting.

Appeal from Kings County Court.

Max Naimark was convicted of perjury, and sentenced for a term of not less than five nor more than ten years, and he appeals. Reversed, and new trial ordered.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, WOODWARD, and RICH, JJ.

Abraham Gruber, of New York City, for appellant.

Hersey Egginton, Asst. Dist. Atty., of Brooklyn (James C. Cropsey, Dist. Atty., of Brooklyn, on the brief), for the People.

WOODWARD, J. The appellant is charged with the crime of perjury, alleged to have been committed in the trial of a civil action. The defendant employed one Goldenberg in his factory in making sweaters. On the termination of this employment, the defendant had some controversy with Goldenberg as to the amount of salary due to the latter. The defendant claimed the amount to be \$86.30, and Goldenberg claimed \$147.35 in addition thereto. The defendant gave Goldenberg his check for \$86.30, and it is claimed by Goldenberg that at the time it was agreed the matter of \$147.35 should be submitted to friends for arbitration, and that the check did not purport to be payment in full of the account. Upon the trial of the action brought by Goldenberg to recover the balance of the claim, the defendant swore that at the time of the delivery of the check it had written across the face thereof the words, "Paid in full," and the check was produced in evidence, showing these words upon its face. Goldenberg testified that he took the check to his attorney before using it, and that he subsequently had a photograph taken of the same, and that the words, "Paid in full," were not upon it when he received it from the defendant. The photograph was received in evidence, and Goldenberg's attorney testified that the check did not have these

words upon it when it was presented to him. With the evidence in this shape, the justice presiding in the Municipal Court impounded the papers and delivered the same to the district attorney, and an indictment was found against the defendant, charging him with perjury.

Upon the trial of the defendant upon this indictment the record upon its face shows no prejudicial error to the defendant up to the time of pronouncing sentence. He appears to have been duly convicted of the crime, and while there was evidence in the record which might have induced reasonable men to think the defendant had been the victim of a plan to catch him in a crime, for men do not usually procure the photographing of a check in anticipation that it may be altered thereafter, yet the evidence is sufficient to warrant the conviction, and, were we satisfied that justice did not require a new trial, we should feel called upon to affirm the judgment.

At the close of the trial, counsel asked for delay in passing sentence, and in the course of a colloquy between the court and counsel the court said:

"This case has been before me for three weeks, from the very moment of his arrest. He was arraigned before me. * * * He knew just what to expect, if he insisted on going into the fabrication of lies and perjury introduced here. * * * I said to this man before he went to trial, through his counsel and associate counsel, that he having admitted his guilt in this case, if he persisted in going to trial and trying further to deceive this court and the jury in this case, that he would get the full limit of sentence. I said: 'If he wished to take a plea in this case, I would give him a very light sentence.' I named what this would be; but, despite that fact, he insisted on going to trial, believing he might deceive this jury and this court with the further daring perjury that was introduced in this case. He went on well knowing that, if he were convicted, he would get the full limit of sentence. That was said to him through his counsel. I told his counsel: 'Now, you are taking a chance. I am satisfied he will be convicted. He admits he is guilty and the records say so. I don't see how he is going to avoid it.' Counsel pleaded with him. He said no; he would take his chance. He has taken his chance. I said to counsel: 'After he is convicted, please don't bring the whole town to me and ask me to give him a small sentence, because I say to you now, if he is convicted he will get the limit of sentence.' He is going to aggravate his already flagrant case of perjury. I told that to counsel. * * * Now, you want me to be held up and beset every minute of twenty-four hours a day by more people until I sentence him? No; I must sentence him this morning. * * * We are not going to let this guilty man escape."

Clearly, had the learned trial judge been proposed for a juror, he would have been disqualified by his attitude toward the prisoner, who was presumed under the law to be innocent, and while it is true that no substantial legal error appears in the trial, so far as the record discloses, it is impossible in a printed record to reproduce the atmosphere of the courtroom, or to take account of those acts on the part of a prejudiced judge which are likely to go far in the determination of questions of fact. A smile, a sneer, an exclamation, an inflection of the voice in giving a ruling, right and proper in itself, may be far more prejudicial to the rights of the defendant than the average erroneous ruling, and the idea of a judge presiding at a trial, committed in advance to the theory of the defendant's guilt, and to a determination to administer punishment up to the full limit of the law, is

destructive to that conception of justice which pictures her with blind-ed eyes, and is shocking to our sense of judicial fairness. In the ordinary administration of justice it is not customary to inflict the full penalty of the law for a first offense, and the statute makes some drastic provisions for those who are convicted of a felony after having been convicted of other crimes and misdemeanors (section 510, Code of Criminal Procedure), but in the case now before us the prisoner was in a sense on trial for two crimes—one the crime of perjury as a first offense, where he would naturally expect some leniency (and such as the trial judge evidently considered adequate for the offense for which he was indicted), and the other for perjury as a second offense, for the trial judge had threatened that if he stood upon his constitutional right, with the presumption of innocence, he would, upon a conviction, be treated as one who had sacrificed the right to a normal punishment. The jury did not know this. They had a right to judge of the facts as they were presented, upon the theory that the court would exercise a judicial discretion in the administering of the punishment which a first offense merited, while the court, prejudging the defendant and holding him guilty of the offense charged in the indictment, permitted the case, so far as he was concerned, to go to the jury as for a second offense, because he had forewarned him that all the evidence he might produce in his own behalf would be treated as perjury—as an effort to deceive the court and jury—and the punishment was already measured out for this second element in the offense. Had the jury understood this, had they known that their conviction would entail punishment as for a second offense (and this is the practical result of the attitude of the court), it is by no means certain that all of them would have concurred in the verdict upon which this judgment rests. "The first idea in the administration of justice," say the court in *Oakley v. Aspinwall*, 3 N. Y. 547, 549, "is that a judge must necessarily be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate in the same cause. Mankind are so agreed in this principle that any departure from it shocks their common sense and sentiment of justice. * * *

It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases; and it is important, in that respect, that their decisions should be free from all bias. After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach or the suspicion of unfairness." See *McClaghry v. Deming*, 186 U. S. 49, 67, 22 Sup. Ct. 786, 46 L. Ed. 1049, holding that the trial of an officer of volunteers by a court-martial, all the members of which were regular army officers, was illegal and could be reached by habeas corpus. It is true that the remarks quoted had special relation to the principle that a man cannot be a judge in his own case, or in which he is interested, but the principles are equally applicable to any case in which the rights of individuals are involved, and in this state we are specially authorized to grant a new trial if the court be satisfied that the verdict against the prisoner was against the weight of evidence or against law, or that justice requires a new trial, whether any excep-

tion shall have been taken or not in the court below. Section 527, Code of Criminal Procedure. This seems to us to be a case calling for reversal upon the last ground, for it is difficult to conceive of an impartial trial and the accomplishment of that practical justice which trial by jury is intended to promote under the circumstances disclosed by this record. The fact that this did not result in erroneous rulings is nothing to the point. The evil is in a judge entering upon the trial of a criminal case prejudged, and virtually disposing of the case upon the basis of an aggravation of the crime charged in the indictment, without any opportunity for the jury to know the attitude of the court, except as that might manifest itself in acts which the record would not disclose, and "the act complained of was calculated to impair the confidence of the opposite party in the impartiality of the officer, which is of itself an evil which should be carefully avoided. Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge." *People v. Suffolk Common Pleas*, 18 Wend. 550, 552.

The judgment appealed from should be reversed, and a new trial ordered.

HIRSCHBERG, J., concurs. RICH, J., concurs in result. BURR, J., reads for affirmance. JENKS, P. J., not voting.

BURR, J. I dissent from the decision about to be made. The prevailing opinion admits that the record "shows no prejudicial error to the defendant up to the time of pronouncing sentence." To my mind the evidence overwhelmingly establishes defendant's guilt of the heinous and all too common crime of perjury. But it is said that "justice requires a new trial" within the meaning of section 527 of the Code of Criminal Procedure. The sole reason assigned therefor has to do only with the sentence imposed by the trial court. It appeared that before trial defendant admitted his guilt in the presence of the judge before whom he was subsequently tried, and that he was then warned that if after such admission he persisted in standing trial, and was convicted, a heavier sentence would be imposed than if he put his admission into the form of a plea of guilty. Mr. Justice Woodward says:

"Clearly, had the learned trial judge been proposed for a juror, he would have been disqualified by his attitude toward the prisoner."

I am not sure that this is the case, for reasons which I shall subsequently state. Whether this is so or not, the same rule would not necessarily apply to a judge. The record establishes that the learned trial judge carefully concealed his knowledge of defendant's guilt from the jury during the progress of the trial, and there is not the slightest ground for believing that their verdict upon the facts was in any way influenced by the knowledge which the judge possessed. There is not a suggestion, either in the record or even in the appellant's brief, that by "a smile, a sneer, an exclamation, an inflection of the voice in giving a ruling, right and proper in itself," any rights of defendant were prejudiced. But it is suggested that the jury did

not know that defendant had admitted his guilt to the trial judge. Is it contended that it was his duty to disclose this fact to the jury during the progress of the trial? If he had, defendant would come before us with a far more substantial ground for the reversal of this judgment than any here presented. The admission of guilt made by defendant to the trial judge before the trial required him either to disclose this fact to the jury, which would have been clearly wrong, or to keep his knowledge carefully concealed from the jury that they may not be influenced thereby, and give defendant an absolutely fair and impartial trial. The learned trial judge properly pursued the latter course. Must a trial judge, under the circumstances here disclosed, decline to preside at the trial? If that is so, then it is quite possible for every guilty defendant to disqualify every trial judge in the state by conveying to him before trial an admission of his guilt in some form other than a plea of guilty in open court.

But even in the case of a juror under the circumstances here disclosed such juror would not be necessarily disqualified. If a defendant knows that a juror has knowledge as to the fact of his guilt or innocence before the commencement of the trial, knows the extent of such knowledge and the opinion in the juror's mind resulting therefrom, and yet consents to accept him as a trier of fact in his case, he cannot afterward be heard to complain upon this ground of the verdict rendered. With full knowledge of the information possessed by the trial judge, and with knowledge of the effect which such knowledge had produced upon his mind, he did not ask to be tried before any other judge. He should not, after conviction, be permitted to play fast and loose with a court in this manner.

It is perfectly apparent from the prevailing opinion in this case that if the sentence had been less severe, or even if it had been of equal severity if unaccompanied by any remarks of the trial judge in connection with the imposition thereof, this judgment would have been unhesitatingly affirmed. Conceding for the sake of the argument that the remarks of the county judge when he imposed sentence were unjudicial in character, and that in determining the extent of the sentence he may have been influenced by passion or a vindictive spirit, that is not a legal error which we can review. The remedy is by appeal to the executive to commute the sentence.

If we are to consider the motives of a trial judge in determining the question of punishment that within the terms of the law may be inflicted, and interfere when we think that he has been too severe, we are assuming a new power of review which has not been supposed to exist. To conceal this under a general statement that "justice requires a new trial," without pointing out wherein the justice of the determination of defendant's guilt has been wronged, is to do indirectly what we may not do directly.

COLBERT v. McCLEARY.

(Supreme Court, Appellate Division, Second Department. January 10, 1913.)

WILLS (§ 745*)—ASSIGNMENT BY LEGATEE—FRAUD—EVIDENCE.

Evidence *held* not to show that a contract assigning plaintiff's interest as the residuary legatee in an estate was obtained by fraud or overreaching.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1918-1933; Dec. Dig. § 745.*]

Appeal from Special Term, Kings County.

Action by Patrick J. Colbert against Philomena Freel McCleary. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, WOODWARD, and RICH, JJ.

Louis Dean Speir, of New York City (Newell Martin, of New York City, and Talcott H. Russell, of New Haven, Conn., on the brief), for appellant.

Augustus Van Wyck, of New York City, for respondent.

WOODWARD, J. The controversy grows out of substantially these facts: Edward Freel, a resident of Brooklyn, died about 16 years ago, leaving a last will and testament, which was duly admitted to probate, and letters testamentary were issued to Edward F. Freel, Francis J. Freel, and Catherine Freel, the executors named in such will. Edward and Francis J. Freel were sons of the testator, and Catherine Freel was his widow. His only other child was Philomena Freel McCleary, the defendant in the present action. Francis J. Freel was a doctor, and we will hereafter refer to him as Dr. Freel. The will of Edward Freel left his entire estate to his widow during her natural life, "and after her death, to my children Edward F. Freel, Francis J. Freel and Philomena Freel, to be equally divided between them, share and share alike." It was further provided that:

"In case of the death of any of my said children before my wife, leaving him or her issue surviving, then the share of said child so dying to go to said issue and in case of the death of any of my said children before my wife without issue, then the share of said child so dying to go to the survivors of my said children, share and share alike."

Edward F. Freel died intestate, unmarried, and without issue on the 22d day of March, 1902, about six years after the death of his father, and Dr. Freel, the second son, died about 10 years after the decease of his father, unmarried and without issue, at Stony Creek, Conn. Dr. Freel left a last will and testament, which was duly admitted to probate in the state of Connecticut, and by the terms of this will he left all of his property, "both real and personal, of whatever kind or nature, to the said Patrick J. Colbert absolutely." Patrick J. Colbert, the beneficiary under the will of Dr. Freel, is alleged in the complaint to have been employed by Dr. Freel "as an attendant and companion, the two residing together at the residence at Stony Creek

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

hereinbefore described, and that the relations between them were extremely friendly and confidential," and this allegation is particularly admitted by the answer, and fits in but poorly with the contention on the trial that the plaintiff, this same Patrick J. Colbert, the companion and intimate friend of Dr. Freel, was a man with no education, and little better than an ordinary village roustabout. When the will of Dr. Freel was offered for probate, it was contested by Mrs. McCleary, the defendant in the present action, but was finally admitted to probate, and the plaintiff acquiesced in the payment of a counsel fee of \$3,500 by the executor. It subsequently appeared that the estate of Dr. Freel, so far at least as it could be reduced to present possession, was not sufficient, after paying counsel fees and other expenses, to pay the debts of the deceased, so that Mr. Colbert, up to the time of the transaction out of which this litigation grew, had realized nothing from the attempted gift under the will, and he had been engaged in various positions since the death of Dr. Freel in and around Stony Creek and in the borough of Brooklyn for which he had received his board and clothes and small sums of money, and it is easy to read between the lines that he had fallen into dissipation, and was drifting. While he was still residing at Stony Creek, and while living in the precarious way mentioned, though evidently not in distress or in any pressing need, Mrs. McCleary, accompanied by Matthew O'Malley who is described by the plaintiff as "her agent, adviser, and secretary," and Matthew A. Reynolds, her lawyer, and a relative by the name of Gray, visited that place, evidently for the purpose of looking over some of the property belonging to the estate of Edward Freel, deceased, through which a new trolley line was being constructed. It does not appear that they were looking for Colbert, but he was near the railroad station when they arrived, and, being acquainted with all of them, he was called over to where they were by the local driver of the omnibus, and afterward accompanied the party upon a trip to look at the property. Subsequently he was asked to go to New Haven, which he did; his fare being paid by O'Malley. The party went to the office of Reynolds, Mrs. McCleary's counsel, where Reynolds stated to Colbert that Mrs. McCleary was disposed to do something for him. After a general statement, during which Reynolds asked the plaintiff if he had made any assignments of his claims under the will of Dr. Freel, and was assured that he had not, Colbert and Mrs. McCleary took up the matter of an assignment of his interest in the estate of her brother and father. She offered Colbert \$3,000, which he refused to accept. She subsequently made an offer of \$5,000, to be placed in a trust fund to yield Colbert the sum of \$35 per month so long as the fund and its interest would afford this amount, with any remainder of the sum to be available to his heirs in the event of his death. This offer Colbert accepted, said he was satisfied with it, and, upon being asked by Reynolds if he felt competent to close the transaction alone, he replied that he did, and Mrs. McCleary made and delivered her check to Reynolds, under the terms of a written agreement constituting a part of the complaint, for the sum of \$5,000; it being understood and agreed that Reynolds was to find a savings bank which would pay the largest possible income upon the fund dur-

ing the time that it was to be held. This agreement clearly contemplated the fact that Colbert had, or might have, some interest in the estate of Edward Freel, deceased, for it recited that:

"Whereas the said Patrick J. Colbert is named as residuary legatee and devisee in the will of Frank J. Freel, late of said Branford and said Brooklyn, deceased, administration upon said estate still pending. Now, therefore, it is agreed the said Patrick J. Colbert in consideration of agreements hereinafter contained hereby sells, assigns and conveys to the said Philomena McCleary any and all interests and rights, claims and demands in or to the estate of said Frank J. Freel, and in or to the estate of Frank J. Freel's father Edward Freel, late of Brooklyn, deceased, in or to any and all property real and personal belonging to said estate of Frank J. Freel or said estate of Edward Freel aforesaid."

Then followed the provision for the placing of the \$5,000 in such a manner as to enable the plaintiff to draw it out at the rate of \$35 per month, and there is no question that the defendant gave her check for the purpose to the party designated, and that everything was done which the defendant was to do to complete her part of the transaction, it being established that she had funds for the payment of such check, and the transaction was not completed in its details, evidently because the plaintiff announced within a few days that he would not sign the necessary papers for the releasing of possible claims upon real estate, and that he elected to rescind his contract.

The theory on which this action is brought is that the plaintiff has some interest in the estate of Edward Freel, deceased, through the will of his son, Francis J. Freel, and that, in some manner, the plaintiff was overreached in the transaction under which he released his claims. Colbert does not claim that there was any active fraud, does not claim that he was in any manner coerced. His testimony as to what occurred just prior to and at the time of the closing of the contract is in entire accord with the testimony of the defendant's witnesses. There is not the slightest evidence that any one interfered with the conversation between Mrs. McCleary and the plaintiff in reference to the contract; and that the plaintiff is not the weakling he would have us believe is plainly evidenced by the fact that he entered fully into the discussion, and declined an offer of \$3,000, a considerable sum of money to be rejected by a man who was living on odd jobs and in distress. When the offer was raised to \$5,000, he accepted it, and he accepted the conditions of its payment; said he was satisfied. Great stress is laid upon the alleged fact that neither Mrs. McCleary nor her attorney told the plaintiff about the amount of the estate of Edward Freel, but the contract between the parties distinctly referred to such estate, and the plaintiff concededly read over the contract, and it does not appear that he thought it worth while to make any inquiries about it. Certainly, as the residuary legatee under the will of Dr. Freel, after a contest over the probate of such will, he was in as good a position to know of the estate generally as the defendant, who was not an executor, and, if he did not think proper to ask for information about the estate, why should the defendant have volunteered to tell him anything? There is nothing to indicate that she had any information which was not equally available to the plaintiff. The estate was large, it is claimed to be from \$500,000 to

\$1,000,000 or more, and it is absurd to say that the residuary legatee of the son of Edward Freel, 16 years after the death of Edward Freel and 4 years after the death of his supposed benefactor, did not have all of the information which was necessary to the proper carrying out of the contract here under consideration, or that he was not in as good a position to know the facts as the defendant. She was not occupying a fiduciary relation. She was merely a beneficiary under the same will through which the plaintiff claims, and if he saw fit to release a claim, which is unquestionably open to grave doubts, for a consideration of \$5,000, we can see no possible reason why he should be permitted to rescind the contract. The estate of Edward Freel, deceased, is incumbered with a life estate. Nothing could come to the plaintiff until this was at an end under any circumstances. While the widow is about 75 years of age, she may, for all that appears in the record, be of sound health and liable to live for years, and, as the learned court at Special Term suggests, it is not at all certain that he has not made a good bargain. Many men of good business abilities would prefer \$5,000 to a chance to litigate a claim for a much larger sum, and especially where, as in the present case, sound lawyers have advised that the plaintiff has no claim under the will, and there is the intervening life estate to be reckoned with.

The case of *Wheeler v. Smith*, 9 How. 55, 13 L. Ed. 44, determined on demurrer, where the estate was attempted to be given to a charitable trust which the court could not sustain, and the heir at law was permitted to hold the property in spite of the fact that he had compromised the claim with the executors, is not in point. There he was advised by lawyers of high standing, one of whom was an executor of the will, that the trust was valid, and relying upon this assurance, and to avoid litigation, the heir at law had compromised the claim for \$25,000. The executor stood in a fiduciary relation to the plaintiff in that action, and he was bound to show that the transaction was fair. While the court admitted that there was no intention of defrauding the plaintiff, upon the well-established rule which requires of one in a fiduciary relation to deal properly with the beneficiary, the plaintiff was permitted to repudiate the contract. But that is not this case, and there is no authority with which we are familiar which permits a contract made between competent persons, without fraud or duress, to be rescinded in the manner here attempted.

The judgment appealed from should be affirmed, with costs. All concur.

FIRST NAT. BANK OF WAVERLY v. WINTERS.

(Supreme Court, Appellate Division, Third Department. January 16, 1913.)

On motion for reargument. Denied, order allowing amendment affirmed, judgment and order denying new trial reversed, and new trial granted. Decision modified, so as to read:

"Order allowing amendment to the complaint affirmed, without costs. Judgment and order denying new trial reversed, and new trial granted, with costs to appellant to abide event, on the ground that it was error to permit the plaintiff to prove withdrawals of deposits not shown to be those stated in

its bill of particulars, and also on the ground that it was error to refuse to admit evidence offered by the defendant of publications of the report of the insurance department in reference to irregularities in the administration of the National Protective Legion of Waverly, N. Y."

For former opinion, see 138 N. Y. Supp. 1115.

Hinman, Howard & Kattell, of Binghamton, for the motion.

Byram L. Winters (James Moore, of Oneida, of counsel), opposed.

PER CURIAM. It is urged upon the motion for a reargument that the decision of the court would be a warrant for the defendant to show upon a retrial the publications of the insurance report as a part of his defense. The court has held that those publications were made competent simply by the evidence offered on the part of plaintiff as to the withdrawal of deposits; that the defendant might show these facts in answer to such evidence for the purpose of showing that the withdrawal of deposits may have been caused otherwise than by reason of the libel of the defendant. If such evidence on behalf of plaintiff had not been in the case, it is clear that the evidence would not have been competent.

The motion for a reargument should be denied.

HOWARD, J., not sitting.

COPANS v. DOUGAN et al.

(Supreme Court, Trial Term, Orange County. January 21, 1913.)

1. **BILLS AND NOTES (§ 47*)—DELIVERY ON CONDITION.**

A note being given on condition that the maker should not be called on to pay it, if, when it was due, the indebtedness of the payee to another, payment of which the maker had guaranteed, existed to the amount of the note; and, the indebtedness having so existed at such time, the note never had a valid inception.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 64; Dec. Dig. § 47.*]

2. **BILLS AND NOTES (§ 92*)—CONSIDERATION.**

D.'s contract of purchase from C. providing that he should give a bond for \$1,000 to C.'s wife payable in future installments, and she refusing to sign a deed unless she received \$200 down, and C. having paid it, on D.'s refusal to do so, D.'s note for \$200 then given C., on suggestion of another, was without consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166-173, 175-212; Dec. Dig. § 92.*]

Action by Henry Copans against Arthur T. Dougan and others. Plaintiff moves to set aside the verdict. Motion denied.

Hirschberg & Hirschberg, of Newburgh, for plaintiff.

Albert H. F. Seeger, of Newburgh, for defendants Dougan.

TOMPKINS, J. Motion to set aside the verdict of a jury in favor of the defendant in an action on a promissory note for \$200.

Defendant Arthur T. Dougan had contracted to purchase a house

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and lot from defendant Cronk for \$3,000, payable by taking the property subject to a \$2,000 mortgage and giving to Cronk's wife, from whom Cronk was estranged, a bond and mortgage for \$1,000 payable in future installments. Mrs. Cronk refused to join in the deed unless she received \$200 in cash at the time of signing it. Arthur T. Dougan refused to pay the \$200, and Cronk paid the money. The entire transaction took place at the plaintiff's office, and he was present and participated in the conference, suggesting that Arthur T. Dougan give a note for that sum to Cronk. Arthur T. Dougan consented to do so, but only upon condition that Cronk should hold the note, and not use it, and that he, Arthur T. Dougan, should not be called upon to pay it when due if at that time Cronk was indebted in that sum upon an account to the firm for which Arthur T. Dougan worked, the payment of which account Arthur T. Dougan had guaranteed, and, if such indebtedness did not equal the amount of the note, that the note should, when due, be valid for only the difference between \$200 and the amount of the indebtedness. The note in suit was then delivered upon those conditions. At the time when the note became due, Cronk's indebtedness upon the account exceeded the amount of the note.

[1, 2] Under this agreement, the note was not to have a valid inception until the moment when by its terms it became payable, and then only for the amount of the difference between the face of the note and Cronk's indebtedness on the guaranteed account; it being agreed that Arthur T. Dougan would pay such indebtedness up to the face amount of the note. As Cronk's indebtedness, when the note became due, exceeded the face amount of the note, the note has had no valid inception. Cronk has not paid a single cent of consideration for the note. The payment of the \$200 by Cronk to Mrs. Cronk was not a consideration, because, under his contract, Arthur T. Dougan was entitled to the deed for the real estate or the acceptance of the property subject to the \$2,000 mortgage and the execution of the \$1,000 bond and mortgage payable in future installments. The plaintiff is not a bona fide holder of the note.

The defense shows a complete want of consideration for the note, and that the note has had no valid inception, and was properly proved in this action. *Smith v. Dotterweick*, 200 N. Y. 299, 93 N. E. 985, 33 L. R. A. (N. S.) 892; *Higgins v. Ridgway*, 153 N. Y. 130, 47 N. E. 32; *Juilliard v. Chaffee*, 92 N. Y. 529; *Bookstaver v. Jayne*, 60 N. Y. 146; *Benton v. Martin*, 52 N. Y. 570.

The motion should be denied.

HILL v. CURTIS et al.

(Supreme Court, Appellate Division, Second Department. January 10, 1913.)

JOINT ADVENTURES (§ 1*)—CONTRACTS.

Under the contract of plaintiff and defendant, reciting the retaining of defendant to prosecute claims on a contingent basis, and the desire of both parties to together undertake their prosecution, and providing that defendant should act as attorney of record, and plaintiff should act as counsel whenever required to do so, and that each should give as much

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

time thereto as necessary, that each should pay half the expenses, and the profits should be equally divided between them, and that, if either should die before termination of the litigation, the other should carry it on to its conclusion, and the representatives of deceased should be entitled to share equally with the survivor in the ultimate profits, the parties were joint venturers, instead of plaintiff being a mere employé of defendant.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 1; Dec Dig. § 1.*

For other definitions, see Words and Phrases, vol. 4, p. 3814.]

Hirschberg, J., dissenting.

Appeal from Trial Term, Kings County.

Action by Charles E. Hill against George M. Curtis and another. From a judgment dismissing the complaint, plaintiff appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, THOMAS, and CARR, JJ.

Joseph W. Middlebrook, of New York City, for appellant.

Almet Reed Latson, of New York City (Ward W. Pickard, of New York City, on the brief), for respondent Curtis.

Marshal Stearns, of New York City, for respondent National Nassau Bank.

BURR, J. This action is brought for an accounting of the proceeds received by defendant Curtis by way of counsel fees and compensation in a series of suits brought against the city of New York in behalf of the "Matrons" of certain penal and reformatory institutions in said city. A written agreement was entered into on September 30, 1908, the material parts of which are as follows:

"Whereas the said Curtis now has in his office for prosecution certain claims by certain parties known as 'Matrons' in certain penal and reformatory institutions of the city of New York, which claims are for increased compensation, gradation and classification, and

"Whereas it is desired by both of the parties hereto that they shall together undertake the prosecution of said claims, and

"Whereas the said claims are upon a contingent basis, therefore, it is mutually agreed that the said Curtis will act as attorney of record in all of the proceedings, and the said Hill will act as counsel whenever required so to do, which may be taken to recover the said claims, and that each party hereto will give as much of his time to the prosecution of said claims, as may be necessary and it is further agreed that each party hereto will pay one-half of the expenses that may be incurred in the prosecution of the said claims, and that the profit, fee, compensation or other emolument which shall or may be received from the prosecution of said claims, shall be equally divided by and between the said parties hereto.

"If either party shall die before the termination of the litigation, if any, or the negotiations, and before the receipt of the fee, profit or emolument, the surviving party will undertake to carry on the prosecution or negotiations to its conclusions, and the heirs of the one who may die shall be entitled to the same compensation as the deceased would be entitled to if alive."

There was some evidence of a prior oral agreement; but, as plaintiff asserts and defendant concedes that the oral and the written agreement are the "same in practical effect and legal intendment,"

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

we may consider the rights of the parties as defined by the latter. By way of defense defendant contends that the cause of action was not cognizable in equity, that there was a failure of performance by plaintiff, and that the agreement was subsequently abrogated. Although considerable testimony was taken bearing upon the latter issues, the learned court at Special Term declined to determine these, and rendered judgment for defendant and dismissed the complaint upon the merits, on the ground that the parties were not "joint venturers," but that plaintiff was an employé of defendant, and that his remedy, if any, was by an action at law and not by a suit in equity. Upon the correctness of this determination this judgment must stand or fall.

While participation in profits is an important factor in determining whether an agreement constitutes the parties thereto joint venturers, this of itself does not afford an infallible test. Rather where a share in profits is contracted to be paid, the question seems to be: Is it as a measure of compensation to employés for services rendered in the business, or for the use of moneys loaned in aid of the enterprise, or does the agreement extend beyond this and provide for a proprietary interest in the subject-matter out of which the profits arise, and an ownership in the profits themselves as compensation for money advanced or time and services bestowed as a principal in the prosecution of the enterprise? *Hackett v. Stanley*, 115 N. Y. 625, 22 N. E. 745; *Boice v. Jones*, 106 App. Div. 547, 94 N. Y. Supp. 896; *Marston v. Gould*, 69 N. Y. 220; *Weldon v. Brown*, 84 App. Div. 482, 82 N. Y. Supp. 1051; s. c. 89 App. Div. 586, 85 N. Y. Supp. 599; *Moscowitz v. Sassulsky*, 141 App. Div. 763, 126 N. Y. Supp. 513. The contract contains a recital to the effect that it is the desire of both parties "that they shall together undertake the prosecution of said claims." A mere recital in an instrument, however, particularly if it is an incorrect recital, is not conclusive upon the rights of the parties. It also appears from said instrument and from the evidence in the case that the retainers in the various claims to be prosecuted ran to the defendant personally, so that in the first instance he may be said to have been the sole owner of the subject-matter of the agreement. The contract provided that defendant was to act as attorney of record in all of the proceedings which might be taken, and that plaintiff should "act as counsel whenever required so to do." Defendant contends that this is to be construed as meaning that plaintiff should only so act when required by defendant so to do, and that this indicates that the character of the relation between the parties was simply that of employer and employé. It seems to us that it may be urged with at least equal force that the requirement referred to was that arising out of the exigencies of the case rather than the will of the defendant. But if the contract is ambiguous in character, so that parol testimony of contemporaneous facts and conversations was competent to aid in its interpretation, it is sufficient to say that, if plaintiff was not precluded from offering such testimony, he may have refrained from so doing at the suggestion of the learned trial court. He was frequently reminded through the progress of the trial that such testimony was immaterial,

and the court repeatedly stated, contrary to the opinion expressed in the decision of the case, that the agreement did constitute the parties joint venturers, and that the only question involved was that of performance on plaintiff's part. The agreement clearly provided for participation in profits. In effect, it provided also for participation in losses. By its terms each of the parties agreed to pay "one-half of the expenses that may be incurred in the prosecution of the said claims." As the claims were taken upon a contingent basis, the only losses that could result to the parties thereto from a prosecution of the enterprise would arise from the time and labor expended and the disbursement of money made by them in connection therewith. The agreement demanded both. It is not necessary for us now to decide whether this clause of the agreement is illegal in character within the law against champerty, but it is indicative of the purpose which the parties sought to accomplish. We have called attention to the fact that by the terms of said contract each party was required to devote to the enterprise so much of his time as should be necessary. This may be fairly said to represent a portion of the capital employed in the prosecution of the undertaking. The final clause of the agreement seems to us entirely inconsistent with the contention that the contract was one of employment merely. A contract of employment necessarily terminates with the death of the employé. Under this agreement, if plaintiff had died while the agreement was in force and before the final determination of the actions referred to therein, it would have been defendant's duty to continue the proceedings, and plaintiff's personal representatives (referred to in the agreement as his heirs) would have been entitled to share equally with defendant in the ultimate profits thereof. When, therefore, we find as here a joint contribution to the capital of the enterprise, a participation in profits, an equal liability for losses, a continuance of the contract beyond the death of either of the parties thereto by the survivor, and a provision that subsequent services shall be rendered for the joint benefit of the survivor and the representatives of the deceased, it seems to us that every element appears which is necessary to make the venture a joint one. It is difficult to think of anything short of an actual assignment of an interest in the retainers themselves which would have more completely expressed an intention to give to plaintiff an interest in the subject-matter of the enterprise in which he and defendant were engaged, and a proprietary interest in the profits thereof. Defendant contends that the clause providing for a continuance of the proceedings by the survivor would have been ineffective provided defendant, who was the attorney of record, had died, since plaintiff could not, without making new contracts with the parties to such actions, have continued the proceedings. That may be so. But in such case it would have been his duty to attempt to secure such contracts, and, if successful, to proceed for the benefit of defendant's representatives as well as his own. But, if this portion of the agreement might become inoperative in case of defendant's death, it would not if plaintiff had died. If the agreement had been limited in its provisions for continuance to the conditions arising upon the death of plaintiff only, it would have been ef-

fective to give him an interest in the subject-matter of the enterprise. It cannot be less so if it is the fact that, coupled with this, is a provision which may be unenforceable. We think, therefore, that the learned court at Special Term erred, and that the judgment must be reversed and a new trial granted, costs to abide the final award of costs.

JENKS, P. J., and THOMAS and CARR, JJ., concur. HIRSCHBERG, J., dissents.

MYERS v. CITY OF NEW YORK et al.

(Supreme Court, Appellate Division, Second Department. January 10, 1913.)

1. MUNICIPAL CORPORATIONS (§ 818*)—DEFECTS IN SIDEWALKS—CUSTOM—EVIDENCE.

In an action for personal injuries by one who had fallen into an opening in the sidewalk, it was error not to permit a police officer, whose duty it was to observe the condition of the place and its negligent use, to testify as to the custom of leaving the place open when not in use.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1726-1738; Dec. Dig. § 818.*]

2. MUNICIPAL CORPORATIONS (§ 821*)—DEFECT IN SIDEWALK—INJURY TO PEDESTRIAN—QUESTIONS FOR JURY.

Whether one was negligent in walking along the sidewalk with his eyes raised to the bulletin board of a newspaper office, causing him to fall into an opening in the walk, was a question for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

3. MUNICIPAL CORPORATIONS (§ 821*)—QUESTIONS FOR JURY—PROTECTING OPENINGS IN SIDEWALKS.

Whether an opening in a sidewalk was sufficiently protected by the doors, two feet wide, being held in a vertical position by rods connecting their corners, and, even so, whether it was left open unnecessarily, and, if so, negligently, were questions of fact for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

4. MUNICIPAL CORPORATIONS (§ 763*)—SIDEWALKS—LIFTS—OPENINGS—PERSONAL INJURIES.

If an abutting owner was permitted by a city to keep an opening in the sidewalk, the city was bound to see that it was properly used and sufficiently guarded, and if the city knew, or with proper care should have known, that such opening was not so used or protected, it would be liable to one injured by falling into it for culpable failure of duty in respect thereto.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1612-1615; Dec. Dig. § 763.*]

5. MUNICIPAL CORPORATIONS (§ 821*)—DEFECT IN SIDEWALK—INJURY TO PEDESTRIAN—QUESTION FOR JURY.

If the facts should show that a lift in a sidewalk was a nuisance, the question of the negligence of the city in allowing it to exist is a question for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by Joseph G. Myers against the City of New York and the Brooklyn Citizen. Judgment for defendants, and plaintiff excepts. Exceptions sustained.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

John C. Robinson, of New York City, for plaintiff.

James D. Bell, of Brooklyn (P. E. Callahan, of Brooklyn, on the brief), for defendant the City of New York.

Henry E. Heistad, of Brooklyn, for defendant the Brooklyn Citizen.

THOMAS, J. The plaintiff, walking up Fulton street in the borough of Brooklyn, fell into an opening in the sidewalk, kept for some three or four years by the defendant the Brooklyn Citizen, with the knowledge of the same and without dissent on the part of the city of New York. The opening was in front of the building of the defendant Brooklyn Citizen, and in it was a lift used for carrying to its cellar paper used by such defendant; and for the purpose of closing the opening two doors, each about two feet in width, were used, and, to guard the public when these doors were open, they were raised up vertically, while bars at each end held them in position and tended to guard pedestrians.

[1] There is no evidence that the lift was in use at the time of the accident, or that it had been used shortly before the same. A police officer saw it a half hour before in the same condition, but, although it was his duty to observe the condition of the place and make report to the city of negligent use of the place, he was not permitted to testify, erroneously, I think, as to the custom of leaving the place open when not in use.

[2] The plaintiff, at about half past 8 or 9 o'clock at night in passing the place was attracted to the bulletin board of such defendant Brooklyn Citizen, and, failing to see the obstruction, walked against it, and fell over the guard to the bottom of the cellar. Whether the plaintiff was guilty of contributory negligence in directing his eyes to the bulletin board, which was placed there for the very purpose of diverting attention of the passers-by, was a question for the jury.

[3] Whether the opening was properly protected, and, even so, whether it was left open unnecessarily, and, if so, negligently, were questions of fact for the jury.

[4] If the abutting owner was permitted by the city to keep the lift, exercising proper care in doing so, it was the duty of the city nevertheless to use care to see to it that it was not used improperly, and if the guards were insufficient, or there were unnecessary and thereby negligent use of the opening, and the city had or in the exercise of proper care should have known of the same, it would be liable to the plaintiff for culpable failure of duty in respect to such matters.

[5] I have not mentioned the matter of nuisance, for the reason that the complaint is based upon negligence. Neither defendant affirms that the opening was unlawful. If the facts should show that it was unlawful, then the question of the negligence of the city in allow-

ing the obstruction to exist would also be for the jury, although from the length of time that the opening had been there the assent of the city could be inferred. These questions should be determined by a jury, and not by the court.

Plaintiff's exceptions should be sustained, and a new trial granted, costs to abide the event. All concur.

**MANHATTAN BRIDGE THREE-CENT LINE v. THIRD AVENUE
RY. CO. et al.**

(Supreme Court, Appellate Division, Second Department. January 17, 1913.)

1. STREET RAILROADS (§ 25*)—RIGHT TO USE STREETS.

The commissioner of bridges of New York City cannot authorize a street railway company to operate a surface railroad over a highway within the boundaries of the city not named, or described in its original certificate of incorporation, nor in any certificate of extension thereof, and for the operation of which it has not obtained a franchise in the manner prescribed by law.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 77, 78; Dec. Dig. § 25.*]

2. MUNICIPAL CORPORATIONS (§ 691*)—STREETS—NUISANCES—RAILROADS.

The unauthorized operation of a surface railroad on a public highway is a public nuisance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1492-1508; Dec. Dig. § 691.*]

3. NUISANCE (§ 72*)—PUBLIC NUISANCE—RIGHTS AND REMEDIES OF PRIVATE PERSONS.

A nuisance which is common or public in its nature cannot be abated at the suit of a private party, unless such party suffers greater injury from the nuisance than the public generally, and such special injury must be alleged and proved.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169; Dec. Dig. § 72.*]

4. NUISANCE (§ 72*)—PUBLIC NUISANCE—RIGHTS AND REMEDIES OF PRIVATE PERSONS.

The competition resulting from the unlawful operation of a street railroad is not such special injury as will authorize another railroad company to maintain a suit to abate it as a nuisance, since the injury to the other company arises from the operation of the road, and not from its unlawful character.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169; Dec. Dig. § 72.*]

Appeal from Special Term, Kings County.

Action by the Manhattan Bridge Three-Cent Line against the Third Avenue Railway Company and others. From an order denying a temporary injunction, plaintiff appeals. Affirmed.

Argued before HIRSCHBERG, BURR, THOMAS, CARR, and WOODWARD, JJ.

Almet Reed Latson, of New York City (Ward W. Pickard, of New York City, on the brief), for appellant.

Charles L. Woody, of Brooklyn, for respondents Railroad Cos.

William P. Burr, of New York City (William J. Clarke, of New York City, on the brief), for respondent O'Keeffe.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BURR, J. [1, 2] It is difficult to resist the conclusion that the defendant railroad companies are operating a street surface railroad over a highway within the boundaries of the city of New York, which is neither named nor described in the original certificate of incorporation of either of said companies, nor in any certificate of extension thereof, and that neither of said companies has obtained any franchise therefor in the manner prescribed by law. If such is the case, the so-called license or consent of the defendant the commissioner of bridges is of no avail (*Brooklyn Heights R. R. Co. v. City of Brooklyn*, 152 N. Y. 244, 46 N. E. 509; *D., L. & W. R. R. Co. v. City of Buffalo*, 158 N. Y. 266, 53 N. E. 44; *Hatfield v. Straus*, 189 N. Y. 208, 82 N. E. 172; *Richards v. Citizens' Water Supply Co.*, 140 App. Div. 206, 125 N. Y. Supp. 116), and their acts constitute a public nuisance (*Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 307; *Central Crosstown R. R. Co. v. Met. St. Ry. Co.*, 16 App. Div. 229, 44 N. Y. Supp. 752).

[3] But a nuisance which is common or public in its nature cannot be lawfully abated at a suit in equity of a private individual or corporation, unless such person is a party specially aggrieved; that is, one who has suffered greater injury by reason of defendant's unlawful acts than the public generally (2 Wood on Nuisances [3d Ed.] § 839; *Central Crosstown R. R. Co. v. Met. St. Ry. Co.*, supra; *City of Yonkers v. Federal Sugar Refining Co.*, 136 App. Div. 701, 707, 121 N. Y. Supp. 494), and this must be both alleged and proved (Wood on Nuisances, supra). Upon this branch of the case we deem the allegations of the complaint, and such evidence as was offered upon the hearing of the motion for an injunction pendente lite, too vague, speculative, and indefinite to justify us in differing with the court at Special Term in the exercise of its discretion to deny such application.

[4] The complaint alleges, first, that the operation of the cars of defendant companies over the Manhattan bridge will come in direct competition with plaintiff's road over the same route; and, second, that this will cause damage to plaintiff in the loss of fares and in delay and inconvenience in the operation of its cars. So far as the first ground of special damage is concerned, plaintiff has, and can have, no exclusive right to operate its cars over Manhattan bridge. By the express terms of its franchise, nothing therein contained should be deemed to affect in any way the right of the city to grant to any other corporation or to any individual a similar right or privilege upon the same or other terms and conditions. If competition is injurious, it will be equally so if it is lawful competition as if it is unlawful. The gravamen of plaintiff's complaint is that defendants' operation of cars over Manhattan bridge is unlawful. No special damage, so far as plaintiff's income is concerned, can result from the character of such operation. Neither is there any satisfactory evidence as to the effect, if any, of competition. The routes of defendant companies (some portion of which, so far as is here disclosed, are lawful routes) are in their entirety essentially different from that of plaintiff. In view of that fact, we do not think that it clearly appears that defendants' patrons, if defendants should be restrained from operating cars over the bridge,

would become patrons of plaintiff. Neither is there any satisfactory evidence that plaintiff has been or will be delayed in the operation of its cars. Unless there was a great congestion of cars upon the tracks over the bridge, or unless the cars of defendant companies were operated at a different rate of speed than those of plaintiff, it is difficult to see how such a result could follow. Neither of these facts appear. It must be borne in mind that plaintiff is not the owner of any tangible property upon the bridge, such as tracks, or mechanism for transmitting power. All of these are the property of the city of New York, and in this respect the case differs from *Central Crosstown R. R. Co. v. Met. St. Ry. Co.*, *supra*. It may be that upon the trial of this action more satisfactory and convincing proof as to special damage will be presented.

For the present and upon this record, we think that the order denying the motion for an injunction *pendente lite* should be affirmed. All concur.

PEOPLE *ex rel.* BRAEBURN ASS'N *v.* HANKING *et al.*, Board of Assessors. (Supreme Court, Appellate Division, Second Department. January 17, 1913.)

1. TAXATION (§ 200*)—MORTGAGE RECORDING TAX—EXEMPTION FROM OTHER TAXATION—"TAXED."

Tax Law (Consol. Laws 1909, c. 60) § 251, provides that all mortgages on real property within the state "taxed" by that article, and the debts and obligations thereby secured, together with the paper writings evidencing the same, shall be exempt from other taxation. Section 253 provides for a recording tax to be collected and paid as therein provided. Section 260 provides that, when the mortgage covers real property partly within and partly without the state, the state board of tax commissioners shall determine what proportion shall be taxable by determining the relative value of the property within the state as compared to the total value of the entire property. *Held*, that where real property covered by a mortgage is only partly within the state, and the proper amount of the recording tax has been determined and paid, a bond secured by the mortgage is taxable by local assessors on an amount proportionate to the value of the real property situated without the state, since "taxed" in section 251 has reference to such mortgages only as are taxable under that article, and to the extent that a mortgage is not taxable, and no tax is collected, it is not taxed within that section, and is not exempt from local taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 319; Dec. Dig. § 200.*]

For other definitions, see Words and Phrases, vol. 8, p. 6890.]

2. STATUTES (§ 181*)—CONSTRUCTION—INEQUALITIES.

While the courts cannot so interpret a statute as to avoid inequalities where its intention is plain, they may where there is room for interpretation construe it in such manner as to avoid false consequences which cannot be deemed to have been intended by the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

Appeal from Special Term, Rockland County.

Certiorari by the People on relation of the Braeburn Association against William H. Hanking and others, constituting the board of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

assessors of the town of Clarkstown, county of Rockland, to review an assessment. From an order confirming a report of a referee, defendants appeal. Reversed, and assessment modified.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, THOMAS, and CARR, JJ.

George A. Blauvelt, of New York City (Joseph A. Warren, of New York City, on the brief), for appellants.

Gervase Green, of New York City (C. C. Stetson, of New York City, on the brief), for respondent.

Robert P. Beyer, Deputy Atty. Gen., of New York City, for interveners State Board of Tax Com'rs.

CARR, J. The relator is a domestic corporation domiciled in the town of Clarkstown, in the county of Rockland, in this state. It was assessed for taxation in that town in the year 1912 on personal property in the sum of \$1,000. It made complaint to the board of assessors, to the effect that the only personal property held by it was not subject to taxation under the laws of this state, and asked that the assessment rolls be corrected accordingly. This request was refused by the board of assessors of the town, and the corporation thereupon sued out a writ of certiorari to review the validity of the assessment in question. The matter was sent to a referee, who took the proofs of the parties and made a report in which he decided that the personal property assessed against the relator was not subject to local taxation for the year 1912. This report was confirmed by an order of the Special Term of the Supreme Court in Rockland county, which directed that the assessment theretofore made against the relator should be canceled. From this order the board of assessors of said town have appealed to this court.

[1] There is no controversy as to the facts, and the only question involved is as to the proper interpretation of several sections of the Tax Law of this state. It appears that the relator owns a bond for \$1,000, issued by Armour & Co., a foreign corporation. This bond, one of a series amounting in the aggregate to \$30,000,000, was secured by a mortgage made by the Armour Company upon its real estate. The greater part of the real estate covered by the mortgage was situated without this state, but some parcels thereof were situated in the counties of New York and Kings within this state. It appeared that said mortgage, executed to secure the bond in question, was recorded in both the counties of New York and Kings, and on the recording thereof that a tax was paid to the state under the provisions of article 11 of the Tax Law (Consol. Laws 1909, c. 60). Section 251 of the Tax Law, which is contained in article 11 as aforesaid, provides as follows:

"Sec. 251. Exemption from local taxation.—All mortgages of real property situated within the state which are taxed by this article and the debts and the obligations which they secure, together with the paper writings evidencing the same, shall be exempt from other taxation by the state, counties, cities, towns, villages, school districts and other local subdivisions of the state, except that such mortgage shall not be exempt from the taxes imposed by sec-

tions twenty-four, one hundred and eighty-seven, one hundred and eighty-eight, one hundred and eighty-nine and article ten of this chapter; but the exemption conferred by this section shall not be construed to impair or in any manner affect the title of any purchaser of land or real estate which may be sold for nonpayment of taxes levied by any local authority."

Section 253 of the same statute, and likewise a part of article 11, provides as follows:

"Sec. 253. Recording tax.—A tax of fifty cents for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is, or under any contingency may be secured at the date of the execution thereof or at any time thereafter by mortgage on real property situated within the state recorded on or after the first day of July, nineteen hundred and six, is hereby imposed on each such mortgage, and shall be collected and paid as provided in this article. If the principal debt or obligation which is or by any contingency may be secured by such mortgage recorded on or after the first day of July, nineteen hundred and seven, is less than one hundred dollars, a tax of fifty cents is hereby imposed on such mortgage, and shall be collected and paid as provided in this article."

Section 260 of the same statute provides, in part, so far as is material to this controversy, as follows:

"When the real property covered by a mortgage is located partly within the state and partly without the state it shall be the duty of the state board of tax commissioners to determine what proportion shall be taxable under this article by determining the relative value of the mortgaged property within this state as compared to the total value of the entire mortgaged property, taking into consideration in so doing the amount of all prior incumbrances upon such property or any portion thereof. If a mortgage covering property located partly within the state and partly without the state, is presented for record before such determination has been made, then there may be presented to the recording officer with such mortgage or at the time when the first advance is made on prior advance mortgages as provided in section two hundred and sixty-four of this article a statement in duplicate verified by the mortgagor or an officer or duly authorized agent or attorney of the mortgagor, specifying the value of the property covered by the mortgage within the state and the property covered by the mortgage without the state, stated separately. One of such statements shall be filed by the recording officer and the other shall be transmitted by him to the state board of tax commissioners. The tax payable under this article before the determination by the state board of tax commissioners, shall be computed upon such proportion of the principal indebtedness secured by the mortgage or of the sum advanced thereon as the case may be as the value of the mortgaged property within the state shall bear to the total value of the entire mortgaged property as set forth in such statement. The state board of tax commissioners shall on receipt of the statement filed with the board by the recording officer, and on not less than ten days' notice, served personally or by mail upon the person making such statement, the mortgagee and upon the comptroller, proceed to determine what proportion of the principal indebtedness secured by the mortgage shall be used as the measure of taxation within the state under the provisions of this article. In determining the separate values of the property covered by any such mortgage within and without the state for the purpose of ascertaining the proportion of the principal indebtedness secured by the mortgage which is taxable under this article, the state board of tax commissioners shall consider only the value of the tangible property covered by each mortgage, taking into consideration in so doing the amount of all prior incumbrances thereon."

Proceeding under section 260, the state board of tax commissioners determined that the proportion of the mortgage in question which was taxable under the provisions of article 11 of the Tax Law was

in the ratio of .016 to the entire issue of bonds, and the tax payable upon the recording of the mortgage was fixed in that proportion, thus leaving a portion of the mortgage, to the extent of \$29,520,000, untaxed on the recording of the mortgage in this state. The position of the relator is that, notwithstanding the mortgage so far as it covered real estate situated without the state bore no tax to the extent of the real property so situated, yet it was "taxed" under article 11 within the meaning of section 251 of the statute, and that, therefore, to its whole extent it was exempted from any taxation for local purposes within this state. It would seem that the word "taxed" as used in section 251 had reference to such mortgages as were taxable under the provisions of article 11. To the extent that a mortgage was not taxable under the provisions of this article, then there was no requirement in the statute that a tax should be paid on the mortgage as an entirety. To such extent as it was not taxable, and no tax to that extent collected on its recording, it would seem that it was not "taxed" within the meaning of section 251 as aforesaid. According to the undisputed facts in this case, a tax was paid to the state on the recording of this mortgage only to the extent of .016 of the total amount secured by the mortgage. Had this mortgage covered real estate situated within this state, then it would be taxable in its full amount, and on its recording would have been actually "taxed" to that extent. Here, of course, there was paid on the mortgage in question a tax to the extent of only a very small fraction of the principal indebtedness thereby secured. The recording of this mortgage in the counties of New York and Kings added nothing to the security for the bondholders as to any real property covered by said mortgage which was situated without the state. The mortgage had to be recorded within this state, in the usual course of sound business, because it was an entire instrument which covered in part real property within the state, but, except as to such real property within the state, it was for the purposes of this controversy practically unrecorded as against the real property situated without the state. So that, whether we consider the tax imposed by article 11 of the Tax Law as a simple recording tax imposed as a condition of recording the instrument, it is apparent that under the provisions of said article the tax, whatever be its nature, was imposed simply to the extent to which the recording of the instrument was necessary for the protection of the security under the laws of this state.

We think that the clause of exemption contained in section 251 of the statute, as aforesaid, goes only to the extent to which the mortgage in question is taxable, and has been "taxed" under the provisions of said article 11. Otherwise we should have an unequal result, for in order to gain an exemption, under article 11 of the Tax Law, there must be paid on a mortgage covering real property situated wholly within this state, a tax on the full amount of the principal indebtedness, while a mortgage covering property practically all of which is located without this state can have the same exemption from local taxation within this state on the payment of a tax on practically an insignificant proportion of the total amount of the principal indebtedness.

[2] It is true that, where the intention of the statute is plain, it is

not for the courts to so interpret it as to avoid inequalities. At the same time, however, wherever there is room or necessity for interpretation, the courts must consider the statute in such manner as to avoid false consequences, which cannot be deemed to have been intended by the Legislature. As we look at this statute, it seems to us clear enough that it was the intention of the Legislature to grant no exemption from taxation for local purposes under this article, except to the extent that the mortgage was taxable, and "taxed" under the article, and that there is nothing in the words of the statute in any way inconsistent with such obvious intent. These conclusions lead to a reversal of the order appealed from, and require that the assessment roll in question should be corrected to the extent that there should be deducted from the face amount of the bond owned by the relator, a sum proportionate to the determination made by the state board of tax commissioners on the recording of the mortgage; that is to say, that the value of the personal property as assessed against the relator should be reduced to the extent of .016 per cent. thereof, and, as so corrected and modified, that the assessment should be confirmed.

Order reversed and assessment modified to the extent of reducing the amount of the assessment to the extent of .016 per cent. thereof, without costs of this appeal. All concur.

PEOPLE ex rel. ROBERT SIMPSON CO. v. KEMPNER et al.

(Supreme Court, Appellate Division, Second Department. January 17, 1913.)

1. CONSTITUTIONAL LAW (§ 305*)—"DUE PROCESS OF LAW"—NOTICE.

A hearing or an opportunity to be heard in which one may defend, enforce, and protect his rights is absolutely essential to constitute "due process of law," and the particular law under consideration must itself require notice and give a right to a hearing; it being insufficient that a person affected may by chance have notice, or that he may as a matter of favor or courtesy have a hearing.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 925-927; Dec. Dig. § 305.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2227-2256; vol. 8, p. 7644.]

2. CONSTITUTIONAL LAW (§ 309*)—DUE PROCESS OF LAW—PLEDGES.

Code Cr. Proc. §§ 687, 806-809, authorizing proceedings to determine the right of possession of stolen or embezzled property coming into the custody of a magistrate, are invalid as against a pledgee of such property for failure to require giving of notice to him as to the time and place at which his claim of a right as pledgee to retain possession should be heard and determined.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. § 309.*]

3. CONSTITUTIONAL LAW (§ 277*)—DUE PROCESS OF LAW—"PROPERTY RIGHT"—PLEDGES.

The right of an apparent pledgee to retain articles pledged as security for his loan is a "property right," which is protected by the constitutional requirement of due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 762, 766, 949; Dec. Dig. § 277.*]

For other definitions, see Words and Phrases, vol. 6, p. 5729; vol. 8, p. 7770.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. CONSTITUTIONAL LAW (§ 45*)—LONG ACQUIESCENCE IN STATUTE—EFFECT.

An unconstitutional statute cannot be sustained, though it has remained unchallenged for many years.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 42; Dec. Dig. § 45.*]

5. COSTS (§ 240*)—PERSONS LIABLE—PUBLIC OFFICERS.

A magistrate, being a public officer, is not liable for costs on appeal on reversal of an order denying an application for prohibition against him.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 922-926; Dec. Dig. § 240.*]

Appeal from Special Term, Kings County.

Application by the People of the State of New York, on the relation of the Robert Simpson Company, for a writ of prohibition against Otto Kempner, individually, and as chief magistrate, etc., and the Magistrates' Court of the City of New York. From an order denying the application, relator appeals. Reversed, and application granted.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

Franklin Taylor, of New York City, for appellant.

John M. Perry, Asst. Dist. Atty., of New York City (James C. Cropsey, Dist. Atty., of Brooklyn, on the brief), for respondents.

CARR, J. The relator appeals from an order of the Special Term in Kings county that denied, as a matter of law and not of discretion, its application for a writ of prohibition against a city magistrate of the borough of Brooklyn and city of New York. From this order the relator has appealed to this court.

The facts necessary for a determination of this appeal are undisputed, and a question of law alone arises. The relator is a domestic corporation carrying on a pawnbroking business in the city of New York. It appeared that it had advanced the sum of \$15 on a pledge to it of certain articles of jewelry, consisting of two rings, and that it held this property as pledgee for security for the loan. A Mrs. Small, who resided in the borough of Brooklyn, applied to a city magistrate for a search warrant under the provisions of the Code of Criminal Procedure. In her affidavit, she stated that the articles in question had been stolen from her by one Effie Brownson, and that to her knowledge they were in the possession of the defendant. A search warrant was thereupon issued, and a police officer acting under the same took possession of the articles in question, and delivered them to the court from which the warrant had issued.

Section 687 of the Code of Criminal Procedure provides as follows:

"If property stolen or embezzled come into the custody of a magistrate, it must, unless its temporary retention be deemed necessary in furtherance of justice, be delivered to the owner, on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate."

Sections 806, 807, 808, and 809, provide as follows:

"Sec. 806. The magistrate must thereupon, if required, deliver a copy of the inventory to the person from whose possession the property was taken, and to the applicant for the warrant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Sec. 807. If the grounds on which the warrant was issued be controverted, the magistrate must proceed to take testimony in relation thereto.

"Sec. 808. The testimony given by each witness must be reduced to writing and authenticated in the manner prescribed in section 200.

"Sec. 809. If it appear that the property taken is not the same as that prescribed in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken."

The magistrate in question was about to proceed under the provisions of these sections to determine the apparent ownership of the articles in question and to dispose of them accordingly. The ground on which the relator asked for a writ of prohibition was that these provisions of the Code of Criminal Procedure do not provide notice to it of the hearing and determination to be made by the magistrates' court. The learned court at Special Term denied the application for the writ on the ground that the statute above quoted did provide for a notice to the relator sufficient to comply with the constitutional requirement of "due process of law." On this appeal the respondent seeks to justify the order made below on the grounds that the proceedings about to be conducted by the magistrate could not deprive the relator of any property right, and that in actual fact the relator had due notice of whatever action was about to be taken by the magistrate.

[1] The rules of law applicable to this situation are familiar, and have been stated very aptly by Rich, J., writing for this court, in *Matter of Grout*, 105 App. Div. 98, 109, 93 N. Y. Supp. 711, 719, in language as follows:

"The federal courts and nearly all state courts have for many years united in so declaring, and the Court of Appeals, as early as 1878, in *Stuart v. Palmer*, 74 N. Y. 183 [30 Am. Rep. 289], declared that a hearing or an opportunity to be heard, in which the citizen may defend, enforce, and protect his rights, is absolutely essential to constitute due process of law, which principle has since been followed by all our courts, and is now so firmly established as the law of this state as to be beyond controversy. So carefully have the courts guarded this constitutional and sacred right of the citizen, that statutes omitting this required essential have uniformly been condemned, even where it appeared, as it does in this case, that the party proceeded against was permitted, through the courtesy of the court, to have and did have notice of the proceeding and opportunity to be heard. It is not enough that a person may by chance have notice, or that he may as a matter of favor or courtesy have a hearing. The law itself to be constitutional must require notice and give a right to a hearing. It matters not upon the question of the constitutionality of such law that the questions involved have been fairly decided. The essential validity of the law is to be tested, not by what has been done under it, but by what may by its authority be done. *Stuart v. Palmer*, supra; *Gilman v. Tucker*, 128 N. Y. 190, 200 [28 N. E. 1040, 13 L. R. A. 304, 26 Am. St. Rep. 464]; *Coxe v. State*, 144 N. Y. 396, 408 [39 N. E. 400]; *Colon v. Lisk*, 153 N. Y. 188, 194 [47 N. E. 302, 60 Am. St. Rep. 609]."

[2] Now it is obvious that the statute before us contains no provision which requires notice to be given to the relator as to the time or place at which its claim of right as a pledgee to retain possession of the articles in question shall be heard and determined. Doubtless no magistrate would proceed to make a determination under the provisions of the statute without actually giving some notice to the relator and an opportunity to be heard in due course. But this is not enough, for notice is an essential ingredient of due process of law as a matter

of right, and not as a matter of favor or good judgment. The learned court at Special Term was of opinion that as the proceedings were in rem the relator had sufficient notice when the property was taken from its possession, and that it was not requisite that it should have any particular notice of the time and place of the actual hearing before the magistrate. It considered the proceeding as analogous to the issuance of a summons in an ordinary civil action. It overlooked the fact, however, that the issuance of a summons in an ordinary civil action is provided for under a statute which gives an absolute right of appearance and answer to the defendant, and that, after such appearance and answer, no proceeding can be had by way of determination by any court without a formal notice to the defendant as prescribed in said statute. Without seeking to justify the decision of the court at Special Term upon the reasons there advanced, the respondent contends that the mere deprivation of the right of the relator to hold the property as security for the pledge, and its subsequent delivery to some one claiming ownership of it as against the pledgee does not constitute a taking of property in the meaning of the state and federal Constitutions. It is argued that the lien of the relator, if it has any legal basis, will still continue notwithstanding any adverse action on the part of the magistrate, and that any determination by him cannot constitute a bar which will preclude the relator from maintaining either a possessory action in replevin or an action for conversion against the person to whom the magistrate may deliver these articles.

[3] We cannot concur in the proposition that the right of an apparent pledgee to retain the articles pledged as security for his loan is not a property right which is protected by the constitutional requirements of "due process of law." Nor do we think that a process which takes from the relator the custody of the articles pledged and delivers them to some one claiming against the validity of the pledge, thus leaving the apparent pledgee to exercise his remedies at law against the person to whom the articles are delivered, does not constitute a taking of property.

[4] A practically similar provision of the Penal Code of California with relation to the same situation as now confronts us on this appeal was considered in the case of *Modern Loan Co. v. Police Court*, 12 Cal. App. 582, 108 Pac. 56, in an elaborate and exhaustive discussion of the question, in the light of decisions of the courts in various jurisdictions, and a result was reached similar to that which we think is obligatory in this case. It is true that the statute now stands in a form which has existed for many years apparently without question, so far as reported judicial decisions may be found, but, however long standing it may be, it cannot prevail over the organic law whenever it has been called in question. The defect in the statute is remediable easily, and, no doubt, can be amended speedily if the matter be called to the attention of the Legislature.

[5] We are of opinion, therefore, that the order should be reversed and the motion granted, but, as the respondent is a public officer, without costs of this appeal. All concur.

(78 Misc. Rep. 276.)

In re KORTE.

(Kings County Court. November, 1912.)

1. PARENT AND CHILD (§ 15*)—PARTIES IN LOCO PARENTIS—CHARITABLE INSTITUTION.

A Roman Catholic charitable institution having statutory power to receive deserted children and those surrendered to it and place them by indenture or adoption stands to them in loco parentis.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 160-164; Dec. Dig. § 15.*]

2. ADOPTION (§ 7*)—REQUISITES—CONSENT OF PERSONS IN LOCO PARENTIS.

Where a Roman Catholic charitable institution surrendered two foundlings to a married couple on condition that they should be brought up in the Catholic faith, and the wife had died a member of the Roman Catholic Church, the surviving husband, who has no definite religious belief, will not be granted an order for the adoption of the children without the consent of the institution.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 7-10; Dec. Dig. § 7.*]

Application of Herman A. Korte for the adoption of Mary Ellen Corcoran and another, minors. Denied.

Hillquit & Levene, of New York City, for petitioner.

Bayard L. Peck, of Brooklyn, for respondent New York Foundling Hospital.

FAWCETT, J. The petitioner in these proceedings, Herman A. Korte, seeks an order, authorizing the adoption by him of two minor children, Mary Ellen Corcoran, aged eight, and Alexander Pell, aged ten. Both children are foundlings originally surrendered to the custody of the respondent herein, the New York Foundling Hospital, a Catholic institution, which has by statute the power to receive deserted children and those surrendered to it, and place children by indenture or adoption. In 1904 and 1905, respectively, the children Alexander Pell and Mary Ellen Corcoran were placed by the hospital in the home of Herman and Elizabeth Korte. Mrs. Korte, who died a few months ago, was a member of the Catholic Church. In 1911 proposed agreements of indenture for the two children were sent to Herman and Elizabeth Korte, which it is contended were never properly executed by the Kortes, and, even if executed, simply gave to them the care and custody of the children, provided such foster parents complied with the covenants therein set forth, until the children were 21 and 18 years old, respectively.

Mr. Korte is not a Catholic, the petition herein stating that he is a Protestant, and there being some evidence, in the affidavits submitted, that he is what is termed a "free thinker." Section 115 of the Domestic Relations Law (Consol. Laws 1909, c. 14), speaking of adoption of children under the care of a charitable institution, provides that:

"Every such child shall, when practicable, be given to persons of the same religious faith as the parents of such child."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The children were in early years taken to Boston, but are now living and attending school in this county. The natural parents of the children have not been found, but it is submitted that both of them having been surrendered to a Catholic charity were presumably of Catholic parentage.

Upon the submission of the question here involved originally, the court, seeking light, required of the respondent, which opposed the applications, additional affidavits as to facts ascertained relative to the home of petitioner, and the education and environments of the children, and asked for a full statement of the grounds for the opposition. Such an affidavit was submitted, and it sets forth substantially the following facts: That the child Alexander Pell was baptized into the Catholic Church in 1903; that the mother of the child, Mary Ellen Corcoran, was a Roman Catholic, according to the records of the hospital; that the petitioner and his wife formally agreed to baptize said child at the earliest opportunity; that the agreements of indentures sent to the Kortess were not intended as consents to the legal adoption of either of said children; that the Kortess when they received the children did promise that they should be reared in the Roman Catholic faith; the children attend public school, and, finally, that the said children have not received and are not now receiving the instruction and education in the Roman Catholic faith which the petitioner and his wife promised should be given to them, and are not receiving any religious training or education whatsoever; that the mother of the petitioner has stated that she, her husband, and her son, the petitioner herein, being all members of the household where these children are living, are so-called freethinkers, and that they do not intend to bring the children up in the Roman Catholic faith; that the petitioner himself has admitted that he is a so-called freethinker, and has no definite religious belief.

The respondent, the New York Foundling Hospital, through its agents, has investigated the home of the said Herman Korte, and is unwilling to consent to the adoption, and objects to the granting of the proposed order of adoption.

It is also alleged that petitioner's business takes him away from home for varying periods of time. He also stated he intended to leave his mother's house and secure a place where he and the children could live; "he being apparently confident that he could find a competent housekeeper who could look after the children and see to the details of the domestic management."

It is urged that the death of petitioner's wife has removed the loving care of a mother from the children and has deprived them of the benefit of religious teaching, that the children are being educated without religious instruction of any kind, and will undoubtedly drift into freethought or atheism.

On the other hand, the petitioner contends that the children have had a "general religious, ethical, and moral training since they were old enough to appreciate the value of such instruction; that your deponent is not attached to any specific religious creed, nor is he a member of any particular church, but does believe in the teachings of Christ.

and Christianity, and has brought up the children in that way; that he has endeavored to teach them the idea of God and a Supreme Being; and above all has given them at home general moral and ethical instruction. That deponent has not sent the children to any particular church" but prefers, in effect, to permit them, when at a suitable age, to select for themselves the particular Christian faith which appeals to them. Finally, and apparently inconsistently with this position thus stated, the petitioner states that he has placed the children in a Methodist Sunday school.

These are briefly the facts and the contentions of both sides of this controversy, and, indeed, it presents a most difficult and vexing question for the discretion of the court. It would seemingly require the judgment of a Solomon to dispose of the issues raised here to the satisfaction of all concerned, keeping in mind always the spiritual, moral, and temporal welfare of the children, the innocent victims of the circumstances. Should the petitioner remarry—as is not only possible but probable—the question would be still more involved and the position of the children, in the event of issue of such marriage, an extremely delicate one.

The case is still further complicated by the legal technicalities urged by both sides in favor of and opposing the proposed adoption. These questions may be briefly disposed of without elaborating them here, for the reason that the solution proposed by the court may render a decision of these questions unnecessary.

It is contended that, without the consent of the New York Foundling Hospital, the court has no power to grant the order prayed for, and that the indentures executed by the respondent in 1911 may not be interpreted as such consent required by law; further, that the fact that petitioner is a Protestant and the children Catholics makes the denial of the petition necessary. Furthermore, it is questioned whether or not this court has power to sign an adoption order without notice to the natural parents of the child. *Matter of Livingston*, 151 App. Div. 1, 135 N. Y. Supp. 328. But under section 111 of the Domestic Relations Law the consent of a parent who has abandoned the child is unnecessary.

[1, 2] The court is of the opinion that the hospital under the facts and circumstances of this case stands in loco parentis. Its surrender of the child in each case was conditional upon its being brought up in the Catholic faith, and not an absolute surrender as would deprive it of that relationship. I am constrained to hold, therefore, that the consent of the hospital is necessary in this case. No one is more keenly cognizant than I of the liberal policy of our Constitution and our laws towards religious liberty and freedom to worship as one chooses, but it would be a manifest wrong to permit these children to be brought up in a condition of pagan unbelief and atheism. As adults, they will have the right to believe as they please, but I must now hold, keeping ever in mind that the welfare of the children is the paramount consideration which guides the court, that the proposed adoption of these children by the petitioner cannot at this time be granted.

However it is not intended by this decision to finally dispose of the matter. I am extremely reluctant to have the children taken back to the hospital and removed from the care and custody of the petitioner, who it seems has developed a real attachment for the children, so much so, in fact, that it is claimed they do not even know that he is not their natural father. I would suggest that both parties to this controversy attempt further conference, and mutually give and take in a true Christian spirit for the welfare of the children. Let the petitioner set aside for the time being his own religious convictions or the lack of them, and place the children under Catholic teaching and religious training for a period of six months as a trial, and perhaps at the end of that time the respondent upon reconsideration will find it possible to consent to the proposed adoption and the application may then be renewed. And in the meantime, and until the further order of the court, the proceedings herein may be stayed.

Ordered accordingly.

(78 Misc. Rep. 191.)

PEOPLE v. KINGS COUNTY IRON FOUNDRY.

(Kings County Court. November, 1912.)

1. INDICTMENT AND INFORMATION (§ 21*)—FORMAL REQUISITES.

The inadvertent striking from the printed form of an indictment of the words "at the borough of Brooklyn, in the city of New York, in the county of Kings," does not render the indictment demurrable, on the ground that the grand jury had no authority to inquire into the crime, as not being within the legal jurisdiction of Kings county, where the indictment bears the caption, "County Court of the County of Kings."

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 92-97; Dec. Dig. § 21.*]

2. NUISANCE (§ 91*)—PUBLIC NUISANCE—CRIMINAL PROSECUTION—INDICTMENT.

An indictment for maintaining a public nuisance, containing no allegation that the acts described either annoy, injure, or endanger the health or safety of any considerable number of people, is demurrable, as not substantially conforming to Code Cr. Proc. § 275, requiring an indictment to contain a plain and concise statement of the acts constituting the crime.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 206-211; Dec. Dig. § 91.*]

The Kings County Iron Foundry was indicted for maintaining a public nuisance. Demurrer to indictment sustained.

James C. Cropsey, Dist. Atty., of Brooklyn, for the People.

Guggenheimer, Untermeyer & Marshall, of New York City (Louis Marshall, of New York City, of counsel), for defendant.

DIKE, J. The grand jury of the county of Kings, by an indictment filed on the 29th day of December, 1911, accuse the Kings County Iron Foundry of the crime of maintaining a public nuisance. The defendant has interposed a demurrer, urging upon the court three

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

grounds of error: First, upon the ground that it appears upon the face of the indictment that the grand jury by which it was found had no legal authority to inquire into the crime charged by reason of its not being within the legal jurisdiction of the county; second, upon the ground that this indictment does not conform substantially to the requirements of section 275 of the Code of Criminal Procedure, in that it does not contain a plain and concise statement of the act constituting the crime; third, on the ground that the facts stated in the indictment do not constitute a crime.

[1] It seems to me there is no merit in the first point urged upon the court. The inaccuracy in the indictment, if I might so phrase it, arises from the inadvertent striking out upon the printed form of the phrase "at the borough of Brooklyn, of the city of New York, in the county of Kings." There can be, however, no doubt as to the county; the caption of the indictment reading, "County Court of the County of Kings." This I hold to be such a part of the indictment as to make the allegation as to the locus sufficiently clear to confer jurisdiction.

[2] As to the second point, namely, as to maintaining the public nuisance, I am inclined to believe that the objection to the indictment is well taken. There is no allegation to show that the acts described either annoy, injure, or endanger the comfort, health, or safety of any "considerable number of people." It seems to me that the pleader should have clearly made use of this phraseology, "any considerable number of persons," under the circumstances surrounding such a charge as is here made. Public, not private, rights are involved in this case. The questions and conditions that would be pertinent in an investigation necessary to enjoin, suppress, or secure damages for the maintenance of a private nuisance do not enter here. A nuisance is public when it "affects the rights enjoyed by citizens as part of the public, as the right of navigating a river, or traveling on a public highway—rights to which every citizen is entitled." In the case of *People v. Transit Development Co.*, 131 App. Div. 174, at page 179, 115 N. Y. Supp. 297, at page 302, Miller, J., quotes from the case of *Ackerman v. True*, 175 N. Y. 353, 360, 67 N. E. 629, 630, as follows:

"It is well established by the decisions of this court that interferences with public and common rights create a public nuisance."

And then he goes on to say:

"It is elementary that a private person cannot prosecute a suit for a public nuisance. Though he may suffer injury, it is common to the public, and can only be redressed by the state, either by indictment, or by a suit to abate the nuisance; though, where an individual suffers peculiar or special damage, not common to the public, the nuisance is as to him private, and he may have his action for damages or, in a proper case, may invoke the equity power of the court. See *Doolittle v. Supervisors of Broome Co.*, 18 N. Y. 155, 160; *Kavanagh v. Barber*, 131 N. Y. 211, 213 [30 N. E. 235, 15 L. R. A. 689]."

While the discomfort and the annoyance arising from the defendant's conduct of its business are undeniable, I am forced to the conclusion that the indictment is defective. The second objection to the indictment is well founded, and the demurrer is therefore sustained.

Demurrer sustained.

(78 Misc. Rep. 269.)

In re CONKLIN, Supervisor of the Town of De Witt.

(Onondaga County Court. November, 1912.)

PAUPERS (§ 37*)—CHILDREN—DUTY TO SUPPORT PARENT—"SUFFICIENT ABILITY."

An honorably discharged veteran 80 years old was in feeble health, and had only his pension of \$22 a month, which was not sufficient for his support. An appropriation by the town for veteran relief, authorized by Poor Law (Consol. Laws 1909, c. 42) § 80, was nearly exhausted. The veteran had two sons, one of whom earned \$17 a week and had a wife and two children, one of whom was self-supporting. The veteran's other son was married, earned about \$15 a week, and was without children. *Held*, that the sons were subject to an order requiring them to contribute \$2 a week each to the veteran's support, as provided by Code Cr. Proc. § 914, the words "sufficient ability," as used in such section, referring to the ability of the child, meaning ability to contribute under all the circumstances of the case, and not depending solely on the amount of property owned by the child.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. §§ 144-158; Dec. Dig. § 37.*]

For other definitions, see Words and Phrases, vol. 7, p. 6760.]

Application by Dana Conklin, as supervisor of the town of De Witt, for an order compelling the children of Timothy E. Carley, a poor person, to maintain him. Granted.

Arthur C. Meade, for petitioner.

Charles P. Wortman, of Syracuse, for defendants.

ROSS, J. This is a proceeding pursuant to the provisions of section 914 of the Code of Criminal Procedure, and kindred sections, to compel the children of Timothy E. Carley to wholly or partly support their father.

Mr. Carley is an honorably discharged veteran 82 years of age, with poor eyesight and in feeble health, and now is in the Hospital of the Good Shepherd. He has no property, but has drawn a pension of \$22 a month, which is not sufficient for his support. Heretofore the veteran relief committee of the town of De Witt has furnished means for Mr. Carley's support, but the appropriation made by the authorities of the town of De Witt for the use of that committee is nearly or quite exhausted.

Mr. Carley has five children, two daughters and three sons, of whom a son, Frank, whose whereabouts are not known, and a daughter, Anna Brewer, are not made parties to this proceeding. Another daughter, Hattie Merritt, was made a party, but so far as disclosed by the evidence her position is that of a married woman living with her husband and without income or property, and, while it would seem that her filial instincts should prompt her to assist in supporting her father, she can decline to do so so far as any legal liability is concerned. The remaining two children are Alexander Carley, 44 years of age, who earns about \$17 a week, and has no property, whose family consists of his wife and two children, a son 19 years of age, who is self-sup-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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porting, and a daughter 13, who is attending school, and Albert Carley, 38 years of age, whose family consists of himself and wife, and who is earning about \$15 a week, and has no property.

The question which this court has to determine is whether an order should be made, under the provisions of the Code of Criminal Procedure referred to, to compel the sons Alexander and Albert to support, or partially support, their father. Each of these sons declines to provide a home for his father in his own family, or to point out where he can have a home. They have employed able counsel whom they have, as appeared by the evidence, paid. Several hearings have been had, and the case has been submitted on briefs.

The defendants claim that the provision of section 914 of the Code of Criminal Procedure under which this proceeding is brought is not applicable because their father is a soldier, and that in the case of a veteran section 80 of the Poor Law (Consol. Laws 1909, c. 42) alone applies. The section of the Criminal Code referred to provides that the father and mother and children (if of sufficient ability) of a poor person who is insane, blind, decrepit, so as to be unable to work to maintain himself, must relieve and maintain him in a manner to be approved by the overseer of the poor of the town where he is. Provision is also made for an order for a partial contribution in which it appears that the child is unable to wholly support his poor relative, and also for the apportionment of the expense of maintenance among two or more relatives.

Section 80 of the Poor Law prohibits in terms the sending of an indigent soldier who has served in the military service of the United States to an almshouse, and provides that he shall be relieved at his home, and provides in detail that relief shall be rendered through a post of the Grand Army of the Republic, and provides the details of obtaining funds for such purpose and the method of disbursing the same. There is nothing inconsistent between those two provisions. There is nothing in the Poor Law which relieves the relatives mentioned in the Criminal Code from the duty imposed upon them. In other words, section 80 of the Poor Law is an additional protection to the indigent soldier, not a release from the duty due to him, in common with other men, of receiving the support of his children. In other words, the children of a veteran are not relieved from filial duty imposed upon them by statute because their father was a soldier.

It is further contended by the defendants that they are not of "sufficient ability" to support or contribute to the support of their father. What is "sufficient ability" must depend upon the circumstances in each case, and, as the matter rests largely in the discretion of the court, it cannot depend solely upon the amount of the property the defendant owns, for in that case a child proceeded against might have a princely income and no property subject to levy. Neither can it depend solely upon the income, as his income might be small and the amount of his property large, but, as stated before, must depend upon the circumstances of each separate case.

In this case the wages of one son is \$17 a week. He has a wife and two children; his son being self-supporting. The other son re-

ceives an income somewhat less, but has no children. I think under the circumstances that each son should be compelled to contribute \$2 a week towards the support of his father. The case of *Colebrook v. Stewartstown*, 30 N. H. 9, 64 Am. Dec. 275, cited by the defendants' counsel, was a proceeding against a grandfather to support the children of a married daughter whose husband was in prison. Our statutes have not extended the duty to support poor relatives beyond parents and children, but within those degrees our remedy is somewhat drastic and necessarily so, for children who have to be brought in court to contribute to their father's support to prevent his becoming a public charge have to be dealt with somewhat arbitrarily. They are deemed under the law in question to be of sufficient ability unless the contrary shall affirmatively appear. Code Crim. Pro. § 916. The matter of whether Mr. Carley can be committed to a soldier's home is not presented in this proceeding, and is, in any event, a matter for the overseer of the poor in the town where he resides. Poor Law, § 83.

An order may be drawn in accordance herewith for the sum heretofore mentioned, to be paid to the overseer of the poor of the town of De Witt until further order of the court, with costs and expenses of this application to be ascertained before the order herein is settled.

Ordered accordingly.

(78 Misc. Rep. 273.)

OWEN v. BROWN.

(Onondaga County Court. November, 1912.)

1. PLEADING (§ 193*)—ULTIMATE OR EVIDENTIARY FACTS.

Where a complaint alleged the making of a contract, its performance, or offer of performance by plaintiff, nonperformance by defendant and resulting damage, it was not demurrable because it also stated evidentiary facts as well as some facts which would not be admissible, instead of being limited to a statement of the ultimate facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428-435, 437-443; Dec. Dig. § 193.*]

2. PLEADING (§ 193*)—DEMURRER—Grounds.

It is not sufficient to sustain a demurrer that the facts are imperfectly or informally averred, or that the complaint lacks definiteness, or that material facts are argumentatively stated.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428-435, 437-443; Dec. Dig. § 193.*]

3. ACTION (§ 47*)—IMPROPER JOINDER.

A complaint for breach of contract was not demurrable for misjoinder of causes of action because of allegations of conversion of personal property belonging to plaintiff, and a forcible taking of plaintiff to a county home, intended by the pleader merely as evidence of defendant's violation of the contract.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 469, 470, 472-489; Dec. Dig. § 47.*]

4. COURTS (§ 170*)—COUNTY COURT—JURISDICTION—AMOUNT IN CONTROVERSY.

Where a complaint in the County Court for breach of contract demanded judgment for \$800 for the return of certain property, for \$300

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for ten months' work, and for \$2,000 for breach of contract, it was demurrable as stating a cause of action beyond the jurisdiction of the County Court under Code Civ. Proc. § 340, subd. 3, conferring jurisdiction on the County Court in cases where the complaint demands judgment for a sum of money only not exceeding \$2,000.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 427; Dec. Dig. § 170.*]

5. PLEADING (§ 193*)—DEMURRER—NATURE OF RELIEF DEMANDED.

The fact that complainant asked for equitable relief in an action to recover damages for breach of contract would not in itself render the complaint demurrable.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428–435, 437–443; Dec. Dig. § 193.*]

6. COURTS (§ 170*)—JURISDICTION—ALLEGATIONS OF PLEADINGS.

A valid cause of action cannot be spelled out of two causes alleged in a complaint, neither of which is within the jurisdiction of the court, the test being not whether the court has jurisdiction over the subject of the action as the facts actually exist, but whether it has jurisdiction over the subject of the action as stated by the plaintiff.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 427; Dec. Dig. § 170.*]

7. COURTS (§ 170*)—COMPLAINT—RELIEF DEMANDED—DEMURRER.

While a complaint is not generally demurrable because the relief demanded is not that to which plaintiff is entitled, it is otherwise when the action is brought in an inferior court, and the jurisdiction of the court depends on the relief demanded.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 427; Dec. Dig. § 170.*]

8. PLEADING (§ 250*)—INSUFFICIENT COMPLAINT—AMENDMENT—JURISDICTION.

Where an action was commenced by the service of a summons, and the complaint stated a cause of action, the subject of which was not within the jurisdiction of the court, plaintiff was entitled to leave to amend.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 730–733; Dec. Dig. § 250.*]

Action by Eugene T. Owen against George H. Brown. On demurrer to complaint. Sustained.

Elmer E. Stanton, of Syracuse, for plaintiff.

Edward W. Hyatt, of Homer, for defendant.

ROSS, J. The defendant demurs upon the grounds, first, that the court has no jurisdiction of the subject of this action; second, that causes of action have been improperly joined, it being claimed that the complaint shows a joinder of causes of action in tort with a cause of action based upon a contract; third, that the complaint does not state facts sufficient to constitute a cause of action. I will consider the grounds of demurrer inversely.

The complaint is somewhat verbose, covering some nine pages to set out a simple cause of action for a breach of contract, and it would be clearly subject to a motion to strike out the irrelevant and redundant matter and to make more definite and certain. See *Gutta Percha & Rubber Mfg. Co. v. Holman*, 150 App. Div. 678, 135 N. Y. Supp. 766. The pleader has stated evidentiary facts and some facts which would not even be admitted in evidence, instead of stating the ultimate

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

facts constituting his cause of action, to wit, the making of the contract set forth in the complaint, its performance, or tender of performance, by the plaintiff and the damages sustained by the plaintiff thereby.

[1] Inartistically as the complaint is drawn, assuming, as must be assumed upon demurrer, that the facts stated therein are true, the pleader has stated facts showing the existence of a contract, performance, or offer of performance, by the plaintiff, its nonperformance by the defendant, and resulting damages.

[2] It is not sufficient to sustain a demurrer to show that the facts are imperfectly or informally averred, or that the complaint lacks definiteness, or that the material facts are argumentatively stated. *Milliken v. Western Union Telegraph Co.*, 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; *Marie v. Garrison*, 83 N. Y. 14.

[3] The claim that causes of action in tort and in contract have been improperly united does not seem to me to be well taken. There is an allegation apparently alleging conversion of certain personal property belonging to the plaintiff. There is also a claim in regard to forcibly taking the plaintiff to the county home that might, if properly averred, sustain an action for assault, or for false imprisonment; but in reading the allegations in regard to these two matters it is evident that what the pleader really intended was to set up evidence of violation of the contract, which is the real basis of his action.

[4] The claim of the defendant that the court has no jurisdiction of the subject of the action has legal merit. The plaintiff demands judgment for the value of the property turned over to the defendant of \$800, and for 10 months' work \$300, and also claims damages of \$2,000 for the breach of contract.

The plaintiff has stated facts from which an action for a breach of contract can be spelled out; but he has, unfortunately for him, demanded judgment for a sum of money in excess of \$2,000.

[5] He also prays for specific performance, and some incidental equitable relief. The fact that he asks for equitable relief in an action to recover damages for a breach of contract would not of itself render the complaint demurrable. But he cannot extend the jurisdiction of the County Court in an action for money damages beyond \$2,000 by asking for equitable relief; or, stated in another way, if his action is an equitable one, the statute does not give this court jurisdiction. If his action is for money damages, then it has no jurisdiction because of the amount demanded.

[6] A valid cause of action cannot be spelled out of two causes of action, neither of which is within the jurisdiction of the court. The test is not whether the court has jurisdiction over the subject of the action as the facts actually exist, but whether it has jurisdiction over the subject of the action as stated by the plaintiff.

The defendant by his demurrer upon the ground of want of jurisdiction does not necessarily say that the court has no jurisdiction of the cause of action which exists, but that it has no jurisdiction of the cause of action alleged. In the case of *Van Clief v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017, cited by the counsel for the plaintiff,

the claim was not raised by demurrer, but the case was tried and the complaint amended. But in the case at bar the sufficiency of the complaint is challenged by the demurrer.

[7] While it is true as a general proposition that a complaint is not demurrable because the relief demanded is not that to which the plaintiff is entitled (*Wetmore v. Porter*, 92 N. Y. 76), it is otherwise when an action is brought in an inferior court and the jurisdiction of the court depends upon the relief demanded, which is precisely this case under provision of subdivision 3 of section 340 of the Code of Civil Procedure, which confers jurisdiction upon the County Court in a case "wherein the complaint demands judgment for a sum of money only not exceeding two thousand dollars."

[8] The plaintiff's attorney states in his brief that the action was commenced by the service of a summons, only there is no proof of this in the papers presented to me, but will assume such statement to be correct. Hence the complaint is amendable under the authority of *Van Clief v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017. But see *Heffron v. Jennings*, 66 App. Div. 443, 73 N. Y. Supp. 410, to the effect that, in an action in the County Court in which a summons and complaint are served at the same time and the complaint demands judgment in excess of \$2,000, the court has no power to amend the same by reducing the amount of damages demanded to that amount; and see, also, *Hamburger v. Hellman*, 103 App. Div. 266, 92 N. Y. Supp. 1067.

The demurrer to a complaint upon the ground that the court has no jurisdiction of the subject of this action is sustained, with costs to the defendant, and the plaintiff is allowed to plead over upon the payment of said costs within 20 days after the entry of judgment and notice thereof.

Demurrer sustained.

(78 Misc. Rep. 245.)

In re KINGS COUNTY TRUST CO.

(Surrogate's Court, Kings County. November, 1912.)

1. WILLS (§ 630*)—CONSTRUCTION—VESTED OR CONTINGENT ESTATES.

Where the only words of gift are contained in the direction to divide or pay, the gift vests on the testator's death if such intention appears, and is future and contingent only when the only evidence of intention is found in such direction.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1464–1480, 1486, 1487; Dec. Dig. § 630.*]

2. WILLS (§ 630*)—CONSTRUCTION—VESTED OR CONTINGENT ESTATES.

Where a testator survived by his widow and her son, and by three children by an earlier marriage, provided by his will that, when the son should attain his majority, the corpus of the estate should be divided among the widow and all the children, share and share alike, the surviving issue of any deceased child to take per stirpes and not per capita, and by a codicil he made a money bequest to his widow and two of the children to equalize advances made to two of his sons, and the widow died during the minority of her son, who reached full age, the provision in her favor vested at testator's death, and the decree on settlement of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the accounts of the administrator of the will annexed of testator should provide for the payment to the executor of the widow of the money bequest with interest from the date of the advances, and a one-fifth share of the residuary estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1464–1480, 1486, 1487; Dec. Dig. § 630.*]

Judicial settlement of the account of the Kings County Trust Company, as administrator with the will annexed of the estate of Charles S. Fowler. Decree entered.

George V. Brower, of Brooklyn, for accounting administrator.

Joseph H. Breaznell, of Brooklyn (John T. McGovern, of Brooklyn, of counsel), for Charles S. Fowler, Jr.

G. H. Brevillier, of New York City, for Richard E. Fowler, William S. Fowler, and Abbie M. Fowler.

KETCHAM, S. The testator was survived by his widow, her son by the testator, and three children by an earlier marriage. The widow has died since the testator's death and during the minority of her son, leaving a will. Her son has attained majority since his mother's death. Portions of the testator's will are as follows:

"Fourthly. I order and direct my executrix to collect and receive the interest, rents, profits and income from my estate, real and personal, and to pay herself fifteen hundred (\$1,500) dollars per annum out of the net proceeds of the same for her support and maintenance and for the support, maintenance and education of my youngest son, Charles S. Fowler, Jr., during his minority; but if the said net proceeds thereof should exceed the sum of \$1,500 per annum, then and in that case I order and direct my executrix to divide such annual excess among my children, William S. Fowler, Abbie M. Fowler, Richard E. Fowler and Charles S. Fowler, Jr., equally, share and share alike, the surviving issue of any deceased child to take per stirpes and not per capita.

"Fifthly. When my said son Charles S. Fowler, Jr., shall attain his majority I order and direct my executrix to divide the corpus of my estate, real and personal, among my wife, Annie E. Fowler, and my said children, William S. Fowler, Abbie M. Fowler, Richard E. Fowler and Charles S. Fowler, Jr., equally, share and share alike, the surviving issue of any deceased child to take per stirpes and not per capita.

"Sixthly. If my said son Charles S. Fowler, Jr., should die before attaining his majority, then and in that case I order and direct my executrix upon his death to divide the said corpus to my wife, Annie E. Fowler, and my surviving children, equally, share and share alike, the surviving issue of any deceased child to take per stirpes et non per capita.

"Seventhly. Believing that equality is justice, it is my will that my wife shall share equally with my children in the division of my estate whenever the same shall be made. Therefore if any of my children should die without issue surviving before the time hereinbefore limited for the division thereof, then and in that case I order and direct that the share of the one dying shall be divided among her and my surviving children equally, share and share alike."

The codicil contains the following provision:

"Secondly. Whereas on the 7th day of July, 1902, I did advance the sum of twenty-five hundred dollars (\$2,500) apiece to my sons William S. Fowler and Richard E. Fowler, now, in order to carry out the principle of equality in my said will, I desire that a like sum should be paid out of my residuary estate before the division or distribution thereof to my wife and children, Abbie M. Fowler and Charles S. Fowler, Jr., together with interest thereon from said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

7th day of July, 1902, and I order and direct my executrix accordingly to pay out of my said residuary estate before any division thereof shall be made, to my said wife Annie E. Fowler, the sum of \$2,500, with interest thereon from July 7, 1902; to my said daughter Abbie M. Fowler the like sum of \$2,500, with interest from July 7, 1902, and my said son Charles S. Fowler, Jr., the like sum of \$2,500, with interest thereon from July 7, 1902, and I order and direct that the balance thereof of said residuary estate resulting from the deduction of \$7,500 therefrom shall be divided among my wife and children, equally as directed by my said will."

The question is presented: Does the provision in favor of the widow upon the son's attaining majority constitute a gift which vested at the death of the testator or is it a gift contingent only upon her survival until the time of the division?

[1] The rule is stated:

"Where the only words of gift are found in the direction to divide or pay at future time, the gift is future, not immediate, contingent and not vested." *Matter of Crane*, 164 N. Y. 71, 58 N. E. 47.

This rule is among those canons of construction of which it has been said that they readily yield to anything in the will which appears to indicate a contrary intention (*Roosa v. Harrington*, 171 N. Y. 341, 64 N. E. 1), and the zeal of the courts to discover the contrary intention has been so persistent that the main rule has practically become the exception. The state of the law may well be formulated as follows: Where the only words of gift are contained in the direction to divide or pay, the gift vests upon the testator's death if such intention appears, and the gift is only future and contingent when the only evidence of intention is found in the direction to divide or pay. In the will at bar the testator not only avows his belief that "equality is justice," but makes it certain that equality among his wife and children is the standard by which his intentions are controlled, and therefore necessarily to be interpreted. In fulfillment of this purpose he directs a division of the remainder which would satisfy his idea of equality if his beneficiaries should all be alive at the time of division, but it requires interpretation to decide the further question whether his conception of equality excluded from the division the representatives of a beneficiary who might die before the distribution.

[2] The will and codicil must be taken as one instrument, in the harmony of which every part modulates and characterizes every other part to which it can be reasonably related. In the codicil there is a new provision which is made "in order to carry out the principle of equality" annunciated in the will. Under the stress of his impulse for equality and because of advances made by him to two of his sons, respectively, of \$2,500, the testator provides that a sum equal to each advance shall be paid out of his residuary estate, and before the division to each of the three beneficiaries to whom no advance has been made. This purpose is manifested by repetition, and is given a meaning of peculiar weight in this discussion by his final direction, which contemplates not an equalizing payment to be made only to such beneficiaries as, lacking in advance, shall survive at the time of the division, but a payment to be made whether such beneficiaries survive or not. Under the touchstone of equality these provisions for the persons

who have had no advance must be gifts which vested at the testator's death, though postponed in payment. In no other way can an equal footing be attained. Equality would vanish if, after these sums have been detached from the remainder and enjoyed by preferred beneficiaries, another, who had received no advance, should by his death be deprived, either in his own person or otherwise, of the equalizing benefit. This eloquently appears as the testator's intention when the direction is regarded that the sums to be paid to the deferred beneficiaries shall be accompanied by interest from the time of the advances.

The vested character of the \$2,500 gifts is confirmed when the codicil directs that the subject of division shall be the residue after the deduction of \$7,500. This requires the payment of each sum of \$2,500, whether the legatee primarily indicated shall survive or not. The whole sum of \$7,500 is to be deducted, and the only thing to be divided is that which shall remain after its deduction. If one of the three beneficiaries who took no advance shall have died before the division, to whom can the \$2,500 deducted to secure equality for him and removed from the residue be paid, if it be not a vested gift? If, then, the testator, in his passion for equality, has found it essential to his purpose to bestow an absolute character upon legacies solely designed to produce the equality for which he is striving, it clearly results that his general intention is that his will shall show forth not merely the kind of equality which would be attained if all his beneficiaries shall survive until the division, but primarily the equality which would only be brought about by an appropriation of his estate to take effect at his death.

The will itself is not wanting in implications that the benefits under the division were intended as vested gifts. A familiar exception to the rule first stated *supra* is said to be applicable where there are words importing a gift in addition to the direction to executors or trustees to pay over, divide or distribute. *Matter of Crane, supra*. While the expression of this subordinate rule is generally, if not always, limited to cases where the words of gift are found elsewhere than in the direction, its origin and spirit would extend it to a case where, in the direction itself, there are words of present gift, for, of course, the testamentary purpose will be evinced with equal force whether words consistent only with an intention that the benefaction shall vest at death are found within or without the phrase which forms the direction to divide.

Under the direction in this will the gifts of the remainder are made in language which elsewhere in the instrument must be confessed to effectuate a gift to take effect as vested at death. It is conceded, and cannot be questioned, that there is a devise in trust to the executors. This devise is effected by the words, "I order and direct my executors to collect, * * * to pay and to divide" the income. Unless these words produce a present estate in the trustee to take effect as an estate in possession at once upon death, there is no trust. These words are sufficient as a devise in trust, and are equivalent to the words, "I de-

wise and bequeath to my executor in trust," or else the structure of the trust must fall, which is impossible. There is no subsequent disposition of the estate or its produce which is not ushered in and characterized by the same form, "I order and direct," etc., and where in the main provision the words have an inevitable meaning the same meaning must be thrown forward into every repetition. *Carr v. Smith*, 25 App. Div. 214, 49 N. Y. Supp. 351, affirmed 161 N. Y. 636, 57 N. E. 1106.

Again, in the paragraph "seventhly," it is ordained as an avowed means of working equality among the wife and children that, if a child shall die without issue, the share of the one so dying shall be divided among the wife and the surviving children. This provision, it must be confessed, indicates that the share primarily intended for the child shall in one event be found in the mass of the remainder and be distributed to persons other than the representatives of the deceased child, but this purpose is reconcilable with the general purpose of the will, that all the gifts in remainder shall vest if it be regarded as a substitution of legatees for the one deceased or as a provision that the deceased child's interest, if vested, shall be subject to defeasance. But it is significant in any event that the will, though express as to the disposition of a child's share upon the death of such child, is silent as to any alternative disposition of the wife's share in case of her death, with or without issue. It is as if the testator had said that his sense of equality was satisfied without any secondary gift of the wife's interest in case of her death. Where as to four legatees the gift in remainder is laboriously subjected to defeasance or change in case of death and the gift to the fifth legatee is left without any expression as to its destination in case of death, the omission as to the fifth legatee is apparently deliberate, and therefore significant.

This case cannot be satisfactorily submitted to the control of *Murtha v. Wilcox*, 47 App. Div. 526, 62 N. Y. Supp. 481, and *Matter of Young*, 78 Hun, 521, 29 N. Y. Supp. 403, affirmed 145 N. Y. 535, 40 N. E. 226. It is sufficiently like later and more authoritative cases to be excluded from the rule that the gifts in remainder are vested when they have been "postponed for accommodation of the estate or to let in an intermediate personal estate or interest." *Matter of Crane*, *supra*. The decree should provide for the payment to the executor of the wife of the sum of \$2,500, with interest from the 7th day of July, 1902, and a one-fifth share of the residue of the trust.

Decreed accordingly.

(78 Misc. Rep. 342.)

In re BROWN et al.

(Surrogate's Court, Kings County. November, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 115*)—ACCOUNTING—CHARGES—INDIVIDUAL TRANSACTIONS.

On the judicial settlement of the account of an executor, the surrogate has no power to decree that the executor return to the estate the salary received by him as an officer of a corporation in which the estate was merely a stockholder.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 467, 468; Dec. Dig. § 115.*]

2. EXECUTORS AND ADMINISTRATORS (§ 115*)—ACCOUNTING—CHARGES.

An objection to an executor's accounts claiming the return by him to the estate of salary received by him as officer of a corporation in which the estate was a stockholder, based on the assumption that the corporation in which the estate held stock was the estate and was treated as such, must be overruled, on the ground that the executor's services as a corporate officer were not performed within his function either as executor or as trustee; and the salary should not be returned to the estate, because it was not taken therefrom.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 467, 468; Dec. Dig. § 115.*]

3. EXECUTORS AND ADMINISTRATORS (§ 115*)—ACCOUNTING—CHARGES.

An objection, on the settlement of an executor's account, to his retention of a dividend on his personal stock in a corporation in which the estate held stock, while assenting to the repayment of the dividend in which the estate was interested, must be overruled.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 467, 468; Dec. Dig. § 115.*]

Judicial settlement of the account of Lilla Brown and another, as executors and trustees of John W. Brown. Decree entered.

Michael F. McGoldrick, of Brooklyn, and Walter W. Westall, of New York City, for accounting executor, Edward V. Slauson.

Wingate & Cullen, of New York City (Conrad Saxe Keyes and T. Ellett Hodgskins, both of New York City, of counsel), for contestant A. Alexander Brown.

Richards Mott Cahoon, of Brooklyn, special guardian for Lilla Hind and Alberta Wheeler, infants, contesting.

KETCHAM, S. [1, 2] The contestants claim that the accountant should "return" to the estate the salary which he has received from a corporation in which he held office, and in which the estate held stock. This argument rests primarily upon the assumption, which the contestants plainly state, that the corporation involved was the estate, and was treated as such. But the corporation was a separate entity. The executors did not own it; nor as such executors did they or either of them conduct it. Their only relation to such corporation was that of stockholder.

Two cases are cited to support the demand that the accountant return the salaries.

In Matter of Froelich, 122 App. Div. 440, 107 N. Y. Supp. 173, the business which the executor continued belonged to the decedent per-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sonally, and itself was a part of the estate. There was no intervention of a corporation in which the estate held stock. The will created a trust to take charge of the decedent's business and to continue the same, and expressly provided for the trustee's compensation in addition to his commissions. The claim of the accounting trustee for a salary in addition to the testamentary provision was denied, upon grounds and precedents wholly inappropriate to a case where the executor has been paid by a corporation, and not by the estate, for services rendered to the corporation, and not to the estate.

The case is ample authority for a recompense to the executor for a service, even though it were rendered to the estate, if it were performed outside the duties imposed upon him in his capacity as executor or trustee. It surely cannot be cited to support inquiry on an accounting in this court with respect to a payment to an executor for his services, when they were rendered outside of his executorial capacity; they were not rendered to the estate, and the payment was not made by the estate.

In *Matter of Popp*, 123 App. Div. 2, 107 N. Y. Supp. 277, the business of the testator was continued under a direction in the will, but without any provision for extra compensation. It was there said:

"If he [the executor] be allowed compensation out of the estate of the deceased other than that fixed by statute, it cannot be for services in his office, but only for something he has done apart from and entirely outside of his office; i. e., as an individual, and not as an executor or administrator."

The expression quoted had nothing to do with any compensation, unless it is payable out of the estate. The case has only to do with services to the estate. The court concedes the propriety, in a proper case, of compensation to the executor "for something he has done apart from and entirely outside of his office," but it takes no thought of a service done for an individual, whether natural or corporate, when such individual is separable from the estate itself.

The objection is overruled, upon the sole ground that the services in question were not performed within the accountant's function either as executor or as trustee; and that the salaries cannot be returned to the estate, because they were not taken from the estate.

It is not forgotten that the law, though obliged to recognize corporations as individual entities, may, upon just occasion, look through the corporate personality if it be found to be a mere mask, and may work equity without regard to the forms in which the parties appear; but the mere statement of this resource of the law intimates that it cannot be availed of in this proceeding. Where the relief prayed for would necessarily dispose of an interest or controversy in which a corporation would be even formally concerned, it could only be awarded in a court having equitable jurisdiction adequate to the case, and not then unless in a proceeding in which the corporation was impleaded.

It is no answer that this court may have recently been endowed with equitable faculties to "affect the accounting party with a constructive trust" (Code Civ. Proc., § 2472a, added by Laws 1910, c. 576); for, if such faculties were available, the conceivable trust would legally

concern the corporation from which the salaries were received, and the surrogate, however his powers may have been broadened by the section cited, cannot affect the accountant with a duty which was presumptively owing to a person not a party before him.

In *Matter of Schaefer*, 65 App. Div. 378, 73 N. Y. Supp. 57, the executors had received certain money from the corporation in which their estate was a stockholder. The only question there considered was whether this money belonged to the estate of the decedent; and the opinion declared that this question depended upon whether the money "was as a fact received by the appellants as a portion of the estate, or as the income or profits of the interest of the estate in the stock of the brewing company."

In that case the court recognized the possibility that the conduct of the accountants might create a grievance in behalf of the corporation from which the money was received, and in this respect the opinion proceeded:

"To entitle the surrogate to charge these executors with money thus received by them there must be competent legal evidence to show that such money actually belonged to the estate of which they were executors, either as money or the proceeds of property belonging to the estate, or as income or profits of the property vested in them as such executors."

And the court added, in words which are adapted to the present case:

"The services that they [the executors] performed for the corporation were entirely distinct from their executorial duties as representing this estate. It is quite clear that they would not be responsible to the estate for their acts as officers of the corporation in any proceeding that could be instituted before the surrogate. While a court of equity would, under certain circumstances, have power to hold them to account at the suit of a stockholder, the surrogate had no jurisdiction of such a cause of action. His jurisdiction would be limited to a determination of the question as to what assets of the estate had come into the hands of the executors, for which upon an accounting they were properly chargeable. The question as to whether or not these appellants had abused their power as directors and officers of the corporation in voting to themselves extra compensation to which they were not entitled, or in distributing the property or assets of the corporation improperly, cannot be determined in this proceeding."

While the case last cited arose before the enactment of section 2472a of the Code of Civil Procedure in 1910, all that is said therein is applicable to the present discussion; for it still remains that the surrogate can only determine "the question as to what assets have come into the hands of the executors [whether legally or in the course of a constructive trust], for which upon the accounting they are properly chargeable," and it must be true, without the need of authority, that the only assets for which upon an accounting in any court any executor can be properly chargeable must be assets which belong beneficially to some party already in the proceeding. Hence, if the surrogate has full power to impose a constructive trust upon the accountant, he is still helpless to consider a trust which is primarily, if not absolutely, for the benefit of a party over whose person he cannot obtain jurisdiction.

The accounting executor personally owned 503 shares of the stock of the Federal Brewing Company at a time when the Long Island Brewery, a corporation, held 2,035 shares of the Federal Brewing Company's stock. It is charged that in the sale of his own stock and in the sale of the stock owned by the Long Island Brewery the accountant subordinated the interests of the estate to his own, and therein dealt unfairly and selfishly with the subject of his trust. The only relation which the estate held to these transactions in the stock of the Federal Brewing Company was that it was a stockholder in the Long Island Brewery. If any injury was sustained by anybody at the hands of the accountant by reason of his conduct touching these sales of the stock of the Federal Brewing Company, it was the Long Island Brewery. To say that the Long Island Brewery was the only person concerned if the accountant failed in duty in these transactions is no mere nicety. It is a reality, the sober recognition of which is imperative if we are not to lapse into legal delirium. The only cause of action or grievance, legal or equitable, which could arise if it were found that the accountant had abused his relations of trust to secure a personal advantage in the transactions above described would be a cause of action or grievance of the Long Island Brewery, whose own property had been sacrificed to the accountant's gain.

The court must still be mindful, as it was with respect to the payment to the accountant of salary as an officer of the corporation, that in an appropriate proceeding in a proper forum the truth and its necessary decretal results must be sought for, without regard to corporate or individual forms; but for reasons assigned *supra* no redress for the wrong which was suffered by the Long Island Brewery, if by anybody, can be administered by any court, however boundless its jurisdiction over the subject-matter, unless it also have jurisdiction of the person of the Long Island Brewery. To give to the estate a judgment against the accountant for a sum which might be said to represent the loss on the sale of the stock which the Long Island Brewery owned would be to determine the rights of the brewery without its prayer for relief or its opportunity to exhibit its rights or measure its damages, and then to extinguish all its claims by awarding its damages to another.

[3] The same considerations dispose of the objection that the accountant retained a certain dividend upon his personal stock, while assenting to the repayment of the dividend in which the estate was interested. In this respect, whatever the accountant did with his own dividends produced a result which legally concerned only the corporation upon whose stock the dividend was paid and the other company which held as its own part of the dividend-paying stock. The only relation of the estate to the dividend transaction was that of stockholder.

A careful review of the brief for the contestant shows that all the items of objection come within the foregoing discussion, and should be overruled. The account will be settled accordingly.

Decreed accordingly.

(78 Misc. Rep. 322.)

In re HAGAN'S ESTATE.

(Surrogate's Court, Kings County. November, 1912.)

EXECUTORS AND ADMINISTRATORS (§ 24*)—ADMINISTRATION DE BONIS NON—RIGHT TO LETTERS—PUBLIC ADMINISTRATOR.

Code Civ. Proc. § 2609, provides for the appointment of a public administrator of Kings county, who is given a prior right to administer on the estate of a person dying without a widow, husband, or next of kin entitled to a distributive share in his estate, resident in the state, etc. *Held* that, under such section, the public administrator is preferred over a creditor or brother of the intestate; and hence, where a daughter died, leaving her father as her sole next of kin, to whom letters of administration were granted, letters of administration de bonis non could not be granted to the father's widow on his death, nor to the intestate's brother, as against the right of the public administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 132-140; Dec. Dig. § 24.*]

Application for letters of administration de bonis non of the goods, chattels, and credits of Emma Hagan, deceased. Denied.

George J. Kilgen, of New York City, for petitioner Joseph L. Hagan, brother of decedent.

Edward L. Dennis, of New York City, for petitioner Annie E. Hagan, administratrix of Arthur B. Hagan, deceased, administrator and sole next of kin of intestate.

O'Neil & O'Neil, of Brooklyn, for petitioner Henry C. Slee, a creditor.

Edward J. Byrne, of Brooklyn, for petitioner Frank V. Kelly, public administrator.

KETCHAM, S. The intestate was survived by her father, who was her only next of kin, and as such entitled to the whole estate. The father took letters of administration, and thereafter died. His widow is his administratrix. Administration de bonis non of the original estate is now asked for by the administratrix of the deceased father, by one of the brothers of the original decedent, by a creditor, and by the public administrator.

Every instinct of justice and good sense urges the appointment of the administratrix of the sole distributee deceased. An executor or administrator of a deceased distributee, who, at the time of the death of the original decedent, was entitled to any interest in the estate, whether solely or with others, should have the same right to administration as the deceased distributee, if living, would have had. The law, however, does not permit such appointment, and in this respect the law is wrong, and should be made right. It is intolerable, though at present inevitable, that the one person wholly interested in the fund must wait for his own, while the fund is subjected to administration and depletion by a stranger.

The brother of the original decedent cannot take the letters. The right to administration is probably confined to relatives entitled at

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

death to succeed to the personal estate (Code Civ. Proc. § 2660; Matter of Seymour, 33 Misc. Rep. 271, 68 N. Y. Supp. 638), although there are authorities to the contrary. Even if the brother were entitled to administration under the general provisions of section 2660, it is expressly provided that he cannot have such letters in preference to the public administrator, who must take as against relatives of the deceased, unless such relatives are "entitled to a distributive share in the estate of such intestate." Code Civ. Proc. § 2669. Between the creditor and the public administrator, the statute prefers the latter (Code Civ. Proc. § 2669); and to the public administrator, since he is preferred both to the creditor and to the brother of the intestate, the letters must issue.

Decreed accordingly.

In re SCHMIDT'S WILL.

(Surrogate's Court, New York County. September 23, 1912.)

1. WILLS (§ 166*)—CHANGE OF INTENTION—UNDUE INFLUENCE—EVIDENCE.

A change of testamentary intention alone is not conclusive evidence of undue influence, though declarations of the testator are admissible to show what his intention was, under a charge of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

2. WILLS (§ 54*)—TESTAMENTARY CAPACITY—EVIDENCE.

When evidence is given in testamentary causes of aberrations or singular actions, it is always important, as a standard of comparison, to show the normal conduct and the intellectual character of the testator in times of conceded sanity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 131-134, 136; Dec. Dig. § 54.*]

3. EVIDENCE (§ 598*)—WEIGHT OF EVIDENCE—NUMBER OF WITNESSES.

The weight of evidence is not determined by the number of witnesses.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2450-2452; Dec. Dig. § 598.*]

4. EVIDENCE (§ 508*)—OPINION EVIDENCE—SUBJECT-MATTER.

The opinions of skilled witnesses are admissible, whenever the subject is one upon which competency to form an opinion can be acquired only by a course of special study or experience.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2311; Dec. Dig. § 508.*]

5. EVIDENCE (§§ 506, 510*)—EXPERT TESTIMONY—INSANITY—TESTAMENTARY CAPACITY.

An attending physician may testify directly as to the fact of insanity, but not as to competency to make a will.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2309; Dec. Dig. §§ 506, 510.*]

6. EVIDENCE (§ 574*)—EXPERT TESTIMONY—WEIGHT.

The opinion of a physician as to the sanity of a testator, drawn from a hypothetical statement of facts, no matter how correctly stated, cannot be accepted in preference to direct and positive testimony contradictory thereto.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2400; Dec. Dig. § 574.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

7. EVIDENCE (§ 574*)—INSANITY—MEDICAL DOCTRINES—FACTS.

If a testator was proven to be rational on certain days, a medical diagnosis that from certain pathological symptoms he could not be rational on any day is in law rejected, and the fact proven prevails in law over the medical theory.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2400; Dec. Dig. § 574.*]

8. WILLS (§ 55*)—TESTAMENTARY CAPACITY—EVIDENCE.

In an action to declare a codicil invalid for testamentary incapacity, evidence *held* to show that testator was at times competent and rational after an apoplectic stroke.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-161; Dec. Dig. § 55.*]

9. WILLS (§ 52*)—INSANE PERSONS—LUCID INTERVALS—BURDEN OF PROOF.

Although an insane person, or one who was at times deprived of reason by illness, may in a lucid interval make his last will, the burden is on those upholding such a will to show that it was made in such lucid interval.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 101-110; Dec. Dig. § 52.*]

10. WILLS (§ 114*)—ATTESTATION—PURPOSE.

Attesting witnesses are required to see that a testator has capacity and that he executes it under free conditions and as required by law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 277-279; Dec. Dig. § 114.*]

11. WITNESSES (§ 321*)—IMPEACHMENT OF OWN WITNESS.

A party cannot impeach his own witness, nor say that he is not entirely worthy of belief.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1094, 1099, 1100; Dec. Dig. § 321.*]

12. WILLS (§ 55*)—INSANITY—LUCID INTERVALS—EVIDENCE.

In an action to declare a codicil invalid for incapacity of the testator, evidence *held* to show that, though testator was at times irrational, he was not so at the time of the execution of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-161; Dec. Dig. § 55.*]

13. WILLS (§ 324*)—TESTAMENTARY CAPACITY—APOPLEXY.

Whether one who has had an apoplectic seizure, which deprived him of reason for a time, has testamentary capacity, is a question of fact to be decided from the evidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 225, 767-770; Dec. Dig. § 324.*]

14. WILLS (§ 166*)—UNDUE INFLUENCE—EVIDENCE.

In an action to declare a codicil to a will invalid, evidence *held* insufficient to show undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

15. WILLS (§ 166*)—"UNDUE INFLUENCE"—SUFFICIENCY OF PROOF.

"Undue influence," invalidating a will, being a species of fraud, and importing coercion, compulsion, and overreaching of a vicious kind, must be proved precisely, or inferentially by irresistible inferences, as the law never infers crime or delict when any other construction is possible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
139 N.Y.S.—30

Application for the probate of a codicil to the last will and testament of Oscar Egerton Schmidt, deceased. Decree entered, admitting the codicil to probate.

Frederick De P. Foster, of New York City (Mr. Hartfield, of counsel), for proponent.

Taylor, Jackson & Brophy, of New York City (Mr. Taylor, of counsel), for contestant Oscar Stevens.

William A. Alcock, of New York City, for Elise von Frisching.

Carter, Ledyard & Milburn, of New York City, for Seamen's Church Institute.

Winthrop & Stimson, of New York City, for New York Orthopaedic Dispensary and Hospital.

Katz & Sommerich, of New York City, for Ida von Hagen.

Ernest F. Ayrault, of New York City, for F. Leopold Schmidt, Jr.

Joseph R. Truesdale, of New York City, for Helen Stevens Schroeder.

Timothy Murray, special guardian.

FOWLER, S. On June 1, 1905, Oscar Egerton Schmidt, a resident of this city, made his last will and testament in due form of law, which is not disputed. This instrument has been duly proved and is entitled to probate. By the second clause of this undisputed will testator devised the estate, consisting of some 317½ acres and a house, all known as the "Poplars" and situated at Lloyd's Neck, Long Island, in the county of Suffolk, state of New York, together with the appurtenances and the portraits of the Lloyd family contained in the house, to his namesake Mr. Oscar Egerton Stevens. On the 3d day of December, 1908, a codicil to this will purports to be made by the testator, whereby, inter alia, he revoked the devise of the "Poplars" to Oscar Egerton Stevens, and in lieu thereof gave him the sum of \$25,000. Testator was then about 69 years of age and had suffered an apoplectic seizure in 1906. Mr. Oscar Egerton Stevens now contests the probate of the codicil, alleging undue influence in the procurement of the codicil and a want of testamentary capacity on the part of the testator on December 3, 1908, the date of the codicil.

At the time the will was executed the testator, Mr. Schmidt, was a widower and childless. He had then title to the estate known as the "Poplars" through the will of his wife, devising it to him in fee simple. During the lifetime of both Mr. and Mrs. Schmidt it appears that a young relative of Mrs. Schmidt, the son of Mrs. Schmidt's first cousin, was much at the "Poplars," and doubtless was regarded by both testator and his wife with affection and interest; they having no children of their own. It was this gentleman who was the devisee of the "Poplars" under the undisputed will. That both Mr. and Mrs. Schmidt had most unwisely, as it turned out, indulged young Mr. Stevens in the hope of inheriting the "Poplars," as the Lloyd's Neck property was known among them, is apparent.

It appears that Mr. Oscar Egerton Stevens was of the blood of Nelson Lloyd, a predecessor of Mrs. Schmidt in the title to the "Pop-

lars," and therefore the bequest of the Lloyd family portraits and the original devise of the estate in question to him by testator were eminently proper under the conditions which prevailed prior to the date on which the codicil was executed. The estate had originally belonged to the members of the family of Lloyd, and both Mrs. Schmidt and Mr. Stevens were descended through female lines from the original proprietors of Lloyd's Neck.

During Mrs. Schmidt's lifetime, and at the date of his will, Mr. Schmidt had other resources besides the real estate known as the "Poplars." In Mr. Schmidt's lifetime this real property was little more than farm property in the main. The house was modern and of wood, and both land and buildings were of no great intrinsic value; but, like many another Long Island property, it had been for a long time held by the descendants of the original settlers, who in this case were the Lloyds. It was, however, only in recent times that this particular portion of Lloyd's Neck had come to have the substantial or considerable valuation which is now conceded to it by all the parties to this controversy. That Mrs. Schmidt in her lifetime was seised of the estate in fee simple is sufficiently established by the fact that she devised it in fee simple to her husband, this testator. Her power of disposition over it was plenary, as was her husband's.

[1] That the testator was at the date of the codicil under any legal or even equitable obligations to hand over the "Poplars" at his death to Mr. Oscar Egerton Stevens is not apparent. Such a contention cannot be the subject of controversy in any event in this court. Mr. Schmidt, at the time of the will and codicil, held the legal title to the "Poplars" estate and was possessed thereof in his own right. He enjoyed it in full dominion and property, and here at least his inherent *jus disponendi*, or legal right to dispose of it as he chose, cannot be disputed or controverted. Whatever expectation Mr. Oscar E. Stevens may have entertained in respect of the estate in question in this court must be regarded as a mere *spes successionis*. Doubtless the declarations of Mr. Schmidt as to his fixed testamentary intentions in respect of Mr. Stevens are to be considered by the surrogate under the issues raised by the pleadings, although a change of testamentary intention alone is not conclusive evidence of undue influence in any probate cause. *Lawrence v. Lawrence*, 4 Wkly. Dig. 299.

The main question for the surrogate on the evidence adduced in this cause concerns the testamentary capacity of Mr. Schmidt on the 3d day of December, 1903, the date of the writing propounded as a codicil. Had he or had he not then testamentary capacity? It appears that when in normal health Mr. Schmidt was a man possessed of a fair mind; at least there is no evidence which shows him to have been in his best days a man of exceptional mental attainment or power. That he was a pleasant, easy-going, extremely well-mannered gentleman, of correct life when in health, the evidence abundantly discloses, and nothing more of consequence as to his normal characteristics.

[2] When evidence is given in testamentary causes of aberrations, or singular actions, or casual eccentricities, or acute conditions of testators, it is always important, as a standard of comparison, to show

the normal conduct and the intellectual character of the person under investigation in his times of conceded sanity; otherwise, a precise standard of comparison is wanting. From the evidence in this cause it is also apparent that in his normal periods Mr. Schmidt was always somewhat indolent, or inclined to do for himself no more than he was obliged to do. He habitually delegated his business and cares as much as possible to others. Much evidence has been given of a certain outward grace of manner and bearing on the part of Mr. Schmidt before his first apoplectic seizure in the year 1906. But there is no competent evidence which shows that in his best days he was a man of more than ordinary intellect, or that he was of dominating will or extraordinary capacity. In the great Parish Will Case, so often cited in our courts, it was clearly established that Mr. Henry Parish, in that case the alleged testator, was before his seizure a dominating man of marked power and unusual mental force. Thus a proper foundation was laid to contrast his condition in time of weakness and ill health. In this cause I can detect no such evidence of force of mind or dominating habit on the part of this testator. On the contrary, it appears that this testator always and habitually delegated as much as possible to others, and that this was a normal characteristic of the testator, even before he was taken ill in 1906.

That at periods of his life after 1904 this testator lived far beyond his means, and even when his personal estate was almost or quite exhausted kept a house in the city of New York, a house in the country, a carriage and horses, and a large staff of servants, is disclosed by the testimony; and these facts are not without legal bearing when we come to inquire whether the actual disposition of his real estate by the codicil is consistent or inconsistent with testator's sanity or his prior expressed testamentary intentions. That such facts have some bearing on the supplemental disposition of the property first devised to Mr. Oscar Egerton Stevens is apparent. When testator had come to the end of his cash resources, and had practically nothing to fall back on except the country real estate, received from his wife, which was nonproductive to any appreciable extent, various dispositions of the "Poplars" were made, both by way of mortgage, deed of trust, and the codicil, which were all inconsistent with the original devise to Mr. Stevens. In 1909 the estate was mortgaged for \$50,000. In 1908 it was conveyed in trust to trustees, and the codicil was then made revoking the devise to Mr. Stevens and giving him \$25,000 in lieu thereof. There is evidence that all these things were the product of Mr. Schmidt's own directions, if he had capacity to give them.

The question remains: Was this codicil the legal act of a capable testator or the act of some one else? Even though the various dispositions mentioned were consistent with Mr. Schmidt's actual needs, that does not of itself establish that they were valid acts, if the testator lacked capacity, or was then the victim of the coercion or fraud clearly alleged in this cause. The surrogate is confined, of course, to the issue of validity of the codicil alone; the validity of the mortgage and the trust deed not being the subject of any inquiry in this court.

At the dates of the will and the codicil it appears that testator had relatives of his own blood, consisting of at least one brother and

one sister, and various nephews and nieces, mainly residing abroad. None of those particular relatives of testator whom he ultimately turned to in his final extremities, however, seemed to have profited by the questioned codicil, and this is important when we come to consider the charges of undue influence and fraud. After the death of testator's wife in 1904, and while he still had some resources other than the real estate, the main and constant companions of his life appear to have been relatives or connections of his late wife and of the contestant. With them or their connections testator lived much of the time between 1904 and 1908, or at least until his cash resources were impaired or nearly exhausted, when he, of necessity, turned to those of his own blood for the active assistance which his disordered finances peremptorily required. This aid they did not decline. It is, however, claimed by Mr. Stevens, the contestant, that after an apoplectic seizure in 1906 testator's mind was so impaired as to render him incapable of a testamentary act, or, if not, to render him unduly susceptible to the fraud and undue influence clearly charged in this cause.

The contestant concedes, and he must concede, that the will of 1905 was the valid and proper testamentary act of a capable testator; for contestant's rights and entire standing in this court flow from that instrument alone. His contention is that between 1905 and 1908 a great change occurred in testator's condition, so great as to incapacitate him for any further testamentary act. It appears that in late June or early July of the year 1906 Mr. Schmidt, the testator, suffered from an apoplexy, or what is commonly called a "stroke," resulting in partial paralysis. He was then sojourning at the "Poplars," where Mr. and Mrs. Ledyard Stevens and their daughter were also residing by some arrangement with testator. They had come to live with him in his town house in Eighth street, in this city, in 1905, and had continued to reside with him. Mr. Ledyard Stevens was the uncle of contestant, but neither he nor his wife was a connection of the testator. At that time it seems to have been quite understood that the "Poplars," the country home of testator, was destined to pass under Mr. Schmidt's will to Mr. Ledyard Stevens' nephew, the contestant, and thus a sort of community of interest existed between testator and Mr. Ledyard Stevens' family, which they at least understood to be unalterable. Whether the testator ever so understood it I doubt, if his subsequent rupture with the Stevens family and the codicil furnish any evidence of his own understanding of his situation.

The autumn of 1906 found Mr. Schmidt again in his Eighth street house. Mrs. and Miss (Ledyard) Stevens, who had returned there with him, then proposed to break up their joint living arrangement and to go abroad. Mr. Schmidt wished to join them, and by the advice of his physician was permitted so to do. He and his valet, Jones, accordingly proceeded to Europe with the ladies in January, 1907, returning in the spring of the same year after a rapid visit to Paris, Rome, and Naples, among other places. Such an exacting tour, whether advisable or not for an invalid, certainly indicates that testator's physical condition was better than that which must have en-

sued immediately after his severe stroke in June or July of the year 1906.

It is to be observed that his visit to Europe was suggested by himself, and that the suggestion was entertained with the respect usually accorded only to persons mentally competent. It is hardly conceivable that an entirely demented man would have been suffered to go abroad with a letter of credit in his own name, accompanied only by two ladies of his acquaintance and an untrained valet as his single attendant. The conclusion is irresistible that in 1907 there was some amelioration of the grievous mental and physical conditions which first followed the stroke in 1906. If we once concede that there were times after the stroke in 1906 when testator was mentally competent, the legal principle applicable in this case is somewhat simplified.

Unfortunately for him, in Naples, in the spring of 1907, the testator suffered some sort of a relapse, and was then brought to his home in New York in what is conceded to be a deplorable state of mind and body. The testator, after several months' stay in New York City, was, however, able to be removed in May of 1907 to the "Poplars," where he was confined to his bed for some time, but toward the end of the summer of 1907 he again improved sufficiently to come down stairs. During all the summer of 1907 testator was under the eyes of the Stevens family. His own family was not with him to any considerable extent, if at all, and the testator's precise mental condition during that summer is more or less a subject of dispute. It may have been as bad as Mrs. Ledyard Stevens thought; but there are circumstances which point to no grave or permanent conditions, except those which the first apoplectic seizure always entails.

In the autumn of 1907 it appears testator again removed to his house in Eighth street, this city. Then it was that Mr. Ledyard Stevens and his family terminated their residence with testator. Their testimony after that throws little light on the inquiry. After their departure, in any event, his condition improved. Mr. Schmidt remained in the Eighth street house until the spring of 1908, when he again went to the "Poplars," at Lloyd's Neck, where he was in constant residence through the summer of 1908 and the winter of 1908-09, and, indeed, until the latter end of the year 1909. This long sojourn at the "Poplars" covers the precise period of the execution of the codicil of December 3, 1908, and it is unnecessary for us at this time to follow testator's movements farther. Mr. Schmidt lived on until April 21, 1911, when he died in a new house which he had himself acquired in Ninety-Third street, in the city of New York, never having revoked the codicil of December 3, 1908.

It has been stated that the Ledyard Stevens family ceased to reside with the testator after the autumn of 1907. From that time testator's nephew, Charles De Rham, and testator's partner, Mr. Tompkins, ministered to his wants, but to a degree which is the subject of acrimonious discussion or implication in this cause. It was during their co-operation with testator, whatever it was, that the troublesome codicil was made. The entire bona fides of Mr. De Rham's ministrations to his uncle was not seriously questioned by the counsel for

Mr. Stevens on the trial. Indeed, one of the counsel for Mr. Stevens went so far as to disclaim in open court any attack upon Mr. De Rham and volunteered to speak of him with a respect and admiration quite inconsistent with an implication of bad faith and undue influence on Mr. De Rham's part. The surrogate cannot be expected to view this disclaimer with equanimity, if it is calculated to devolve on him alone the responsibility of inquiring on his own account, whether Mr. De Rham's actions were or were not illegal in respect of the codicil.

The charge of undue influence in this court is a serious charge, and if followed by sufficient proofs suffices to avoid a testamentary act. If the actors so charged are to be found guilty, there is no room for eulogiums of them or disclaimers of their intended guilt. Certainly such disclaimers are out of order so long as such serious charges are pressed to a conclusion or are suffered to stand on the record. It cannot be otherwise than that Mr. De Rham, Sr., is implicated in the contestant's charge of undue influence, for Mr. De Rham was an active agent in all matters connected with the contested codicil of 1908. If by such disclaimer of counsel it was intended to charge that Mr. Tompkins, the friend and copartner of testator, was the only guilty agent of undue influence, the surrogate is forbidden to accept this assertion, as Mr. Tompkins and Mr. De Rham were co-operating in all the matters of any significance in this controversy. If one gentleman was guilty, both were; and if not both, neither. But the consideration of undue influence may be reserved until the major contention of insanity or testamentary incompetency is first disposed of by the surrogate.

Was or was not Mr. Oscar Egerton Schmidt competent to make a codicil to his will on December 3, 1908? This is the major issue in this cause. The evidence bearing on testator's capacity on December 3, 1908, is twofold, lay and professional, or expert. We must first consider the effect of the professional or expert testimony in this case. On his return from Naples in the spring and afterwards in the fall of 1907, testator was attended by Dr. Partridge, a leading physician of the quarter in which testator then lived. There is no doubt that testator was then very ill. This physician states that there was then evidence of senility as the result of the stroke of 1906, and that testator suffered from bladder trouble. Dr. Partridge consequently turned testator over in 1907 to a specialist for that last-mentioned complaint. After that Dr. Partridge rarely, if ever, saw testator.

It will be observed that this very competent physician refused to characterize testator's complaint as "senile dementia," and he is contestant's own witness. He does state that there was evidence of mental incapacity, senility, and almost imbecility "*for the time being.*" Dr. Partridge is absolutely unable to testify whether or not the testator's condition was improved in the year 1908. He was of the general opinion, however, that the conditions observed by him were not susceptible of improvement. But this prognosis, for prognosis it was, must give way to the facts which are in evidence. The surrogate is unable to conclude from the evidence of this excellent physician, under oath, that at the date of the codicil, in 1908, testator was then

mentally incompetent. The evidence of this particular physician in law falls very short of itself of establishing that fact. It does establish the serious condition of testator in the year 1907.

Dr. Partridge in the autumn of 1907 was succeeded by Dr. Brouner, a specialist for bladder troubles. This medical gentleman states that at times when he saw testator in the late months of 1907, or early months of 1908, testator was incompetent to appreciate what was going on around him. But Dr. Brouner never saw testator after the spring of 1908. He treated the testator for a mechanical obstruction successfully, and that was all. Dr. Brouner does state that at times during the treatment testator was clear in his ideas, and at other times his ideas lacked concatenation. He also states that, on the majority of the visits when he saw testator, testator was not competent mentally to appreciate what was going on around him. Such evidence falls very far short of proof that testator in late 1907 or early 1908 was suffering from incurable dementia or permanent want of mind—"mens insana." While the evidence may be significant in connection with other testimony, it does not of itself establish that on the 3d day of December, 1908, testator lacked capacity to testamentate, and that is the real point at issue.

Dr. William B. Gibson, of Huntington, Long Island, was the attending physician of testator in December, 1908, the date of the codicil in controversy. Dr. Gibson was coroner of Suffolk county, an examiner in lunacy, and obviously an experienced practitioner in the part of the country where testator mainly resided. Dr. Gibson testifies to testator's physical condition, his paralysis, and local difficulties. It was entirely competent for contestant to put to this medical attendant the general question of testator's sanity or insanity in December, 1908, leaving the facts to be brought out in cross-examination. *People, etc., v. Faber*, 199 N. Y. 256, 92 N. E. 674, 20 Ann. Cas. 879; *Weibert v. Hanan*, 202 N. Y. 328, 95 N. E. 688. But no such question was put or answered. Had it been put and answered in the negative, the answer would have been entitled to great attention from the surrogate. But there is absolutely nothing to that effect stated by Dr. Gibson. His actual testimony is most inconsequential in law. His response to the hypothetical question was not founded on his own observation, but upon an hypothesis, the legal effect of which will be considered when we come to weigh the purely expert testimony in this cause.

The only other medical man who testified from observation prior to the codicil was Dr. Coerr. This gentleman, while on several social visits in the year 1907 to the family of Mr. Ledyard Stevens, then living at testator's house, met the testator casually. This witness testifies to testator's senility, his repetitions, and the character of his anecdotal conversation. In cross-examination, this witness detailed the subjects of the interview. The detailed conversations testified to evince nothing from which the court may infer *mens insana* or want of testamentary capacity on the part of testator in December, 1908. The witness does testify to a senile state or condition; but his entire testimony falls far short of that which is necessary to establish permanent insanity or testamentary incapacity, if we have regard to un-

disputed evidence of the periodicity of testator's attacks, his constant recuperations, and only occasional lapses into a somnolent, a forgetful, a wandering, or an oblivious state of mind.

[3] We come next to the legal effect of the expert evidence in response to the hypothetical question put by contestant and proponent. Two experts testified for contestant; Dr. Gibson, the attending physician, already mentioned, and his son, Dr. Gibson, the younger. Upon a detailed statement of the facts assumed to be proved by contestant they both affirm that in their opinion testator was insane on the day he made the codicil, December 3, 1908. The younger Dr. Gibson also states that from his own observation while attending testator in 1909 (a year almost after the codicil) testator was then insane, and that such condition was then progressive. See *Miller v. Miller*, 150 App. Div. at page 611, 135 N. Y. Supp. 773. On the other hand, Dr. Dold, a specialist in mental disorders, called for the proponent, upon an hypothesis which the surrogate is constrained to say more nearly approximated to the facts proven in this cause, was of the opposite opinion, and testified that on the 3d day of December, 1908, the date of the codicil, testator was sane. It is not in our law as it was in the civil law that the weight of evidence is determined by preponderance of numbers. Many facts enter into the weight of evidence, other than number of witnesses to a given point.

[4, 5] The opinions of skilled witnesses are admissible whenever the subject is one upon which competency to form an opinion can be acquired only by a course of special study or experience. *Dougherty v. Milliken*, 163 N. Y. 527, 57 N. E. 757, 79 Am. St. Rep. 608. It is customary in testamentary causes, involving an issue of sanity, to receive such evidence when it involves complicated symptoms or the causes or effects of disease. In such a case the attending physician may testify directly to the fact of insanity (*People v. Truck*, 170 N. Y. 216, 63 N. E. 281; *People v. Faber*, 199 N. Y. 256, 92 N. E. 674, 20 Ann. Cas. 879), although he cannot in this state testify to incompetency to make a will (*Wyse v. Wyse*, 155 N. Y. 367, 372, 49 N. E. 942; *Curtis v. Hudson Valley Railway Co.*, 147 App. Div. 349, 131 N. Y. Supp. 758; *Matter of Mason*, 60 Hun, 54, 14 N. Y. Supp. 434).

One who is not an attending physician or an observer can testify only to his opinion on an hypothesis. But the value of an answer to an hypothesis always depends on the precise correspondence of the hypothesis to the facts found to be true in a cause. This must be so; for if an irrelevant or incomplete hypothesis is put to the expert, his opinion cannot aid the trier of fact. No more difficult task, therefore, is ever placed on counsel than the framing of a hypothetical question to a man of science. It calls above all for accuracy and for exact scientific information in the questioner, but also for the exercise of the logical faculty in directing the question to essentials and not to non-essentials. Otherwise the question and answer are a hindrance, rather than a help, in the administration of justice. A one-sided question, an irrelevant hypothesis, or a defective hypothesis, is an obstruction instead of an aid to the surrogate. *Seifter v. Brooklyn Heights R. R.*, 169 N. Y. 254, 62 N. E. 349; *Miller v. Miller*, 150 App. Div. 604-611, 135 N. Y. Supp. 773; *Faudington v. Erie R. R.*, 136 App. Div. 737, 121

N. Y. Supp. 428; *Weibert v. Hanan*, 136 App. Div. 388, 392, 121 N. Y. Supp. 35.

[6] But even if the question is skillfully put, in no case can a trier of fact accept a mere opinion of an expert on a condition in fact in preference to direct and positive testimony contradictory of the expert's conclusion. *Poynton v. Poynton*, 37 Ir. L. T. R., 54; *Aitkin v. McMeckan*, 1895, A. C., 310; *Dougherty v. Milliken*, 163 N. Y. 527, 533, 57 N. E. 757, 79 Am. St. Rep. 608. In the case now before the surrogate speculations and hypotheses concerning testator's chronic insanity after 1906 are worthless, in face of the fact, established in this cause, that this testator was at times after 1906 rational, and only at other times irrational. The precise question for the surrogate, as the proofs actually stand, is whether or not testator was rational on the day he purports to have made the codicil, to wit, December 3, 1908, and not whether he was at all times rational. That after the stroke of 1906 testator was occasionally rational is clearly proven by a preponderance of the testimony given by his associates and disinterested relatives, all intelligent people of good standing in the community. That the testator occasionally was irrational is, however, sufficiently proved to cast upon the proponent additional burdens of proof in this cause, but nothing more. This point we shall consider later when we come to consider the manner in which these additional burdens have been discharged.

While the opinions of the physicians called to the stand in this matter seem formidable in the mass, yet when analyzed they are little to the point in this controversy, if we have regard to other facts proved beyond peradventure. The opinions of experts are not conclusive upon the trier of fact. *Dougherty v. Milliken*, 163 N. Y. 527, 533, 57 N. E. 757, 79 Am. St. Rep. 608. They do not relieve the surrogate of the duty of weighing the evidence, including the opinions of the experts themselves. If the effect of expert opinion were to relieve the court of such responsibility the burdens of judicial station would, indeed, be light. Each side would then defray the outlay for the desired conclusion, and the court could wash its hands of all responsibility. Such is not, however, the law.

In judicial investigations concerning legal capacity or responsibility the courts of justice have been compelled to frame for themselves certain tests and rules which they regard as more direct, simple and conclusive than those prescribed by the medical profession as tests of mental derangements. M. Troplong, the first President of the Cour de Cassation of France, in his well-known work on "Donations Entre-Vifs et des Testaments," alludes to the differences between the medical tests and the judicial tests of insanity. Unfortunately there is no English version of the work of this great French lawyer. In substance M. Troplong says:

"What I have seen and heard of certain physicians in my judicial career passes all belief; there is not a man whom they would not declare a monomaniac in listening to them. If Pascal was not dead, he should take care; for I know many a doctor who would regard him as laboring under an hallucination. Socrates is very happy to have been born so soon; he has at least perished with the repute of being the wisest of men, whereas more than one

medical expert would now have characterized him as a monomaniac with his familiar demon."

Such, at least, is my own rendering of the remarks of this great and learned French master of the Law of Wills.

[7] While the passage just quoted has little precise application to the facts of this case, and while it is quite unfair to the learned medical profession of this country as a whole, it serves well to emphasise the fact that there is a recognized distinction between the medical and the legal tests of *mens sana*. The medical tests are those applied in the diagnosis and cure of diseases of the mind. The legal tests are applied in the administration of exact justice and in determining the validity of the acts of civil life. Very slight symptoms may need cure, and yet not deprive the patient of his freedom to act or to will. To apply the distinction in this cause: If testator was proven to be rational on certain days, the medical diagnosis that from certain pathological symptoms he could not be rational on any day is in law rejected, and the fact proven prevails in law over the medical doctrine or theory. I yield to no man in my respect for the medical profession in its own sphere, and I consider their opinions at all times as very worthy of attention; for they are the opinions of experienced men and skilled observers. But their judgment is not always that of the courts, and it is the rulings of the courts which alone bind me.

That Mr. Oscar Egerton Schmidt was sometimes, if not at all times, rational after his apoplectic seizure in 1906 the evidence clearly shows. He was president of the Orthopædic Hospital before his attack in 1906, and he resigned only in the year 1908. After his stroke in 1906 testator attended a meeting and made a report to the trustees in his own handwriting. The episode of his trip to Europe in 1907 and the respectful treatment by Mr. and Mrs. Ledyard Stevens of Mr. Schmidt's suggestion that he go along shows that these constant companions thought him then competent to cross the sea and take a great journey in a foreign land among strangers. Mrs. Ledyard Stevens distinctly states that after his stroke testator at times seemed better, and that on some days he was brighter than others. This is only important because it comes from contestant's own witness. It is, however, consistent with better testimony to the same effect.

The testimony of the trained nurses, Miss Wallace and Miss Pomeroy, shows that both after testator's stroke in 1906 and his relapse in 1907 testator improved so as to walk, go out for visits, and take part in ordinary conversations. That testator was seriously ill, both after his stroke in 1906 and after his return from Europe in 1907, is apparent. That he was not demented, or in articulo mortis, even in the summer of 1907, is evident from the great number of visitors entertained at the "Poplars," where he then resided and where he was the master of the house. It is not to be supposed in view of that fact that his condition then caused alarm, or that he required great seclusion or tranquillity, or anything more than ordinary nursing and confinement to his apartment. It was during this summer of 1907 that testator's ready money or personal resources were being so quickly exhausted as to make a resort in some form to the real estate designed

by the will of 1905 for Mr. Oscar Stevens indispensable. Whoever is responsible for the undue expenditure at that time must share with testator the responsibility of frustrating the hope of succession which Mr. Oscar Stevens had a reasonable right to entertain.

[8] That testator was at all times incompetent to make a will, in fact, after his first stroke in 1906, is not proven in this cause. That at the end of 1907 and during the winter of 1908 testator was much better than he had been in early 1907 is disclosed by undisputed testimony. He was in 1908 and 1909, and even before, able on Sunday evenings to go out to take supper with his nephew, Mr. Charles De Rham, at the latter's house on Fifth avenue, and while there testator's conversations were obviously those of a rational man. In 1907 testator as trustee attended a meeting of the board of trustees of the Orthopædic Hospital, and his conduct was entirely rational. That at least at times he was rational in each year after his first stroke in 1906 is abundantly established in the evidence given in this cause. In 1910, for example, the testator transferred of his own motion and by an instrument drawn by himself a share in the Society Library to his nephew, Mr. Seton. In May, 1909, Mr. Baylis had an interview with testator, and his actions show that testator was then rational. Mr. Seton's evidence is only consistent with testator's entire rationality at some period in 1909. The testimony of Mr. Leopold Schmidt, who has no interest under the codicil, that testator, after his stroke in 1906 and his relapse in 1907, was at least at times rational and of sound mind by legal standards, is of great weight. Consider, also, testator's note of August 12, 1910, to his brother:

"Dear Leopold: Can't make out who you met in Munich. Am better and stronger. Love. Affectionately, Oscar."

And the other note of June 4, 1909:

"Dear Leopold: Thanks for your letter. Your visit added ten years to my life. Affectionately, Oscar."

These unprompted notes were not the notes of an irrational man. Nor is the note to the mother of contestant, in answer to her remonstrance about the execution of the codicil, an irrational note:

"Dear Madam: In reply to yours of the 14th instant, I beg to say that I am quite able to judge for myself as to the rectitude of any action I have taken or arrangements I have made providing for the disposition of such estate as I may leave at my death."

These missives were all written by the testator himself, and were only consistent with rationality for the time being. There is much, also, which I need not detail, in the evidence of disinterested persons of respectability and intelligence which makes it conclusive that after 1906 and 1907 testator was at times rational.

[9] That testator never after 1906 was a well man physically is, however, apparent, as it is that at times he was quite irresponsible and miserably ill in mind and body. The fact that the testator was occasionally rational after 1906 and 1907 disposes of any mere medical prognosis to the contrary made before those dates, and it compels the surrogate to have reference to the long-established principle in tes-

tamentary law that even one furiosus, or mad, or in other words lunatic, may in a lucid interval make his last will and testament. Where an insane condition is established, the burden is, however, on proponents to show with great particularity that a will of such a person was made in a lucid interval. Here testator was not furiosus, or lunatic; but he was at times deprived of reason by illness, and the principle is the same. *Coke on Litt.* 247a; *Clark v. Fisher*, 1 Paige, 171, 174, 19 Am. Dec. 402; *Matter of Taylor*, 1 Edm. Sel. Cas. 375; *Matter of Coe*, 47 App. Div. 177, 62 N. Y. Supp. 376; *Swinb.* pt. 2, § 3, pl. 1, 4; *Beverley's Case*, 4 Rep. 123, 6; 1 Ph. 1184; *Brogden v. Brown*, 2 Add. 441; *Kemble v. Church*, 3 Hagg. 273.

The testimony of the nurses and servants, adduced by the contestant, if we give to it all possible credit, establishes only that in times of acute illness and in periods of prolonged recuperation the testator showed symptoms and states of irrationality or irresponsibility. The testimony of the medical witnesses to the effect that the pathological conditions of testator indicated *mens insana* after the stroke of 1906 must give way, under the rules laid down by the courts, to the fact, abundantly established, that at times the testator was rational. The surrogate is not permitted to allow opinions of even the most learned medical men to control the facts established in a cause.

I do not feel it incumbent on me to go into a prolonged discussion of the details of the evidence establishing the fact of occasional rationality when a summary will suffice. I find from the evidence that after the stroke of 1906 the testator was occasionally rational, or, in other words, sufficiently restored to his original state of mind as to be able to testamentate. This still leaves the real question in this cause as follows: Was the testator so competent on the 3d of December, 1908, the day the codicil purports to be executed? This is the only question in the cause, and the testimony bearing on the testator's mental condition after that date is only consequential in so far as it contradicts the medical hypothesis of a pathological condition which pointed to incurable insanity before December 3, 1908. So far as such subsequent evidence destroys or supports the medical hypothesis it is important, but no farther.

Now, what does the weight of evidence establish concerning testator's condition of mind on the 3d of December, 1908? In this connection we must remember that the burden is on proponents to show that the codicil was executed in a lucid interval. The codicil was witnessed by three attesting witnesses, Miss Saxton, the housekeeper and attendant of Mr. Schmidt, John Caley, the tenant of testator's farm, and Mr. Frederick F. De Rham, a lawyer and the great-nephew of the testator.

[10] Attesting witnesses are required for the purpose of seeing, in the first instance, that the testator was in such a condition as enabled him to make his last will, and next that he executed it under free conditions and in conformity with the law regulating testamentary dispositions. If an attesting witness has any doubt on the score of the testator's competency, he has no business to make himself an attesting witness to a will; and it is declared a fraud so to do when the witness has doubts on testator's capacity. *Scribner v. Crane*, 2 Paige, 147, 21

Am. Dec. 81. In the former practice in testamentary causes, where an attesting witness to a will was missing or dead, it was necessary to allege:

"That the witness in question was a person of good character and standing in the neighborhood where he lived, and would not have set his name as witness to a will unless he had seen the same duly executed and was well convinced that the person executing the same was of sound and perfect mind, memory and understanding." Coote's Ecc. Practice, 493.

Whether trespass on the case would not lie against a witness who falsely attested an instrument in favor of those injured I confess I have not fully considered, but that it is highly improper for a person who has doubts of testator's competency to act as an attesting witness to a will, and to certify under his hand that testator was of sound mind when he has no information on that score, I have no doubt whatever.

The attesting witness, Miss Saxton, a woman of intelligence and good origin, who was certainly an untiring, faithful, and entirely competent mistress to her employer (for it is proved that she not only gave him good and intelligent care, but brought order and economy into his then ill-regulated and extravagant household), testified on the stand. She states that the testator on the 3d of December, 1908, at the moment of executing the codicil, was entirely competent, and was under no restraint. It was pressed on the surrogate that there was some evidence of fellow servants of Miss Saxton that on several other occasions she showed signs of inebriety, and much stress was laid, by counsel for contestant, on those circumstances, as, on one occasion at least, these lapses are stated to have occurred in the presence of testator himself, who, it appears, did not reprove them. This is supposed to be significant of his want of mind. There is no pretense that on the occasion of executing the will Miss Saxton was not in full possession of her ordinary faculties and did not conduct herself with her usual good sense and propriety.

We are not permitted to infer that an intelligent and faithful servant is incapacitated from acting as an attesting witness because on one or more occasions there may have been lapses from strict sobriety; nor is an inference to be deduced of testator's want of proper mind because he did not discharge her for such lapse on the spot. Neither inference is to be drawn from the incidents in question. The law draws no final inferences which are not conclusive. An indulgent or easy-going master and friend might well overlook even so grave a lapse from the highest standards (especially if the lapses were slight and only on one or two occasions) in the interest of his own peace, or even by reason of a kindly interest in a servant of the higher order of intelligence who had rendered him faithful and unselfish service. There is still much kindness in the world. There are as many good as harsh masters. Whatever Mr. Schmidt was or was not, he was shown to be a kindly gentleman. The law, fortunately, has a very lofty standard, and where two constructions, motives, or inferences are possible, it always chooses the best, not the lowest.

It is to be observed Mr. Charles De Rham testifies, from a long and intimate acquaintance with his uncle's household, that he was

much surprised to hear her underservants' imputations against Miss Saxton. But be such imputations true, or be they false, they do not destroy Miss Saxton's testimony, nor disqualify her to act as an attesting witness. In this court she is to be regarded as a credible witness on the occasion of the execution of the codicil, for there she is not impeached, nor is anything shown which destroys her credibility on that occasion.

Frederick De Rham, a lawyer, and an attesting witness of the codicil, testifies to all the acts necessary under the law to establish the codicil as a testamentary instrument, and that the testator was then of sound mind, memory, and understanding. This witness was obviously a truthful and disinterested witness, and I cannot reject his testimony, but must give it due weight. By the Statute of Wills only two attesting witnesses are essential to a will. Here there were three to the codicil. In the celebrated case of *Wright v. Doe d. Tatham*, 1 A. & E. 3, it was held in substance:

"That the object of the provisions of the old Statute of Wills in regard to attesting wills was not directed primarily to a mode of proving a will when contested, but to the security of the testator at the time of the execution of the will; the statute intending that the witnesses should be in the nature of guards or securities to protect him in the execution of the will against force or fraud or undue influence."

If this were the true construction of the old statute once in force here, it is true of the present statute. Now, the attesting witnesses mentioned were chosen by Mr. Schmidt, and they were eminently proper persons. To Miss Saxton, one of such witnesses, was then confided the care of testator's health and the direction of his household. The other witness, Frederick De Rham, was testator's lawyer and grand-nephew, and supervised his affairs. Neither was benefited by the codicil, and there is no reason to suppose that they were not acting in entire good faith in attesting the codicil and making their certificate of the acts well and truly performed and of the testator's competence. That their testimony on the stand was truthful I believe.

John Caley, the third attesting witness to the codicil, was testator's tenant farmer, and his testimony falls very short of establishing either the competence of testator or the due execution of the codicil. Yet Caley signed the attestation clause, certifying to everything required by law for a perfect codicil, and to his own part in it and that testator was competent. He now says he had not been in testator's company, except for five or eight minutes, in eight years, and this was four years prior to the codicil. He confesses to inadequate data for forming any conclusion on such a subject, and opinion he holds none. This witness was by occupation a farmer, and this codicil was the first will ever witnessed by him. Mr. Caley's testimony was very negative on all points, and in law his testimony was unnecessary to establish *prima facie* the codicil. The evidence of Mr. Caley does not, however, materially conflict with that of the other two attesting witnesses of the codicil, and to some extent it corroborated theirs. It neither proves nor disproves the codicil. If Mr. Caley was not sure of the testator's capacity, he should not have acted as an attesting witness, as it has been declared a fraud to act under the circumstances. Scrib-

ner v. Crane, 2 Paige, 147, 21 Am. Dec. 81. This Mr. Caley probably, as we may at least hope, did not know.

[11] The testimony of two of the three attesting witnesses prima facie established the codicil and the testator's competency to execute it. But the evidence on this point required corroboration, in view of contestant's proof. The proponent in this case is bound to show that the testator was competent on December 3, 1908, even if the proofs of the contestant were largely circumstantial or of an inferential character. That the testimony of the attesting witnesses concerning testator's competency on December 3, 1908, was amply corroborated I am constrained to find. Mr. Tompkins, the old friend and copartner of the testator, was called to the stand by contestant. This means in this state that the witness Tompkins was held out to the court by the contestant to be an entirely trustworthy witness. Contestant cannot impeach him, nor can he say that Mr. Tompkins is not entirely worthy of belief. *Coulter v. American Merchants' Un. Ex. Co.*, 56 N. Y. 589; *Pollock v. Pollock*, 71 N. Y. 137, 152; *Koester v. Rochester Candy Works*, 194 N. Y. 92, 97, 87 N. E. 77, 19 L. R. A. (N. S.) 783, 16 Ann. Cas. 589; *Bernstein v. Empire Bridge Co.*, 146 App. Div. 529, 131 N. Y. Supp. 129; *Voorhees v. Unger*, 151 App. Div. 35, 38, 135 N. Y. Supp. 113.

Now Mr. Tompkins in all essentials corroborates the testimony of the attesting witnesses. It may be quite true that Mr. Tompkins may not have been a successful merchant, and that he and Mr. Schmidt in their joint business lost the money necessary to assure Mr. Oscar E. Stevens' succession to the Lloyd's Neck property. But that fact does not convict Mr. Tompkins of crime nor discredit him as a witness. Mr. Schmidt's actions in respect of the continuation of his partnership with Mr. Tompkins, testified to by Mr. De Rham, Sr., show how considerate Mr. Schmidt's feelings for his old friend, Mr. Tompkins, really were. So testator's conduct in respect of omitting Mr. Tompkins as his executor showed right feeling and delicacy when he said in reference to Mr. De Rham's suggestion to that end:

"No; I do not want to do that. Mr. Tompkins has been a good friend of mine, and I do not want to hurt his feelings by removing him as executor."

Mr. Tompkins was shown to be one of the oldest friends of the testator, a friend of 40 years' standing, almost a lifelong friend. While testator's original wisdom in choosing Mr. Tompkins as his business associate may not have conformed to the highest order of business sagacity, it was not then or later so deficient in intelligence as to bear the construction placed on it by contestant. The loss of money in the partnership dealings and the continued fidelity of testator to his friend, Mr. Tompkins, notwithstanding the loss, and also the attention of Mr. Tompkins to his friend, Mr. Schmidt, during periods of protracted illness, are all consistent with good faith and intelligence on the part of testator, and in the absence of direct proof to the contrary no other construction is to be put upon these incidents of a long life. But in any event, Mr. Tompkins was contestant's own witness, held out by contestant as worthy of belief, and I must so accept him. Now, Mr. Tompkins' uncontradicted testimony establishes

that Mr. Schmidt was a sufficiently capable testator on December 3, 1908. It corroborates in this respect the testimony of two of the attesting witnesses to the codicil. No other possible construction can be placed on it. Mr. Tompkins and Mr. Charles De Rham had long conversations with testator prior to the making of the codicil about his affairs, and then Mr. Tompkins received testator's instructions for the codicil. These instructions were communicated to the very respectable lawyer who prepared the codicil accordingly. The lawyer swears that Mr. Schmidt subsequently confirmed them. That these conversations took place just as Mr. Tompkins testifies I must believe. I have no other alternative, as Mr. Tompkins is not contradicted, and the evidence is that of contestant's own witness. *Voorhees v. Unger*, 151 App. Div. 38, 135 N. Y. Supp. 113. It appears that in one of these conversations with Mr. Tompkins, testator furnished the names of the legatees named in the codicil.

The part that Mr. Charles De Rham took in all these matters, including the codicil in question, was only such as any fair-minded gentleman would be expected to take in arranging the disordered affairs of an invalid relative with whom he was on terms of intimacy. I do not know whether or not the praise accorded to Mr. De Rham's conduct by contestant's counsel, and already alluded to, was intended to embrace the transactions about the codicil of December 3, 1908. But, if not, the surrogate will supply the omission and infer from the testimony that there was no impropriety on Mr. De Rham's part in respect of the execution of the codicil by testator. It may be observed that the surrogate's recollection that Mr. De Rham's motives were not impugned by contestant is confirmed by a statement to that effect which is a matter of record.

That testator was in December, 1908, competent to make the codicil, as stated by the attesting witnesses, is also confirmed by the testimony of Mr. and Mrs. Wood, of Mr. Flinsch, and Mr. Matheson, his near neighbors in the country. The evidence offered by contestant to the contrary is not sufficiently directed to the time the codicil was made. It is also lacking in sequence and in the circumstances necessary to disprove capacity of testator. Such proofs of contestant are wholly insufficient to counterbalance the direct testimony offered in support of the will.

[12] While the burden was undoubtedly on proponents to show that the testator had capacity to make the questioned codicil, that burden they sufficiently discharged in this cause. Testamentary acts cannot be disturbed by unrelated circumstances, however grave such circumstances may be in themselves. If in 1906, immediately after his stroke, the testator had attempted to make a will, it must have failed. But this he did not do. The codicil was made in 1908, when his condition was proven to be very different from what it had been in 1906 and part of 1907.

[13] It is not the law of this state that an apoplectic seizure, although it deprives a testator of reason for a time, renders the victim forever after incapable of making his last will and testament. The effect of this malady may be lasting and complete, or it may, on the other hand, be to some extent temporary in its disabling effect upon testamentary

capacity. What its effect is in fact is a matter for proof, and not for speculation or hypothesis, in a particular cause.

In the year 1828 the chancellor of this state had before him the will of one who had suffered from cerebral apoplexy (*Clark v. Fisher*, 1 Paige, 171, 19 Am. Dec. 402), and although the decision was adverse to the will, the law applicable to such a case as this was correctly stated. In that case at the time of the act of testamentation the alleged testator was worse, and not better, than he had been. Indeed, he was so bad as to be unable to speak or to give instructions for the will. He could not even make himself understood. That is a very different state of facts from those presented to me in this cause.

In the leading case of *Delafield v. Parish*, 25 N. Y. 9, the testator after his stroke was unable to articulate, and, this being so, the principal beneficiary of the will interpreted the testator's inarticulate sounds to the draftsman of the will, who was a leading chancery lawyer. Had it been otherwise in that case, and had Mr. Henry Parish, the testator, been able to speak or to articulate, there can be no doubt that the view set forth in the powerful dissenting opinion delivered by the great Chief Justice Selden in *Delafield v. Parish* would have then prevailed. *Matter of Raynor*, 18 N. Y. Supp. 426.¹

In *Cheney v. Price*, 90 Hun, 238, 37 N. Y. Supp. 117, the testator had an apoplexy prior to the making of his testamentary dispositions. Just as here in this cause before me, the condition of Mr. Cheney, there the testator, subsequent to his attack was variable, and even his doctor testified to his being irrational, and that in his opinion testator was incapable. But Mr. Cheney's will was nevertheless maintained, because on the day of the questioned act he was found to be *compos mentis* in law. The decision of the surrogate to the contrary was set aside by the Supreme Court.

In the *Matter of Iredale*, 53 App. Div. 47, 65 N. Y. Supp. 533, the testatrix there had suffered "a stroke" prior to making her will. Yet in that case the Appellate Division annulled the decree of the surrogate, who had found a want of testamentary capacity. There are numerous adjudged cases where the wills of those who had previously suffered from cerebral apoplexy were upheld. In *re Bennett's Will* (Sur.) 133 N. Y. Supp. 409. But no further citations of such cases are necessary to so plain a point.

It is apparent, then, that in law it is not the cerebral disturbance which an apoplexy always causes that incapacitates a would-be testator, but the fact that at the time of the making of the will such a testator is what the common law terms "*non compos mentis*." A person who has suffered from an apoplectic seizure may so far recover his mind as to be able in law to testamentate. In the *Matter of the Will of Benjamin* (Sur.) 136 N. Y. Supp. 1070, the will of one who had suffered one or more "strokes" was sustained by this court. When the will of Mrs. Benjamin again came to trial in the Supreme Court before a jury, the testatrix was declared competent in

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 63 Hun, 635.

pais, and thus her will was ultimately sustained, and I believe justly sustained.

The legal definition of insanity in the jurisprudence of the common law rests primarily on Coke's interpretation of principles, which for centuries before had been applied with great refinement, in the testamentary causes in the ecclesiastical courts, by the English civilians charged with that jurisdiction. Co. Litt. 247a. Such principles were derived by the civilians from the Roman law. As part of the jurisprudence of England transferred to New York, and formally adopted by the state, we find Coke's paraphrase of *non compos mentis* of primary authority in the early testamentary causes occurring under the state government. *Stewart's Ex'r v. Lispenard*, 26 Wend. 299. Coke's own commentary was taken from the contemporary English law; but, as stated before, that contemporary law was derived from the English civilians, even Coke's well-known expression, *non compos mentis*, being but the *mentis non compos* of the jurist Ulpian (D. 20, 4, 'Qui test, facere possunt'). Therefore was it that Chancellor Kent, with his usual penetration, felt at liberty whenever necessary to go behind Coke to the Roman originals of the common law. *Van Alst v. Hunter*, 5 Johns. Ch. 148.

So very often did the highly instructed counsel of the early days of the republic resort directly to the Roman originals. See abstract of Ambrose Spencer's argument in *Jackson v. King*, 4 Cow. 207, 215, 15 Am. Dec. 354. If this reference to Roman law was so frequent at that day, it is apparent how much more frequent it must have been in the still earlier days of the common law, when the common law itself was much more silent than it now is concerning such refined conceptions. But I shall not attempt to refine away the great common law itself, for Coke's definition of *mens insana* in law continues to be the mainstay of our "common lawyers," as the disciples of the common law are correctly termed to contradistinguish them from the civilians. We find that Chief Justice Selden finally recurs to Coke's definition in the celebrated case involving the will of Mr. Henry Parish. 25 N. Y. 103.

Thus it is to Coke and not to the civilians that we must look in our law of testaments for legal capacity. In this cause before me I have accordingly followed the precedent thus laid down by Judge Selden, and my inquiry has been whether or not, from the proofs, Oscar Egerton Schmidt was or was not "*compos mentis*" on December 3, 1908, the day he made the codicil. Under the adjudications, binding in all the courts of the surrogates, I am constrained to find that Oscar Egerton Schmidt was *compos mentis*, or, in other words, of sound and disposing mind on the day and at the moment of executing the codicil now offered for probate.

[14] But one other issue remains to consider: Was testator the subject of undue influence, fraud, or restraint which here nullifies the codicil, as is charged by the contestant? This particular charge of contestant is not greatly pressed by counsel in the brief submitted; but the charge has been examined with the care which the testator's enfeebled condition of body at the moment of executing the codicil made imperative on the surrogate. It is unnecessary to discuss the rule regarding the burden of proof in testamentary causes, or on whom rests

onus probandi undue influences in a testamentary cause. By reason of some mere deviation of expression by the courts of this state the rule of this state on this point is sometimes thought not to conform with testamentary law generally. This I do not believe. In *re Van Den Heuvel's Will*, 76 Misc. Rep. 137, 136 N. Y. Supp. 1109, 1116. But wherever lies the burden of proving undue influence in this cause, no undue influence or fraud whatever has been established. *Miller v. Miller*, 150 App. Div. 604, 611, 135 N. Y. Supp. 773.

All the actors in the act of testamentation now to be tested in this cause were entirely respectable, law-abiding men. One of them was the subject of a particular eulogium by counsel for contestant, and of a specific disclaimer of record. This fact has been already alluded to in this opinion. Mr. Charles De Rham was one of the persons involved in the preparation of the codicil which his son in his professional capacity prepared, and they must have been the persons intended by the averments in the allegations of undue influence. Yet neither took a single benefit under the instrument in question. Their explanation of its preparation is clear, unreserved, and frank. The necessity for the codicil under the testator's altered pecuniary circumstances, alluded to before, was imperative upon him. Mr. Tompkins' connection with the preparation of the codicil was simply ancillary. It was Mr. De Rham and his son who were then directing testator's affairs as his agents. Mr. Tompkins had been practically superseded as chief director in charge. Mr. Tompkins' offices thereafter were largely due to the fact that he was then co-operating with Mr. Charles De Rham and the latter's son. If Mr. Charles De Rham is pronounced by contestant free of all censure in the matter of the codicil, Mr. Tompkins' conduct is inevitably in the same category. Either all or none are guilty of undue influence in procuring the codicil. If one is guilty all are.

[15] But quite irrespective of any such inference, no undue influence by any one soever was established in any way. Undue influence is a species of fraud. Undue influence imports coercion, compulsion, and an overreaching of a vicious kind. Now, none such was proved. The surrogate cannot find from the dubious proofs and doubtful circumstances submitted that such serious offenses against the law were committed on testator. Fraud and undue influence must be proved precisely, or inferentially by irresistible inferences, just as all other serious offenses against the law must be proved. The law never infers crime or delict when any other construction is possible. See the authorities cited by the surrogate in *Matter of Campbell*, 136 N. Y. Supp. 1089, 1104, 1105; and see *Wilhelm v. Wood*, 151 App. Div. 42, 135 N. Y. Supp. 930, and *Voorhees v. Unger*, 151 App. Div. 35, 135 N. Y. Supp. 113.

Doubtless the testator's change of testamentary intentions towards Mr. Oscar Egerton Stevens was a great hardship on Mr. Stevens. A self-denying man of a different type from that which testator was proven to be in this cause, one of less luxurious habit, would have husbanded his resources rather than be obliged to disappoint the fair expectations of a young man who was almost in loco filii to him. Such a man the testator was not. But with these considerations the surro-

gate has nothing to do. The duty of the surrogate is both narrow and plain. The proofs in this cause show the codicil propounded was the competent, free, and unrestrained act of a capable testator, and as such it is entitled to probate in this court.

Decree accordingly.

(78 Misc. Rep. 592.)

In re VAN NESS' WILL.

(Surrogate's Court, New York County. December 14, 1912.)

1. WILLS (§ 288*)—PROBATE—CONTEST.

Where a beneficiary under a will does not contest it, and is willing to take under it, she will be presumed to assent to its probate, if the mere execution is established by the proponent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 651, 652, 662, 664; Dec. Dig. § 288.*]

2. WILLS (§§ 153, 155*)—PROBATE—FRAUD AND UNDUE INFLUENCE.

Fraud and undue influence, sufficient to avoid a will, are distinct vices, though proof of the fraud may be made under general allegations thereof.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 371, 375-381; Dec. Dig. §§ 153, 155.*]

3. WILLS (§ 164*)—PROBATE—EVIDENCE.

In probate causes, where undue influence and actual fraud are set up against a will, no fact tending to prove such fraud is irrelevant, if it bears at all on that issue, and the inquiry should be given a wide range.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.*]

4. WILLS (§§ 164, 166*)—PROBATE—UNDUE INFLUENCE.

Undue influence, which will avoid a will, may be established either by direct or circumstantial evidence, which is sometimes termed "presumptive evidence"; but, to be admissible, circumstantial evidence must be inconsistent with any other result than the undue influence charged.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414, 421-437; Dec. Dig. §§ 164, 166.*]

5. WILLS (§ 155*)—PROBATE—"UNDUE INFLUENCE"—"COERCION."

"Undue influence" is unlawful "coercion," which is an artificial state, whereby the testator is deprived of his free will by fraud or any other unlawful means.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375-381; Dec. Dig. § 155.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1241, 1242; vol. 8, pp. 7166-7172.]

6. WILLS (§ 2*)—PROBATE—SOURCES OF DECISION.

The modern law of wills being founded on the civil and canon law, such law, in the absence of modern law, is authoritative in probate courts.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2; Dec. Dig. § 2.*]

7. WILLS (§ 166*)—PROBATE—UNDUE INFLUENCE—LUNACY.

In a proceeding for the probate of a will, where undue influence and fraud were alleged, it is not necessary to prove that the testator was at the time of making the will insane, to warrant denial of probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

8. WILLS (§ 163*)—PROBATE—BURDEN OF PROOF.

While, in proceedings for the probate of a will, proof by the proponent of a formal compliance with the statute places the burden of proof of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

undue influence upon the contestants, the ultimate burden of proving there was no undue influence rests upon the proponent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388–402; Dec. Dig. § 163.*]

9. WILLS (§ 163*)—PROBATE—UNDUE INFLUENCE—EVIDENCE.

Undue influence, while susceptible of proof by circumstantial evidence, cannot be presumed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388–402; Dec. Dig. § 163.*]

10. WILLS (§ 164*)—PROBATE—EVIDENCE.

Where the validity of a will executed by an aged testator in favor of his young wife only a few months after marriage was attacked for undue influence and fraud, and it was urged that the will was the consummation of a conspiracy between the wife and others, evidence of the acts leading up to the marriage, together with the conduct of the parties thereafter, is admissible, where they are all connected with the execution of the subsequent will, although the mere disparity in the ages of the two spouses alone would raise no presumption of an unlawful purpose on the part of the younger spouse.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403–414; Dec. Dig. § 164.*]

11. WILLS (§ 163*)—VALIDITY—SENILITY.

While there is no presumption of testamentary incapacity by reason of the advanced age of a testator, yet, when his senile state is established, a will giving all of his property to his wife casts the burden upon her of showing that it was his free and independent act.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388–402; Dec. Dig. § 163.*]

12. WILLS (§ 164*)—VALIDITY—UNDUE INFLUENCE—EVIDENCE.

A sudden change of testamentary intention without adequate explanation is to be considered in determining whether a will is the product of undue influence; and evidence that a testator made slight, if any, provision for his only daughter, giving all of his estate to his third wife, who was much younger than himself, is material on the question of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403–414; Dec. Dig. § 164.*]

13. DEPOSITIONS (§ 95*)—USE OF DEPOSITIONS—ADMISSIONS.

Where the deposition of the proponent of a will is taken before trial, the contestants may read any portion of it they desire, and omit the remainder; the basis of the ruling being on the ground of admissibility.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 276, 277; Dec. Dig. § 95.*]

14. WITNESSES (§ 265*)—COMPETENCY—EFFECT OF TAKING DEPOSITION.

That the proponent of a will, who was the sole beneficiary thereunder, was examined by deposition before trial, and parts of her deposition were read in evidence by the contestants, did not render her incompetent as a witness in her own behalf.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 906; Dec. Dig. § 265.*]

15. EVIDENCE (§ 121*)—RES GESTÆ.

In an action for the probate of a will, contested on the ground of fraud and undue influence, letters received by the sole beneficiary, the testator's young wife, who married him only a few months before the execution of the will, showing that it was her intention to marry him for his money, are admissible as part of the res gestæ, being found in her possession.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303, 307–338, 1117, 1119; Dec. Dig. § 121.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

16. WILLS (§ 164*)—PROBATE—EVIDENCE—ADMISSIBILITY.

In a proceeding for the probate of a will, contested on the ground of fraud and undue influence, evidence of a decree which fixed the rights of the testator in the property disposed of is admissible; it appearing that the sole beneficiary, who was the testator's young wife, was familiar with the decree under which he received a large sum of money.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.*]

17. WILLS (§ 164*)—PROBATE—EVIDENCE.

In a proceeding for the probate of a will, contested on the ground of undue influence, conspiracy, and fraud, the question whether the attorney who drew it was familiar with the claims of third persons upon the testator, which were shown by a judgment, is material, where it was claimed that the attorney was a party to the fraud and conspiracy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.*]

18. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—EVIDENCE.

In a proceeding for the probate of a will, contested on the ground of fraud and undue influence, where it appeared that the attorney who drew the instrument was the attorney of record in an action against the testator, wherein it was shown that other persons than the sole beneficiary had claims upon the testator, the allowance of questions as to whether he was familiar with these facts was harmless, as such knowledge would be imputed to him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

19. WILLS (§ 166*)—PROBATE—UNDUE INFLUENCE.

In an action for the probate of a will, contested on the ground of undue influence, evidence held insufficient to warrant probate, showing that it was not the will of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

20. WILLS (§ 166*)—PROBATE—BURDEN OF PROOF.

Where the will of a very aged man was drafted by a lawyer resting under obligations to the family as well as the sole beneficiary, who was the testator's young wife, it appearing that such attorney had come into possession of securities of the testator of great value and was paying the income thereof during the life of the testator to the brother of the sole beneficiary, who was in no way entitled to such income, that fact excites suspicion, and proof, other than the testimony of such attorney, that the will was the voluntary act of the testator, must be offered by the proponent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

21. WILLS (§ 166*)—EXECUTION—EVIDENCE—ATTESTING WITNESSES.

The purpose of the law in requiring attesting witnesses to a will is primarily for the security of the testator and to protect him against force or fraud or undue influence; and hence, where the attesting witnesses are not disinterested parties, their testimony is of little weight.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

22. WILLS (§ 72*)—VALIDITY—ANIMUS TESTANDI.

A paper is not valid as a will, where it was executed, not with the intention of passing any property, but merely as a sort of release to support prior executed assignments in favor of the sole beneficiary.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 189; Dec. Dig. § 72.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

23. WILLS (§ 166*)—PROBATE—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.

In an action for the probate of a will, which was attacked on the ground of fraud and undue influence, the testimony of a subscribing witness *held* insufficient to establish the validity of the instrument, by showing absence of fraud and undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

24. WILLS (§ 164*)—PROBATE—UNDUE INFLUENCE—EVIDENCE.

Evidence that the sole beneficiary under a will, who was the aged testator's young wife, procured the execution of a writing, attested by the draftsman of the will and purporting to have been signed by the testator, which cast doubts on the legitimacy of the testator's only daughter and threatened her with exposure in case the validity of the will or assignments of property to the proponent was attacked, is admissible as an implied admission showing that the will was not the voluntary act of the testator; it appearing that the recitals in the writing were wholly false and without foundation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.*]

25. WILLS (§ 160*)—VALIDITY—RATIFICATION.

Where a will in favor of his young wife was procured by her undue influence, the fact that the aged testator, who had previously assigned to her practically all of his property, and who, beyond receiving the income from a trust estate, which he turned over to her, carried on no business, stated in her presence that the will was his free and voluntary act, does not amount to ratification.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 372, 373; Dec. Dig. § 160.*]

26. WILLS (§ 165*)—VALIDITY—UNDUE INFLUENCE.

When acts of undue influence are proved, declarations of the testator are competent to show the effect of such acts on his mind, and dispel or rebut any claim of imposition.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415-420; Dec. Dig. § 165.*]

27. WILLS (§ 168*)—PROBATE—ADMISSION.

Under Code Civ. Proc. § 2622, the surrogate must be satisfied of the genuineness of a will and the validity of execution before it is entitled to probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

In the matter of the probate of papers propounded as the last will and testament, and a codicil thereto, of Cornelius H. Van Ness, deceased, offered by Alice Wood Van Ness, in which Alice Van Ness Parsons and others appeared as contestants. Probate refused.

William B. Aitken, of New York City (Rastus S. Ransom, of New York City, of counsel), for petitioner.

Agar, Ely & Fulton, of New York City (Charles Blandy, of New York City, of counsel, and Charles Blandy, Jr., on the brief), for Alice Van Ness Parsons.

Conrad Milliken, of New York City, for Emma Louise Van Ness Day.

Martin, Fraser & Speir, of New York City (Wallace Macfarlane, of New York City, of counsel), for Harriet B. Morse and Marie B.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

H. Pierce et al., and for Francis B. Chedsey, surviving executor and trustee of the will of Emma Louise Van Ness.

George Y. Webster, of Rochester, for Mary Campbell.

Parker V. Lawrence, of New York City, special guardian, for Jerome Campbell and George H. Campbell.

FOWLER, S. This has been one of the longest contested probates ever before this court. The contest has been so close, the various points of law have been so ably argued by counsel, and the testimonial evidence is of such great volume as to require a somewhat detailed opinion from the surrogate.

[1] Cornelius H. Van Ness, the alleged testator, when a very old man, made the papers propounded in favor of his third wife, now here as proponent. Much, if not all, of the estate, which in some event purports to pass under the testamentary scripts in question, was derived by Mr. Van Ness under the will of his second wife. Probate of the several papers propounded as the last will of Mr. Van Ness is contested by certain beneficiaries or representatives under the will of the second Mrs. Van Ness, and also by the only daughter of testator's first marriage, now Mrs. Parsons. The daughter, Mrs. Parsons, however, confines her contest to the paper purporting to be a codicil, and she fails actively to contest the will itself, but in an extremely cautious way, as she states at the bar of the court, that she regards it "as unjust." This statement of opinion goes for nothing, as if she does not contest the will, and is willing to take under it, she must be taken to assent to its probate if the mere factum is established by proponent. The special guardian, likewise, contests the codicil only.

The fact is apparent to the surrogate that this disputed will in reality relates to a small part, if any, of the estate enjoyed by the late Mr. Van Ness in his lifetime. Before he made the testamentary writings, now brought into this court for probate, he had made various assignments of his property to his third wife, which are now the subject of controversy elsewhere. The testamentary papers propounded seem to operate, to a great extent, as a sort of further assurance to the third wife. If the assignments to her fail, she falls back on the will. If the will fail, she resorts to the assignments. Thus this probate cause is only an incident in an extensive litigation, or litigations, which ransack the whole estate enjoyed by the late Mr. Van Ness in his lifetime. The proceedings in this court are a mere adjunct to more searching proceedings conducted elsewhere. A contested probate of this character is extremely troublesome in this court, as it magnifies the proofs and involves more than the extent of the property apparently passing under the alleged will justifies.

But such a contest has, perhaps, another relation. When assignments of all a man's estate are in fact made in his lifetime, his will, if it purports to convey the same estate, must operate, in respect of that estate, passing under the assignments, as a mere further assurance. In any other aspect the will reflects somewhat on the validity of the earlier transfers, but possibly to no greater extent than the earlier transfers reflect on the validity of such a will, which also

incidentally violates the trite maxim "nemo dat qui non habet." The assignments being valid, there is no necessity for a will in such a case. But here, I am informed that there is some small estate, outside of the property passing under the assignments, which is operated on by the will, if valid. If this is so, the smallness of the estate conveyed by this will offers a poor justification for the magnitude of this contest in this court. But I will not, on that account, shrink from the fullest consideration of this cause, which is most involved, by reason of the inconsistent positions of the different contestants; one charging actual overt conspiracy, and the others only that conspiracy which is always involved in a charge of undue influence exerted by more than one person.

Cornelius H. Van Ness was born in this state February 14, 1819. In 1845 he married in this state the daughter of his employer. The lady's name was Deborah Bradt. She is still alive, in the ninetieth year of her age. By this marriage Mr. Van Ness had one child, now Mrs. Parsons, one of the contestants of the codicil here offered for probate. During this first marriage Mr. Van Ness is shown to have had a somewhat varied business career, at first being employed in the Erie Canal freight office, and afterwards with various transportation offices. He appears not to have shown extraordinary talent or power of accumulation. His own estate, if anything, was always small. On August 21, 1867, Mr. Van Ness was divorced by a decree of a competent court of this state from the wife of his youth, Deborah, for his own grave delinquency. The decree establishes that his own property was then very small.

In 1875 Mr. Van Ness married Mrs. Emma Louise Burr Wright. There was some offer or attempt to prove that Mr. Van Ness courted this lady while she was the wife of another; but the surrogate excluded this as too remote and not relevant or fair to the dead woman in question. This lady's relatives and representatives are now here contesting on various grounds the probate in this cause. It seems Emma Louise Van Ness was the heiress to a very large paternal estate, of which she shortly after her marriage to Mr. Van Ness, became seised and possessed in her own right. For 23 years Mr. Van Ness lived apparently happily with this second wife, Emma Louise, lastly, on an estate purchased by her at Cornwall, in the county of Orange and state of New York. In 1898 the second Mrs. Van Ness died, and her property passed by her will to Mr. Van Ness, under conditions and circumstances which will, of necessity, be the subject of consideration in this cause.

In the eighty-second year of his age Mr. Van Ness, then being possessed of an apparently large property, contracted his third marriage. This time he intermarried with a very young woman, by name Alice Wood. This third marriage took place under circumstances and conditions shown in great detail in the testimonial evidence offered on the part of the contestants. The third marriage ceremony was twice performed, once in New York City on February 21, 1900, and again in New Jersey on May 11, 1900. It is the widow of this third marriage who now stands here as the proponent of the papers purporting to

be the last will and codicil thereto of Cornelius H. Van Ness. The will offered for probate bears date June 24, 1901, and the codicil January 24, 1902, and both writings purport to have been executed on their respective dates.

[2] The opposition of the contestants to the probate sought rests mainly upon charges of fraud and undue influence exercised over the testamentary mind of Mr. Van Ness by the proponent and others unknown. Absolute incapacity to make any will upon the part of Mr. Van Ness is not precisely claimed by contestants. In fact, such a contention is openly disavowed, both in the record and in the briefs of counsel, as well as at the bar of this court. Undue influence of the proponent over a senile and weakened mind is claimed, *inter alia*. It is true that fraud generally is also charged to have been practiced by proponent and others unknown on the said Cornelius H. Van Ness in respect of the papers propounded. But the charge of fraud, other than that involved in a charge of undue influence, is not specifically alleged by contestants in their formal objections to the probate. This is unfortunate, for fraud and undue influence are in turn distinct and not distinct offenses. Under the new rules of the English Court of Probate, since 1875, fraud, other than that involved in undue influence, is the subject of a special plea, and if undue influence alone is charged the question of coercion only is raised. *Parfitt v. Lawless*, 2 P. & D. 462, 470, 471.

In this cause before me both fraud and undue influence are charged separately. The fraud is, however, charged generally and not specifically. It may be only a concomitant of the undue influence charged. It may be that it is some independent fraud. As the pleadings stand, if any other fraud, besides undue influence, is discoverable in the proofs, the contestants are entitled to the benefit of such evidence under the general allegations and somewhat looser practice that still prevail in this jurisdiction. Such practice has long prevailed in this court. That it is possible, even under the present practice, to cause pleas of undue influence to be separated from pleas of fraud in probate causes, and to require allegations of fraud to be more specific than they are in this cause, the surrogate entertains little doubt. One object of written pleadings is to give notice to the adversary concerning what he must meet. I certainly should feel inclined, in the interest of justice and precision, to encourage an attempt to make pleadings here more precise. In this cause I have been embarrassed by not knowing to what issue the proofs offered might be intended to apply.

[3] In probate causes, alleging undue influence alone, the proofs naturally take a wide range (*Matter of Woodward*, 167 N. Y. 28, 31, 60 N. E. 233) and where actual fraud is charged in addition, no fact tending to prove such fraud is irrelevant if it bears at all on the issue of fraud (*Matter of Gannon*, 73 Misc. Rep. 327, 132 N. Y. Supp. 712). Thus it is that in this cause the proofs extend over a long period of time and are extremely various.

[4] Undue influence, like other offenses against the law, may be proved directly by sworn witnesses of it, or indirectly by established circumstances which permit no other inference than the undue influence charged. Circumstantial evidence is sometimes termed "pre-

sumptive evidence." Like presumptive evidence, it is open to many infirmities. If the circumstances or evidentiary facts sought to be proved on an issue of undue influence are consistent with any other result than the undue influence charged, they are not evidential, and they should be excluded, at least from the final consideration. Evidentiary facts of a circumstantial nature are, however, so subtle, being either moral indications or indications only generally inculpatory, that it is often impossible for the trial judge to determine until the close of the case precisely what bearing the proofs offered really have, and whether or not they are of legal consequence. It is for this reason that in a case of this character the real excluding function of the judge has to be reserved for the judgment, when the circumstances relied on are to be finally weighed and valued. In a case before a judge without a jury, this course is practicable and does not detract from precision. The surrogate has been at some pains to indicate the legal evaluations of circumstantial proofs, because it is by the tests indicated that the complicated and extended evidence adduced in this cause must be weighed.

[5] Undue influence has been so often defined by courts of authority that it is superfluous for us again to enter at large upon such a refined and settled discussion. But in respect of the principle which ought to control this adjudication it may be announced, in brief, that undue influence in law always imports coercion in and about the will itself. In *re Campbell's Will*, 136 N. Y. Supp. 1104, 1105. Without such moral or actual coercion there is no undue influence in law. *Wingrove v. Wingrove*, 11 P. D. 82; *Williams v. Gaude*, 1 Hagg. 581. And see Lord Campbell in *Boyce v. Rossborough*, 6 Ho. L. Cas. 48. There is a lawful or legitimate exercise of influence, and an unlawful exercise of influence, and the latter is "undue influence." *Gardiner v. Gardiner*, 34 N. Y. 162. A recognized or lawful influence may be exercised by the most abandoned person, such as a harlot or a gamester, into whose hands a testator may have fallen. It is not the character of the person exercising the influence which is a controlling circumstance in cases of this kind, but the nature and the manner of the influence itself. As well said in *Wingrove v. Wingrove*, there is no subject in which "there is a greater misapprehension" than undue influence in law. These discriminating utterances of foreign common-law judges are constantly recognized and emphasized in our own jurisdiction. *Gardiner v. Gardiner*, 34 N. Y. 163; *Brick v. Brick*, 66 N. Y. 149; *Seguine v. Seguine*, *42 N. Y. 669; *Matter of Will of Martin*, 98 N. Y. 196; *Smith v. Keller*, 205 N. Y. 44, 98 N. E. 214.

But the definition of undue influence just noticed is obviously incomplete. What in law is coercion, or, as it is sometimes designated, "moral coercion"? To define coercion is really the crux of the accepted definition of undue influence. It has been said that it is impossible to define or prescribe undue influence with precision, and that it depends on the facts of each case. *Rollwagen v. Rollwagen*, 63 N. Y. 519. This can only mean that the law in this regard proceeds by negation; it defines what is not undue influence, not what is undue influence. Some day surely the negative category will be complete,

and an accurate legal definition made possible. Fortunately meanwhile we are not left with so unsatisfactory a working rule. The coercion of the definition may be defined with tolerable precision.

Coercion is an artificial state whereby a testator is deprived of his free will. This deprivation may result from fear, constraint, force, or fraud, or any other unlawful inducing cause, produced by some one, not the testator himself, for the purpose and with the intention of procuring from testator a last will and testament of testator which shall not in fact be the true expression of testator's own testamentary mind or intention. In such instances testator is deprived of *animus testandi*, which the law requires for a valid act of testamentation. A will so coerced does not speak the testator's own mind or intention in law, and is consequently void. A testator subject to undue influence has not, in other words, in law, "*testamenti factio*," or testamentary capacity. The law still prevailing here on this point is of very ancient origin, and it remains much what it always has been, and ever will be. 1 Redfield on Wills, 513; Swinburne on Wills, pt. 7. § 2; Kindleside v. Harrison, 2 Phill. 551, 552; 2 Troplong, Des. Testaments, 63; C. I. 2, 1; C. 6, 34, 1.

It is obvious that "coercion," as used in the sense indicated or in the definition of undue influence, need not be induced by actual or physical force. It may be the result of any wrongful means which produces moral restraint and consequent want of free will. Such means in law constitute the moral coercion of the definition. In the year 1564, in *Hacker v. Newborn*, Style, 427, Chief Justice Roll said:

"If a man make his will in sickness by the overimportuning of another to the end that he may be quiet, this shall be said to be a will made by constraint and shall not be a good will."

This case is cited with approval by the chancellor in *Clark v. Fisher*, 1 Paige, 177, 19 Am. Dec. 402. But the importunity Chief Justice Roll speaks of must be irresistible and such as to render the act no longer the act of the deceased. *Kindleside v. Harrison*, 2 Phill. 551; 1 Ecc. Rep. 336; *Constable v. Tufnell*, 4 Hagg. 485; C., 6, 34, 1.

[8] I have cited the Roman law as still of some indirect influence on probate law and the law of wills, and in so doing I am justified by precedent. In this court the authorized citations of rules of law differ from those employed in the other courts of this state. The testamentary law, administered in this court, stands on its own independent foundations, and it has a long history, too little understood. The genesis of the English and American will was peculiarly Roman, and in every country where wills exist Roman law affecting them remains potentially, even if not expressly, adopted. Kelke, *Roman Law*, 101. It has been said with accuracy that the entire conception of a will in English law was derived from Roman law, and to understand the history of the English law of wills it is necessary constantly to refer to the great system of jurisprudence from which English law derived that conception. Strahan, *Law of Wills*, p. 4.

The testamentary law of England became in time, however, only indirectly Roman or civil law, and to understand the law administered in this court in probate causes an acquaintance with the history of

English ecclesiastical courts and procedure is also essential. Markby, *Elements of Law*, §§ 560–583; Jenk's *Hist. Eng. Law*, 195. It must be remembered that the English ecclesiastical courts were courts of the civilians, and through them we derive much of our present law of wills. It was for the reasons indicated that civil law is counted one of the recognized constituents of the law of England. Coke Litt. 11b. The influence of Roman or civil law, as also the canon law in parts, is necessarily to be recognized in probate jurisdictions. Geldart's *Elements of English Law*, 64. When the Constitution of this state adopted the former law in force in New York, the civil and canon law, then recognized in the ecclesiastical courts of England and the Prerogative Courts of New York, became a part of the fundamental law of this state, and so it continues in this court, in the absence of more direct authority to the contrary, to prescribe the ratio decidendi for probate cases not otherwise provided for by statute or domestic adjudications of authority. *Goodrich v. Pendleton*, 4 Johns. Ch. 558; *Foster v. Wilber*, 1 Paige, 540; *Public Administrator v. Watts*, 1 Paige, 347, 356; *Brinckerhoof v. Remsen*, 8 Paige, 488; *Betts v. Jackson*, 6 Wend. 173, 183; *Bogardus v. Clarke*, 1 Edw. Ch. 266; *Introduction to 1 Bradf. Sur.*; *Vanderheyden v. Reid*, Hopk. Ch. 408, 411; *Id.*, 5 Cow. 720, 728; *Hunt v. Johnson*, 19 N. Y. 294; *Robins v. Coryell*, 27 Barb. 556; Kirkland's *Treatise on N. Y. Surrogates' Courts* (A. D. 1830) c. 1.

Few of the principles administered in this court, on the probate side, are either new or original, and to understand thoroughly those in force it is often highly essential to resort to the fons or origo of the entire system. Of course, by incorporation in modern decisions the old canon may be superseded as the most direct authority; but the old canon is never unauthentic or destitute of all weight or force. There is still no reason why in this court the original law should not be cited at all times to illustrate or vivify any derivative principle. It was the original of this court which gave to the common law itself a higher tone and character. The jurisdiction of this court, in origin, is of great antiquity, irrespective of its superadded and now extensive powers as an original court of construction of wills of both real and personal property. The surrogate is induced to make the foregoing observations, not only because they justify his citations, but because they have an exact relation to what he conceives to be a better application of the commonest principles continually applied in this court. Yet he is quite conscious that such incursions into the past require much deliberation at all times, as the origins of law are not to be mistaken for the law itself. The application of law is not to be left to the idiosyncracies of a judge, or to the results of his own researches.

[7] It is not necessary for contestants in this cause to prove Mr. Van Ness insane. It has never been doubted, since Lord Hardwicke said in *Lord Donegal's Case*, 2 Ves. Sr., 408, that fraud and imposition upon a man of weak mind (which include undue influence) might be sufficient to set aside his will, although his weakness was not sufficient ground for a commission of lunacy. *Rollwagen v. Rollwagen*, 63 N. Y. 519; *In re Campbell's Will*, 136 N. Y. Supp. 1104. As

stated before, contestants rest in this cause largely on a charge of undue influence exerted by Alice Wood, the third Mrs. Van Ness, and now the proponent in this cause, as the widow of the deceased. Fraud also is distinctly alleged.

It has been said by the highest court of this state that "undue influence is not often the subject of direct proof. It can be shown by all the facts and circumstances surrounding the testator * * * " *Rollwagen v. Rollwagen*, 63 N. Y. 519; *Children's Aid Society v. Loveridge*, 70 N. Y. 395; *Matter of Sandberg*, 75 Misc. Rep. 38, 44, 134 N. Y. Supp. 869. Certainly, when undue influence is charged and maintained by evidence of circumstances only, the courts are extremely liberal in regard to the circumstances considered evidential on this issue. *Delafield v. Parish*, 25 N. Y. 95; *Rollwagen v. Rollwagen*, 63 N. Y. 504, 519; *Children's Aid Society v. Loveridge*, 70 N. Y. 387, 395; *In re Campbell's Will*, 136 N. Y. Supp. 1086, 1104.

[8] Having briefly surveyed what is conceived to be the accepted law of this case in order that the evidence may be weighed with more precision, the surrogate takes leave to remark that there are some points which should not be overlooked. After proponent shows a formal compliance with the Statute of Wills, the burden of going forward and making out proof of undue influence lies with contestants. *Boyse v. Rossborough*, 6 Ho. L. Cas. 51; *Matter of Will of Martin*, 98 N. Y. 196; *Matter of Bolles*, 37 Misc. Rep. 567, 75 N. Y. Supp. 1062; *Matter of Nelson*, 97 App. Div. 217, 89 N. Y. Supp. 865; *Matter of Klinzner*, 71 Misc. Rep. 638, 130 N. Y. Supp. 1059. But where the ultimate burden of proof on the whole issues raised by the pleadings lies in a probate cause is another matter. *Matter of Mooney*, 73 Misc. Rep. 323, 132 N. Y. Supp. 705; *Matter of Klinzner*, 71 Misc. Rep. 638, 130 N. Y. Supp. 1059; *In re Campbell's Will*, 136 N. Y. Supp. 1102. There can be no doubt that it rests on proponent.

[9] Undue influence, while it may be proved indirectly by circumstantial evidence, cannot be presumed; it must be proved with precision. *Boyse v. Rossborough*, 6 Ho. L. Cas. 49; *Cudney v. Cudney*, 68 N. Y. 148; *Loder v. Whelpley*, 111 N. Y. 250, 18 N. E. 874; *Matter of Richardson*, 137 App. Div. 103, 122 N. Y. Supp. 83; *In re Campbell's Will*, 136 N. Y. Supp. 1104. This rule is as old as Ulpian, "*Dolum ex indiciis perspicuis probari convenit*," and it is a part of the testamentary law of every nation where wills are allowed. Pothier, *Pand. tit. 1*, p. 125, No. 10; 2 Troplong, *Des Testaments*, 64.

What do these rules, recognized in all probate courts, mean, except that strained inferences and arbitrary assumptions are not to be indulged in on an issue of this kind? The evidence must be cogent and permit no other inference than undue influence. The danger of all circumstantial evidence is that some pride of intellectual ingenuity or some irrelevant guesses and unauthorized assumptions may be suffered to bridge chasms of missing proofs. Circumstantial proofs must be irrefragable and they must irresistibly point with moral certainty to the *factum probandum*. If the circumstances relied on in

this cause are consistent with any other hypothesis, they are not proof of undue influence. *People v. Rzezicz*, 206 N. Y. 249, 269, 99 N. E. 557. Although the court can never presume fraud or undue influence, it may require of proponent, in a proper case, very strong proofs of intention in order that probate may be granted. *Mortimer on Probate Law*, 80; *Billinghurst v. Vickers*, 1 Phill. 187, 194; 1 Ecc. Rep. 70. This is a very important principle of probate law for our consideration in this particular cause, founded largely on circumstantial evidence of an overreaching of a mischievous kind.

[10] This brings us to the general consideration of the first point of difficulty in this cause. I refer to the circumstances proved in relation to the third marriage of testator, or that to Alice Wood. Much time was consumed on this branch of the trial. The circumstances in and about the marriage of Mr. Van Ness to Alice Wood are greatly relied on by contestants to prove undue influence on her part in and about the subsequent procurement of the papers propounded in this cause. It is claimed by contestants, in substance, that a young stranger enticed an old and amorous man, in his dotage, into matrimony for her own ulterior ends, and that she accomplished these ends by undue influence, circumvention and artifice. From the facts surrounding her marriage, I am asked to infer undue influence in subsequent acts and events. The first question of law for me in my own mind is whether the circumstances in and about her act of marriage ought to be assumed to be connected with subsequent circumstances of a different nature tending to prove undue influence in and about a later will made in the favor of the young woman by her husband. To inquire into the motive which induces any status of marriage is to me abhorrent, and I think, as a general rule, it is contrary to public policy. To my mind all prior acts, conduct, and negotiations of the intending spouses in and about an act of marriage are to be regarded as merged in their subsequent marriage, if it is a marriage *de jure*, or one recognized as a marriage in fact and in law. If there is not sufficient fraud or incapacity about such circumstances to induce the active interference of a court of equity, either to set aside the marriage or to secure the property of the offended spouse to his or her own uses, no other court ought, in my judgment, to question the motive of the act of marriage itself.

I should be of the opinion ordinarily that an allegation of undue influence in such a case in a probate court must be confined to strict proof of circumstances in and about the will itself, and that, a status of marriage being an accomplished fact, the spouses of an immoral marriage are in the same relation towards each other as any other spouses in so far as the property of either is concerned.* It is noticeable that it has been often held that the successors to the ecclesiastical courts, retaining jurisdiction of the marriage relation, have no power to pronounce a decree of nullity because of fraud in the inducement of marriage. There certainly may be frauds in inducements of marriage which end there and have no subsequent relation to a charge of subsequent undue influence of either spouse over the other. But, on the other hand, such frauds in the marriage inducement may under some circumstances be

actually connected with the subsequent undue influence of one of the spouses. Each case depends on its own circumstances.

There is authority, both English and American, to the effect that extraordinary circumstances in and about a prior marriage may be considered on an allegation of undue influence in the subsequent procurement of a will from one spouse in favor of the other. In *Clark v. Fisher*, 1 Paige, 171, 19 Am. Dec. 402, the marriage was regarded as a circumstance of the unlawful performances consummated by a will. In the well known case on the will of Rollwagen (*Rollwagen v. Rollwagen*, 83 N. Y. 508) the Court of Appeals went very far I venture to think. They appear to sanction an inference from discrepancy in age, taking into account the ill health of the man and the poverty of the woman, that their marriage was not therefore "a marriage of affection," and that such a woman "could have no motive to marry a helpless and broken-down man except his wealth." From that decision I would, perhaps, be justified in drawing a similar inference here, but I will not. In *Hoffman v. Hoffman*, 192 Mass. 416, 78 N. E. 492, all the facts in and about the marriage of an elderly man to a younger woman were allowed to be proven on an issue of undue influence in her subsequent procurement of his will in her favor. In the case of *Marshall v. Tyrrell*, 2 Hagg. 84, 4 Ecc. 33, 42, 43, Sir John Nicholl, a renowned judge in testamentary causes, went very far in inferring improper motives on the part of an elderly husband to get possession, through a will, of his elderly wife's separate property. Sir John even criticises letters from him of apparent affection as inconsistent with the age of the parties, and from that fact alone he infers that the letters of the husband have more the appearance of being written with a view to "wheedling the wife out of her estate." To my mind, Sir John Nicholl went too far in his utterances and conclusions in that cause. He should have drawn no inference of the kind stated, if another was even possible. Yet *Marshall v. Tyrrell* is a leading case in probate courts.

These are very exalted utterances of authority which I have just instanced, and to some proper extent they are those to which the surrogate may be bound to defer in this cause. But, nevertheless, I venture to think for myself that some of such inferences are not wholly legitimate in application by the stricter principles of the law governing circumstantial evidence. A mere discrepancy, however gross, in the age of the spouses, seems to me to tolerate no conclusion in law that there is an absence of affection between them, or that one will necessarily overreach the other. There are well-known instances of deep affection and good faith between apparently ill-mated spouses, and one such instance destroys the legitimacy of an inference of the kind indicated. An inferior court is always obligated to take the law from the superior courts of its jurisdiction. But it is not bound to adopt mere inferences which are unnecessary to its judgment. I am, in fact, in extreme doubt, having reference to the principles controlling circumstantial evidence, whether many of such inferences as those stated in the cases cited were intended to be prescribed as invariable inferences from certain facts proven. There are some sanctuaries where even the law cannot penetrate, and one, to my mind, is the heart of man or

woman, no matter their ages, in and about their individual act of marriage.

In all events, the facts proven in and about the act of any marriage should in a case of this character be directly and irresistibly connected with the subsequent testamentary act. Otherwise no conclusion in respect of the illegality of a subsequent testamentary act is possible to be drawn from a supposed immorality or indecency on the part of the younger spouse, connected with the separate act of marriage. On this point I entertain no doubt, and I shall venture to observe the distinction denoted in weighing the evidence in this cause. That it is more natural for the young to mate with the young all sensible persons will agree, and that there is a certain lack of dignity in elderly marriages some will readily concede. But the law draws no harsh inferences from acts entirely lawful, no matter how lacking they may be when subjected to a test by the highest canons of good taste. If the parties to the marriage are capable, the marriage is conclusive on the status of husband and wife. I have so firm a conviction of the great importance of the law regulating the status of marriage that I will not minimize it for the purpose of sustaining or rejecting a will of one of the spouses by mere inferences.

While it is true, I think, that an assumption of an unlawful intent upon the part of the younger spouse ought not to be made from the poverty of one spouse and the wealth of the other, or from a mere discrepancy in the ages of the spouses, there may under the authorities be other circumstances surrounding a marriage which are fairly entitled to be taken into consideration on the allegation of subsequent undue influence exerted by one spouse over the other. The situation of the parties at the time of marriage, the mental strength of one spouse and the weakness of the other at the time the status of husband and wife is first determined, may have some direct relation to a subsequent testamentary act on the part of the weaker spouse. A fact or situation once proved to exist may, in the absence of proof to the contrary, be presumed to continue. Indeed, there are occasions when subsequent situations may be shown in no other way. In such cases to reject such proofs would, I think, be a denial of justice. This is the true principle, as I conceive, of the decisions cited.

Again, when a conspiracy or fraudulent purpose is alleged in a probate cause, such as that of an unscrupulous and artful young woman and her evil associates to gain possession of the estate of an elderly, desolate, and weak-minded old man through marriage and a will, the facts connected with her first relations with her husband may be highly material, and it may then be necessary to risk invading the marriage sanctuary itself in order to establish the real facts. In this cause, where no bill of particulars or pleadings, in the true sense, existed, it soon became apparent to the surrogate that such was the claim of contestants. Counsel for one or more contestants distinctly avowed on the trial that there was a conspiracy to gain possession of the estate through the marriage and the will, and he named the draftsman of the will, Mr. Parshall, as one of the participants with the proponent. The act of marriage, however, seems to have been prior to

Mr. Parshall's active participation; but this is not necessarily fatal to the claim of conspiracy or fraudulent concert. In civil cases the essential element is the resultant wrong, not the concert, and the common purpose and agreement may be inferred from collateral acts, raising a presumption of the common design. *Rex v. Murphy*, 8 C. & P. 297, 311; *Wright on Conspiracy*, 54, 58.

[11, 12] In order to understand the proofs of contestants tending to show that at the time of his marriage and the making of his will testator was in his dotage, eccentric, and feeble-minded, and thereby rendered peculiarly susceptible to outward influence of a feminine kind, we must first construct from the evidence the normal man, both mentally and physically. A man asserted from circumstantial incidents to be in such a state of dotage and subjection must be compared with himself in periods of his health and freedom from subjection; otherwise our inference from the circumstances proved may err. *Matter of Hock*, 74 Misc. Rep. 20, 21, 129 N. Y. Supp. 196. We are all familiar with the common principle that there is no presumption of testamentary incapacity by reason of advanced age alone. But when a senile state is established the proponent's proofs must be clear.

In his best days it is obvious that Mr. Van Ness was not what is called a cultivated man, nor was he a moral man with women. There is no evidence that intellectually he was a strong man. The nature of his early education and his subsequent employments precluded much intellectual development beyond that necessary at first to a gainful existence. He had native intelligence, and little more. In 1845, in his twenty-seventh year, he contracted his first marriage. In 1867 he was divorced by his first wife for the gravest delinquencies on his part, and in 1875 he was married to Mrs. Wright, from whom, as already stated, he derived the large property now indirectly in controversy in the courts of this state. He and his second wife seem to have lived mainly and for many years in the country, and there is no evidence that while there he ever formed any close friendships with men or exercised any influence among the men of his neighborhood or the county of his adoption. His life was isolated, apparently. His tastes were simple and secluded, as the life he led indicates. His letters reveal a man of somewhat weak sentimentality, one somewhat morbid about death and the trappings of death, such as ostentatious and costly tombs. That he was all his life devoted to women and preferred their society is apparent from the whole evidence in the cause. I refer to this point with reluctance, and only because it bears on the evidence given to prove contestants' claims of his dotage and a particular feminine subjection. The divorce record in evidence discloses his relations with women in the prime of his life. It is a proceeding in rem, binding on all the world.

At the time of the death of his second wife, Emma Louise, Mr. Van Ness was in his 80th year, and no doubt the shock of her death was great. Her life must have been most closely bound to his in consequence of the peculiar obligations entailed by the intermarriage of persons situated as both then were. There is no reason to conclude that his grief for her death was not genuine and his isolation com-

plete, no matter what peculiar or tasteless form his grief may have exhibited. Whether the forms in question are consistent with the normal man or only consistent with dotage and mental weakness is one of the questions at issue. That the death of his second wife left him a lonely old man, without occupation or intellectual resources, is apparent. In testing his subsequent conduct we ought not to apply to either the life or the conduct of such a man standards of comparison derived from the habits and conduct of more elevated men.

That some of the contestants' evidence of Mr. Van Ness' acts is consistent with the claim of dotage and abnormal eccentricity on the part of Mr. Van Ness is all that can be inferred. Standing alone, such evidence would be insufficient to establish testamentary incapacity. But even if it denotes only the weakness of age, that fact, if established, is not to be disregarded in a probate cause, where fraud and undue influence are charged, and attempted, as in this cause, to be substantiated by circumstantial proofs only.

The testator's family relations must next be considered. From the time of Mr. Van Ness' second marriage with Emma Louise Wright, in 1875, until her death in 1898, Mr. Van Ness' intercourse with his first wife's daughter, Mrs. Parsons, was necessarily interrupted. This daughter lived with her mother, Mr. Van Ness' wife, who had divorced him, and Mrs. Parsons' sense of dignity and propriety toward her mother precluded such intercourse with her offending father. But after the death of the second Mrs. Van Ness, Mrs. Parsons, with apparent delicacy and amiability, became reconciled to her father and he to her. That the daughter was in every way his superior was apparent on the trial. That before his third marriage the father's affection, or such as he had to give, returned to his only daughter, after his second wife's death, is also apparent in detail. He exhibited some real interest in this daughter and presented her with an elaborate and costly tomb, quite out of keeping with her apparent and regular means of existence.

The small settlement in money which Mr. Van Ness also made on his daughter, after his second wife's death, exceeded only by a little the cost of the tomb, but not by much; both items aggregating from \$50,000 to \$60,000. At that time the income of Mr. Van Ness was very large, and his mode of life relatively inexpensive. He could very well afford to do what he did for his daughter without resort to his donative or controlling powers over the principal of the estate then enjoyed by him under the will of Emma Louise Van Ness. That the relation of father and daughter was completely re-established after his second wife's death admits of no doubt. Nor does it admit of any doubt that before testator's subsequent marriage to Alice Wood he exhibited a great interest in Mrs. Parsons' comfort and permanent welfare, and intended to provide for her. This is the only evidence, out of the great mass submitted to the surrogate in this cause, which tends to show any really elevated or entirely normal intention on the part of this singular testator. The change of testator's intentions towards his daughter after his third marriage is not adequately explained. The justification attempted is no justification in fact. A

sudden change of testamentary intention, without adequate or sufficient explanation, is a fact to be considered by the surrogate in a cause of this character. *Matter of Mooney*, 73 Misc. Rep. 317, 132 N. Y. Supp. 705.

Mr. Van Ness, after his second wife's death, was in the eightieth or eighty-first year of his age. He then lived alone in his country home, with several servants, among them Mr. and Mrs. East, who were brought back from England to testify in this cause, and their evidence is much relied on by the contestants. This man and his equally elderly wife seem to have performed almost all the household duties for Mr. Van Ness, as they had in the lifetime of the second Mrs. Van Ness. Later they were aided by their niece, Lilian, a very young English woman, who soon was high in the favor of their common employer. Mrs. East, the woman servant, testifies that Mr. Van Ness, after the death of the second Mrs. Van Ness and about the time that Miss Alice Wood appeared on the scene, was in such a helpless condition that she even gave him his bath and dressed and undressed him. This testimony is not contradicted directly. No doubt, after the death of the second wife, Mr. Van Ness was both ill and prostrated, and such ministrations ought to be referred, I think, largely to that immediate period.

Certainly this extremely weak condition must have somewhat altered for the better, for there is much competent and uncontradicted testimony showing that Mr. Van Ness was some little time afterwards a vigorous and very active man for his age. He continued to drive his own favorite horses with some skill. The Reverend Father Curry, the priest of the village church, near Mr. Van Ness' country house, testified to the condition of Mr. Van Ness, and stated that, about the time of Alice Wood's arrival at Cornwall, Mr. Van Ness was an active, spare man, appearing not more than 65 years of age. But Father Curry had but a slight acquaintance with Mr. Van Ness. Yet entire confidence is to be placed in the accuracy of this reverend gentleman's observation on this point. He was both competent and most disinterested. But there must have been many other country neighbors of Mr. Van Ness at Cornwall whose observation of his condition was more extended. If so, they were not called to the stand, with one or two solitary exceptions. The service of the East family to Mr. Van Ness terminated in April, 1900, shortly after his third marriage. After that time their evidence throws no light on the controversy. Before then their evidence, if taken as true, is most important.

There is much disagreeable evidence in the record, and some arguments of counsel which I will not refer to, unless they are imperatively necessary to my conclusions. Mr. Van Ness was a very old man at the date of his last marriage, but some inferences suggested from that fact would not be proper for a court of justice. In summing up the testimony and taking account of the arguments of counsel, of course, the court must take the facts and arguments as it finds them, and not as it would prefer them. The case is not an ordinary one, and, if there are some incidents or arguments which seem trifling

or indelicate, the surrogate at least need not dwell on them longer than necessary.

The testimony of the servants, Mr. and Mrs. East, is so important that the weight to be accorded to it requires much consideration. The testimony of dependents in a household concerning household matters is always to be scrutinized with some care in cases of this character, not because there is any diminution of average truthfulness by reason of such an honest status, but for other reasons hereafter mentioned. It is true that there are many grades of domestic servants. We are all familiar with the classical instance of Cicero's servant, M. Tullius Tiro, who was one of the most accomplished men of his time, honored by the Romans, and greatly respected and confided in by Cicero himself, as the latter's letters disclose. So at present, or until lately, in long-established and substantial households of this country, there were generally dependents on whose wise service, honest affection, and fidelity the employer greatly relied.

But as regards the evidence of the best domestic servants, about the affairs of a family, there is always this defect: In most instances they are not permitted to see much of the reality. Most family matters of importance are kept concealed from them. Their range of vision is consequently oblique and inadequate; it is rarely direct and complete. It is for this reason that their evidence in cases like this is always to be scrutinized with some care. The Easts, although apparently not of the highest order of domestic servants, evidently enjoyed the full confidence of their employers, and their testimony, if taken as true, is most important in this cause. Had the proponent, Mrs. Alice Wood Van Ness, contradicted it on her oath, and she was present throughout the trial, I might have given it less weight. But she did nothing of the sort, and so it is that this important and most incriminating testimony stands before me wholly uncontradicted. It bears on its face no such marks of inherent improbability as to compel me to disregard it, in view of the proponent's failure to challenge it by her contradiction.

[13] It is true that, at the instance of contestants the deposition of Mrs. Alice Wood Van Ness was taken before trial and that some portions of the deposition so taken were read in evidence before the surrogate by counsel for contestants, while still other portions were read by counsel for proponent. This deposition was taken before trial under the provisions of the Code of Civil Procedure, and it was read in evidence pursuant to the Code of Civil Procedure. *Berdell v. Berdell*, 86 N. Y. 519. The party reading it in evidence was at liberty to read any parts of the deposition which he preferred to read and to omit any parts not desired. *Smith v. Crocker*, 3 App. Div. 471, 38 N. Y. Supp. 268; *Parmenter v. Boston, H. T. & W. R. Co.*, 37 Hun. 354; *Whitlatch v. Fidelity & Casualty Co.*, 21 App. Div. 124, 128, 47 N. Y. Supp. 331.

The party who reads any portion of such deposition makes it a part of that party's own direct evidence; but he is not estopped to object on the trial to his own questions, so put to the witness, as irrelevant or incompetent. *Cudlip v. N. Y. Eve. Journal Pub. Co.*, 180 N. Y.

85, 72 N. E. 925. This is a singular variation from common rules of evidence, but it is one well established. The rules relative to reading parts of the deposition, I think, proceed on the old ground that a party may always use the admissions of the other side, or their answers to interrogatories, without putting in the whole admission or answer, leaving it to the trial judge, or to the other side, to require the whole answer, if explanatory, to be read. Phipson, Ev. 218, 220. Whether either the present or the old rule justifies reading the entire deposition, because some parts of it are used, I have doubt, at least if the balance does not qualify or explain those parts first read. *Parmenter v. Boston, H. T. & W. R. Co.*, 37 Hun, 355. But that point is not now here.

[14] In any event, the fact that Mrs. Alice Wood Van Ness was so examined before trial, and that parts of her deposition so taken before trial were read in evidence by contestants, did not render her incompetent as a witness in her own behalf on the trial before the surrogate; and when it is here stated that she failed to go on the stand and deny certain evidence given on the trial by the Easts and Mr. Chedsey reflecting on her, this statement is to be taken with this qualification now mentioned. The parts of her deposition read on the trial failed to contradict the evidence of the Easts or that of Mr. Chedsey before referred to, as given on the trial. Thus it is that such evidence remains uncontradicted before me, either by the deposition or by any subsequent evidence of Mrs. Alice Wood Van Ness herself. Why the proponent did not take the stand in her own behalf I am not advised.

The testimony of Mrs. East, taken on the trial, concerning Mr. Van Ness' physical prostration after the death of his second wife and at the period of the arrival of Miss Wood on the scene at the country home at Cornwall, is confirmed by her husband, the manservant East; but, as stated before, the period of Mr. Van Ness' greatest prostration ought, I think, to be confined to the period of his acute illness after the death of his second wife. That for some time in the latter part of 1899 Mr. Van Ness was very feeble in health is established. The actual condition of an old man's health and strength is apt to be better known to the inmates of his household, who can more readily detect the signs of his weakness, than it is to the outside world or to casual acquaintance. Although Mr. Van Ness throughout his entire life probably preferred female society, it is not without significance that when the young English woman, Lilian, came into his household after his second wife's death she at once procured some influence over her aged employer, receiving from him very costly and inappropriate presents, without any apparent consideration, and, I think, driving out with her employer.

This is claimed by contestants to be significant of Mr. Van Ness' dotage and speedy subjection to feminine influences. Yet too much stress is not to be placed on these extraordinary incidents, if we consider the habits and nature of the employer himself throughout his long life. That they are not without significance in connection with other established acts of the alleged testator is all that can be inferred,

having strict regard to the probabilities of circumstantial evidence. The surrogate would be unauthorized in the instance of Mr. Van Ness to infer senility or testamentary incompetence from such unbecoming incidents as these alone.

Much testimony of the contestants was directed to other strange incidents and circumstances, relied on by contestants as significant of undue influence, conspiracy, and fraud, as well as senility and weakened condition of the alleged testator in the years 1899, 1900, and 1901, the period embracing his first acquaintance and marriage with Alice Wood and the making of the contested will. The attentions of Mr. Van Ness to various women, including the young country girls whom he met on the roadside or casually elsewhere, are instances in point, and are much relied on by contestants, or I should not notice them. It is, however, apparent to me that this may have been stupid jocularity on his part. At this time Mr. Van Ness certainly contemplated matrimony, and he was rather insistent on procuring a young and pleasing wife. As stated before, while these sudden civilities or attentions to young women are not peculiarly appropriate to his age, they may not have been altogether inconsistent with Mr. Van Ness' normal states and habits. Such incidents were certainly not conclusive proof either of weakness of mind or of testamentary incapacity in his particular case, although they are entitled to be considered.

Nor do I think that the contestants' evidence, going to show his morbid interest in costly tombs, in absurd and tasteless printed panegyrics of the dead, or in memorial effigies, are, in his case, more indicative of mental weakness of mind than they are of his congenital want of correct taste in all matters of propriety. This man in his normal state, it must be remembered, was an exceptional being. It appears that after the death of his second wife Mr. Van Ness erected in the gable of her old house the figure of an angel, which he thought somewhat resembled the departed lady. This fact proves a certain exaggeration on his part, but, perhaps, nothing more in itself. This figure of an angel he ultimately removed, it seems, to the mausoleum which he constructed at great expense in Greenwood, where his second wife's remains were placed. Mr. Van Ness always manifested a lively interest in this mausoleum and other family tombs.

That Mr. Van Ness, the alleged testator, was during the years 1899, 1900, and 1901 a very old man, somewhat eccentric and susceptible to female influences, is, I think, established. That he was an easy prey to designing people is likewise established, although there seems to have been a dominating note and strength of purpose at times apparent in him, which he mainly reserved for trifles. In no instance of importance was it ever apparent. In all trifles he was firm, and in all important matters obviously weak. But had there been no evidence of fraud, circumvention, or undue influence in this cause, his testamentary power would have been sufficient. His actual condition, as established by the proofs, made it highly incumbent on proponent to substantiate the fact that the papers propounded were the acts of a free, unrestrained, conscious, and capable testator. The question is:

Did she so establish the papers propounded as to entitle them to probate under the well-established law governing probate of contested wills?

It appears by the evidence that on November 5, 1899, when the grief of Mr. Van Ness for his late wife was apparently somewhat allayed, as shown by some of the incidents mentioned, the proponent, then Miss Alice Wood, suddenly appeared at his country home in Cornwall. This then very young stranger, more than half a century Mr. Van Ness' junior, was a native or resident from her early youth of Port Jervis, in the same county, and was at that time sojourning temporarily at Cornwall. It is established that she was then in very poor circumstances. As the result of a slight mishap to her ankle in front of Mr. Van Ness' house, Miss Wood entered the house on November 5, 1899, and was cared for by one of Mr. Van Ness' woman servants, Mrs. East. Miss Wood did not meet Mr. Van Ness on that occasion, as it appears. But on the day following she called in person to thank Mr. Van Ness. He invited her in, and on this first occasion she is sworn to have embraced him and to have protested that she could remain all her life in his attractive house, or words to that effect. On that occasion the testator was so affected as to shed tears. Miss Wood then left, but the next day Mr. Van Ness took Miss Wood to drive, and in a day or so it seems he followed her to the city of New York. A few days subsequently Miss Wood came quite unattended for a visit of some duration to Mr. Van Ness. Reciprocal visits followed between Mr. Van Ness and Miss Wood's family; but it is quite unnecessary to go into all the uninviting details of the evidence concerning this courtship, which resulted in a first marriage ceremony in the city of New York on February 21, 1900, a little more than three months after the first meeting of the contracting parties.

The important points in law are the only necessary considerations for the surrogate. In order to be just to the parties concerned, too much weight should not be placed on what may be termed the unconventional character of some of the incidents surrounding the accidental acquaintance or the character of the courtship in question. These incidents concern mainly the parties themselves, and they may not be inconsistent with their ideas of propriety. That they are not without weight in this cause depends on their precise relation to subsequent events of greater importance.

We come next to the consideration of matters which do constitute the gravamen of the contestants' case: The facts proven are claimed to show undue influence, fraud, and circumvention in and about the unlawful procurement by the proponent and her abettors of the estate of Mr. Van Ness, including the will propounded. A will is claimed to be only part of the res of which Mr. Van Ness was defrauded. If the marriage of Mr. Van Ness to Alice Wood was in fact only a part of an avowed and established scheme, it should be so considered. Otherwise the facts attending the marriage itself, however lacking in conventionality, are to be disregarded. The newly married couple, as it appears, went to Mr. Van Ness' house at Cornwall to live immediately after the ceremony on February 21, 1900, which was unattended by his friends or relatives. On his arrival at home the alleged testator

was taken ill from a cold, and he kept his bed for several weeks. During the first month of the newly married life of Mr. and Mrs. Van Ness, the declarations of Mrs. Van Ness are given in evidence as tending to prove her intent and purpose and the fraud and undue influence charged by contestants. Had she seen fit to contradict them, I should have given her contradiction close attention; but she did not.

[15] It is uncontradicted that the proponent, shortly after marriage, told Mrs. East that she had heard before her acquaintance with Mr. Van Ness "that there was a rich old guy up the country that wanted a wife badly, and that was how she came to know Mr. Van Ness." This declaration stands wholly uncontradicted, and the surrogate cannot disregard it, in view of the character of his acquaintance with proponent and Mr. Van Ness' condition at the time. Such declaration is only important in connection with other closely related facts, established on the hearing.

The surrogate must now pass to a circumstance greatly relied on by contestants and strenuously objected to by counsel for the proponent. Within a month after the marriage, as Mrs. East swears, proponent requested Mary East to allow proponent to have some of her correspondence from the "dearest fellow in Brooklyn," by name Pobe, addressed under cover to Mrs. East, and proponent then stated that she had married Mr. Van Ness "for his money." This last declaration is reiterated by the witness, Mr. Chedsey. Proponent, though present in court, never contradicted this extraordinary testimony, and its truth stands confessed or without contradiction. The result of this arrangement with Mrs. East about the correspondence was that a letter purporting to be from one Pobe, but addressed to Mrs. East, was opened by the younger maidservant, Lilian, as her aunt, Mrs. East, could neither read nor write. This letter was part of proponent's own correspondence and was ultimately received in evidence.

Its reception was the subject of much and long discussion by counsel. The counsel for proponent vigorously claimed that the letter was incompetent, and all the counsel for contestants with equal insistence claimed it to be competent evidence under the issues. A copy of the letter, it appears, had been annexed to the proceedings in the Supreme Court, to which I shall have occasion subsequently to refer, and secondary evidence of it as lost was first resorted to in this cause. It appears that some part of the record had in some mysterious way been abstracted from the files of the Supreme Court, and this occasioned embarrassment. But in any event the original letter was finally produced on the trial before the surrogate. It seemed at first to the surrogate that a letter written by a third person not called to the stand, and not proved except by production, ought not to be received in evidence over proponent's objection. But upon further reflection, although on this point I was less assisted by the arguments of the learned counsel than on other points in the cause, the surrogate decided to receive the letter, in view of its surroundings and the issues raised by the pleadings.

When the state of mind of a party, with reference to a transaction at issue, is material, all acts and declarations from which it may be inferred are in general prima facie evidence for or against her. Her

possession of incriminating documents containing the information, especially if answered or acted upon by her in any way, are evidence of the truth of their contents for or against her. They are then part of the *res gestæ*, or they are equivalent to statements in her presence which may operate as a constructive admission of her own. *Rex v. Plummer*, Russ. & H. Crown Cas. 264; *Fairlie v. Denton*, 3 Car. & P. 103, and note pp. 104 and 105; *Com. v. Eastman*, 1 Cush. (Mass.) 189, 215, 48 Am. Dec. 596; *Sturtevant v. Wallack*, 141 Mass. 119, 4 N. E. 615; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; *People v. Smith*, 172 N. Y. 232, 233, 64 N. E. 814. Thus it is that letters from men merely found in a woman's desk are sometimes admissible as a part of *res gestæ*. *Walton v. Green*, 1 C. & P. 621. So, when the terms upon which two parties lived are material, their letters to third persons are admissible evidence of that fact, although not of the truth of all matters stated. *Willis v. Bernard*, 8 Bing. 376.

That proponent did carry on a correspondence with Pobe and his roommate was fully established aliunde, and that the Pobe letter came to Mrs. Van Ness and was part of her own correspondence stands uncontradicted. There was, in fact, proof in this case which distinctly connected the proponent with the Pobe letter within the language of the cases cited. So far as the letter itself reflects on the state of mind or intent of proponent to despoil the testator, the contents of the very objectionable letter, to which I shall not otherwise allude, may have some bearing on subsequent events. I do not, however, attach much weight to the Pobe letter in view of proponent's careless action on receiving it, although I cannot reject it altogether. She tossed it aside, as she said, unread, and it fell into the hands of others.

Mr. Chedsey, the very respectable family lawyer, who had long been connected with the estate of the second wife, Emma Louise Van Ness, gave very important testimony about the Pobe letter and proponent's conduct concerning it. Mr. Chedsey's evidenced on this point also stands uncontradicted, although it was in proponent's own power to have denied it if untrue. Taking his testimony on this point as true, it establishes, I think, without the necessity of resorting to the Pobe letter, an original design on the part of the proponent to marry an aged man "for his money." Precisely what this expression "to marry for money" may mean is perhaps open to argument, but that it means at least that proponent intended by marriage to advantage or benefit herself is open to no equivocation. We thus start with a declared intention on the part of proponent which may cast some light, however dim it may be, upon the subsequent testamentary acts in proponent's favor. Her statement in itself is sufficient to establish her original intention in connecting herself with the aged testator without resort to the Pobe letter. For this reason I am inclined to disregard the Pobe letter in arriving at my conclusions, and to accord to it no evidential weight whatever in this cause, thus relieving the cause itself from a difficult point of law.

[16] We come next to the nature and situation of the testator's property. The nature and situation of the property of a testator is

always properly before the surrogate on an allegation of undue influence in a testamentary cause. *Matter of Woodward*, 167 N. Y. 28, 60 N. E. 233. The judgment roll in the action of *Harmon v. Van Ness* in the Supreme Court of the state of New York was ultimately put in evidence in this proceeding, and the judgment is certainly binding as between the parties thereto and the persons claiming under them in this proceeding. It discloses much concerning the nature and the situation of the testator's property at the time the papers propounded came into existence. It also discloses that shortly after the intermarriage of Mr. Van Ness with Alice Wood the will of Emma Louise Van Ness was construed in that action by the Supreme Court of this state, and that the rights and powers thereunder of Mr. Cornelius H. Van Ness, whose will is now offered for probate in this proceeding, were determined to be plenary.

The persons entitled under the will of Emma Louise Van Ness, in the event that Mr. Van Ness did not exercise the powers of disposition conferred on him by the will of his wife, Emma Louise Van Ness, had brought that action against him individually and as executor of Emma Louise Van Ness, claiming in substance that the said Cornelius H. Van Ness was then 82 years of age and under the dominion and control of Alice Wood, whom he had lately married, and that the estate would be wasted and the powers enjoyed by Mr. Van Ness under his wife's will would be perverted from their intended purpose. Alice Wood Van Ness, the proponent, was a party defendant in that action, appearing by Mr. Parshall as her attorney. The result of the action was a judgment which provides, *inter alia*, that \$375,000 received by Mr. Van Ness under the will of Emma Louise should be set apart by him and paid to trustees, on trusts to receive and pay over the income to Mr. Van Ness for his own life, remainder to those claiming under the will of Emma Louise Van Ness. The segregation of the trust estate under this judgment of the Supreme Court, although this is immaterial, must have proceeded, I think, on some such ground as that first laid down in *Chancery* in the year 1715 (*Packer v. Wyndham*, Pre. Ch. 412), where a man who had married a woman of weak mind was compelled to settle her estate on herself. If this was the ground of the judgment in *Harmon v. Van Ness*, it is not without significance in this proceeding. But on that point I do not rely.

It appears that this trust arrangement, provided for in the judgment of the Supreme Court, was carried out or executed by Mr. Van Ness, his wife being a party defendant, and that the remaining estate not embraced in the trust received by this alleged testator under the will of Emma Louise Van Ness continued in his possession, but subject to certain contingent limitations over in the event that he did not exercise his powers of disposition. Such limitations of contingent remainders over after life interests, with power of disposition in life tenant, have become very common limitations in this state since the Revised Statutes. The \$375,000 so set apart, it is conceded, did not pass under the will or codicil now before the surrogate in this proceeding to probate them. That a very large property did remain in the hands of Mr. Van Ness is apparent, and he continued throughout

his life to be entitled to receive a considerable income from the trust fund created pursuant to the said judgment. When received, it appears that he soon handed it, also, over to his third wife. It is quite unnecessary at this time to speak further concerning the judgment in *Harmon v. Van Ness*, except to observe that the attorney of record for Alice Wood Van Ness in that action, Mr. Parshall, was the same lawyer who later was the draftsman and attesting witness of the testamentary papers now propounded in this proceeding for probate. In *Harmon v. Van Ness* Mr. Van Ness was not represented by Mr. Parshall.

[17] Mr. Parshall was asked on cross-examination concerning his own knowledge at the time he drew the will of the claims of the heirs and next of kin of Emma Louise Van Ness as made in the suit of *Harmon v. Van Ness*. In other words, Mr. Parshall was asked, in effect, whether he knew that Alice Wood Van Ness was there charged with being an adventuress, intending to possess herself of the estate enjoyed by Mr. Van Ness under the will of his second wife. Objection was made that the record alone could show the state of his knowledge of such claims. But no attempt was made at that time by such questions to introduce in evidence the record qua record. The questions so put to Mr. Parshall were addressed merely to the knowledge of the witness and to his notice of the contestants' early position and allegations. The questions were also directed to the fact that after the witness had received such notice he became a party to all the subsequent proceedings stripping testator of his entire estate in favor of Alice Wood Van Ness and her family associates. It seemed to the surrogate that the knowledge of the witness as to the claims of those claiming adversely to Alice Wood Van Ness under the will of Emma Louise Van Ness was material in several aspects. It might not be very material in all respects, and yet in others it might be important. Mr. Parshall was distinctly charged by contestants with aiding and abetting Alice Wood Van Ness in all her subsequent acts regarding Mr. Van Ness' property.

The state of Mr. Parshall's mind was important, as was the extent of his knowledge of the precise situation of Mr. Van Ness and his estate. If the witness Parshall had acted professionally in good faith for Mr. Van Ness, without anything to put him on his guard, his subsequent action might be more justifiable. The propriety of his action, his credibility, bias, and the bona fides of his professional attitude in connection with the will offered for probate, were all involved in the pureness of his own intentions and actions on the occasions under investigation in this court. In such aspects his knowledge of the claims of the Harmons and the state of his own mind were material. *London Joint Stock Bank v. Simmons*, [1892] A. C. 201, 221. The contents of the record in *Harmon v. Van Ness* were not involved in such questions, and no proper rule of evidence was, I think, violated by the questions put, without exhibiting to the witness the record itself in the action of *Harmon v. Van Ness*. We are familiar with the rule that matter of record must be proved by the record. But the knowledge of the witness Parshall was not matter of record.

[18] But if any strict rule of evidence was, in fact, perchance,

violated by the surrogate, and I do not think that it was, it was quite immaterial in so far as the result of this proceeding is concerned. Whether Mr. Parshall knew, or not, of the claims of the Harmons is not very material. Actual knowledge of a witness may, however, be inferred from a mere access to documents containing the facts chargeable. The judgment roll in *Harmon v. Van Ness* was in evidence, and Mr. Parshall was one of the attorneys of record. Where a witness admits that he knew the facts, nothing more is required by the way of proof of such knowledge. So a witness' good faith or bad faith in doing an act may be inferred from anything authorizing the inferences. Whenever a witness' intention in doing an act is material in law, it may be shown, if possible, and he may always speak directly to it. *Mansell v. Clements*, L. R. 9 C. P. 139. He may be asked what opinion he formed on seeing a document. *The Queen v. King*, [1897] 1 Q. B. 214. The constant objections in this court to questions to a witness, as to his own intention or knowledge while doing a particular act testified to as done by him, are in the main unjustified. If, for example, a witness testifies that he made a particular visit or drew a particular instrument in evidence in a proceeding of this kind, his intention is often very material under certain circumstances, and may be proved, if possible, except in cases for construction of written documents.

[19, 20] That the Harmon heirs had, after his third marriage to Alice Wood, some reason to apprehend that Mr. Van Ness might defeat their expectations under the will of Emma Louise Van Ness is apparent, as before such marriage he had already begun to make costly gifts to her and her family in Port Jervis, including real estate. It was conceded that Mrs. Alice Wood Van Ness and Mr. Parshall were in the vaults of the Nassau Bank engaged in an examination of the securities of Mr. Van Ness at the very moment process in the suit of *Harmon v. Van Ness* was served in April, 1900, some 60 days after the first ceremony of marriage between Mr. Van Ness and Miss Wood. While this fact is perhaps inconsequential in itself, it tends to disclose the circumstances of testator's property and testator's sudden and unusual relations with the persons charged with a later undue influence over it and him. That these comparative strangers to Mr. Van Ness should be concerned in any such examination so soon after the marriage is a strange circumstance in itself, perhaps possessing no legal significance and perhaps explained away. It is, however, a fact established.

In May of the year 1901, immediately after the injunction restraining Mr. Van Ness was removed in the action of *Harmon v. Van Ness*, Mr. Van Ness, the testator, is claimed to have transferred nearly all his securities and property to Alice Wood Van Ness. It is also in evidence that within two weeks after his marriage testator was importuned by Harry Wood, the brother of proponent, to make some such provision for proponent. This transfer in May, 1901, was without any actual consideration. The written act of transfer is in evidence. The transfer or gift, being a postnuptial one, was purely voluntary on the part of Mr. Van Ness; but its validity is not before the surrogate. It is, however, apparent that it contained no reservation in the favor

of grantor and no power of revocation reserved to him. I myself asked Mr. Parshall whether he advised Mr. Van Ness that the transfer should contain a power of revocation, and he said that he did not. In equity this would be considered a strange omission. This transfer in question denuded a very old man of all his property (except the annuity from the Havemeyer trust) by means of a postnuptial settlement in favor of a young woman who, although his wife, was almost a stranger. An antenuptial settlement would stand in a very different position in equity, as marriage is the highest consideration known. It did seem to the surrogate that the careless fashion in which the transfer of a large property was made was some evidence that old Mr. Van Ness lacked both vigor of mind and independent and proper legal advice about the times of the transfer and the will. These facts a court of equity might well consider. The only bearing they had on this contention was more restricted.

The crude and careless fashion in which the aged husband transferred all his very large property to one who, though his wife, was a comparative stranger to him, is some evidence of a condition of senility and incompetence charged at the times under investigation in this cause. Mr. Van Ness reserved nothing whatever for himself except the income of the trust fund already mentioned. This he could not convey to her, but he soon transferred the income to her. The settlement on his part on his third wife was so imprudent, so counter to human experience, as to excite the most minute inquiry into its bona fides. The slightest evidence would, I think, suffice to impeach it in a court of equity. But in this cause such transfers are entitled to be regarded only as a badge and circumstance tending to prove the undue influence charged. The transfer was superintended by Mr. Parshall, who was the very same lawyer who later drafted the will in controversy in this proceeding and superintended its execution, participating in the ceremony as one of the attesting witnesses. It is in evidence that Mr. Parshall was an old acquaintance of Miss Wood, and he and she had been friends from their respective youths in Port Jervis, where both lived for many years. Mr. Parshall had never known Mr. Van Ness until after Miss Wood met Mr. Van Ness. Mr. Parshall had not acted professionally in any way before 1900 for Mr. Van Ness, whose business and large estate had for a great many years prior to 1900 been managed by old and trusted legal advisers of Mrs. Emma Louise Van Ness in the city of New York.

That Mr. Van Ness had the abstract right at any time to change his agents and legal advisers cannot be gainsaid, and his excessive anger at the action of the Harmon heirs and their allies might well have been a good and sufficient justification, were it not for other circumstances disclosed by the evidence. Had Mr. Parshall shown himself free of all complicity in the denudation of Mr. Van Ness, and a competent and wholly disinterested legal adviser, keenly alive to professional obligations, the circumstances which I am considering and about to consider would have less bearing on the factum of will in this proceeding. As it is they have much.

About a year or less after Mr. Van Ness' marriage to Miss Wood,

Mr. and Mrs. Van Ness removed to Port Jervis from Cornwall, thus exchanging the beautiful and picturesque country, to which Mr. Van Ness had long been much attached, for one in which he was a total stranger. His life while at Port Jervis was passed in the intimate company of his new wife's family and their acquaintances and far from those of his prior lifetime. He was in the eighty-third year of his age and among strangers when the will in controversy purports to be made. It was made at Port Jervis, amidst the new surroundings of testator, and was drawn by Mr. Parshall and witnessed by those who were also comparative strangers to Mr. Van Ness and who had but recently come into his life through his last marriage. While little legal significance attaches to these circumstances standing apart, they are not devoid of relation to other serious circumstances about to be considered.

At the time Mr. Parshall drew the will now offered for probate it appears that he was in possession of \$40,000 in prime railroad bonds belonging originally to Mr. Van Ness, or in his control under the will of his second wife for proper purposes. Mr. Parshall says the transfer of these bonds to Mr. Parshall was for legal services rendered by him. No bill was rendered; no services shown. If the evidence concerning Mr. Parshall's possession of this \$40,000 of the bonds of testator had ended there, no grave irregularity would be apparent on its face. But it did not end there. Shortly afterward some disgorgement, it appears, was demanded of Mr. Parshall by Harry Wood, a young brother of Mrs. Alice Wood Van Ness, who had made the early postnuptial demand on Mr. Van Ness already mentioned. There is no evidence that Mr. Wood had any authority, or that Mr. Van Ness was privy to the demand on Mr. Parshall, or that Mr. Van Ness took any part in it, or ever received any benefit from the arrangement which followed the demand of Wood. This demand of Wood was a mere statement in effect:

"Give up some of your booty to me, or take the consequences."

Unexplained, such a transaction speaks louder than a human voice for Mr. Van Ness' total incapacity to manage his own affairs at the time the will was made. Mr. Van Ness had then given away without consideration about all his large property to Alice Wood Van Ness or her family, as before stated, except the \$40,000 which Mr. Parshall himself had taken. Instead of giving it back to Mr. Van Ness, Mr. Parshall, it is conceded, agreed to give Harry Wood the income on the bonds then in Mr. Parshall's hands, to be paid during Mr. Van Ness' entire life. Here, without the consent of Mr. Van Ness, was an annuity in favor of a stranger carved out of property which Mr. Van Ness held as his own, subject to the will of his second wife. Mr. Parshall states that he made this extraordinary arrangement because Mr. Wood had introduced him to the profitable business which led to his receipt of these bonds. For many years Mr. Parshall states that this strange compact between Wood and himself was carried out. As long as Mr. Parshall was financially able, Mr. Parshall handed over all the income on the bonds to Mr. Wood; and when no longer

able, being sore pressed by Wood, Mr. Parshall even converted to his own use the fund of an estate of which he was then an executor in order to discharge the pressing demands of Wood. How pressing these obligations must have been is apparent by Mr. Parshall's resort to such desperate means of relief. As such obligations to Wood had no foundation in law, the arrangement is some evidence of the conspiracy charged in this cause, or at least it tends to support the contention of contestants that there was such a conspiracy to gain possession of the estate of the aged testator by any means possible, including the will now offered for probate.

If even this last-stated inference is too strong, or not justifiable, then we may safely conclude that the facts established in respect of the bonds in his custody do deprive Mr. Parshall of the advantage of that lofty position of professional independence and disinterestedness which is always highly essential in the draftsman of the will of one whose capacity, independence, and freedom are in doubt. The proponent should show, in this proceeding to probate a will in her favor, that the agent of the will was not her agent. Mr. Van Ness, the alleged testator, was in a very peculiar situation toward proponent at the time the will was drawn; he was among strangers, very old, and separated from his only daughter. His whole environment, his great age, and his many peculiarities certainly entitled Mr. Van Ness to the most independent, the most disinterested and competent, legal services on the part of the draftsman of his will. Mr. Parshall's relations with Wood and his sister, Mrs. Alice Wood Van Ness, disclose that he did not possess these qualifications, and that he was then under most serious responsibilities and obligations of some kind undisclosed to the family of this proponent. Mr. Parshall, in other words, did not occupy that position towards testator, at the time the will was drawn, which affords any guaranty, in itself, that the paper propounded was the free, unrestrained, and independent act of a capable testator.

Indeed Mr. Parshall's connection with the will does not benefit it under the circumstances. On the contrary, it raises grounds of suspicion that it was not the voluntary and free act of a capable testator. It was quite open to young Mr. Wood, who, as the record discloses, was present in court, to explain the transaction with Mr. Parshall about the bonds and its relations to Mr. Van Ness and his estate; but Mr. Wood was not called to the stand. Mr. Parshall's evidence on this point is wholly insufficient, and from it I am bound to infer that Mr. Van Ness, at the time of making his will, did not have that independent and disinterested legal advice which his dubious situation justly required. In other words, Mr. Parshall's evidence, standing alone, does not make it sufficiently or conclusively apparent to the surrogate that the will of June 24, 1901, was in fact the free and the independent act of a capable testator. On Mr. Parshall's evidence alone this will cannot be established, in view of the contestants' other proofs in this cause.

[21] The other attesting witness to the will now offered for probate was Mr. Senger, a brother-in-law of Mr. Parshall, and then a

young law student in Mr. Parshall's own law office in Port Jervis. The acquaintance of Mr. Senger with old Mr. Van Ness was most limited, and his permitted opinions on the testamentary capacity of Mr. Van Ness and that old person's freedom from all restraint on the occasion of the execution of the will are necessarily not on the highest foundation. Mr. Van Ness was a newcomer in Port Jervis, and the young law student hardly knew him. The greatest circumspection and care was necessary to establish the due execution of a will executed in Port Jervis, among strangers, by the aged Mr. Van Ness, almost exclusively in favor of his young wife, and contrary to prior testamentary intentions. Certainly attesting witnesses could have been selected whose witness would have been more conclusive upon factum of will than that of either of the young men actually selected.

When the character of persons acting as attesting witnesses is implicated by any circumstances connecting them with the sole beneficiary, their act of witnessing is necessarily somewhat affected, and their bias is then to be taken into the account by the surrogate. When their opinions on testator's capacity or freedom are weighed, they are entitled to less consideration than those of persons standing in a better and more exalted and neutral position. Testamentary law fully justifies these conclusions, if none other. The purpose of the law in requiring attesting witnesses to a will has been held to be "primarily for the security of the testator at the time of the execution of the will; the statute intending that the witnesses shall be in the nature of guards or securities to protect him in the execution of the will against force or fraud or undue influence." *Wright v. Doe d. Tatham*, 1 A. & E. 3. In the *Will of Oscar Egerton Schmidt*, 139 N. Y. Supp. 464, the surrogate recognized the accuracy of the statement in *Wright v. Doe*, just cited. In this cause now here the testimony of neither attesting witness is in a strong position to rebut the undue influence or fraud charged, if it is otherwise established.

It has been held in this country, though not, I think, in this jurisdiction, that undue influence is more readily inferred in case of a will in favor of a mistress than in case of a will in favor of a wife. *Kessinger v. Kessinger*, 37 Ind. 341. It has been also held that the undue influence of a husband over a wife is more easily inferred than that of a wife over a husband. *Marsh v. Tyrrell*, 2 Hagg. 84, 4 Ecc. Rep. p. 51. The integrity of both these decisions may, of course, be open to further contention, although the decisions just cited are only a recrudescence of a very old conception in law. In early Roman law, gifts between spouses were prohibited to some extent, in order to avoid the exercise of the influence now termed undue influence "*ne mutuo amore invicem spoliarentur*," or, in other words, "lest by mutual affection they should be despoiled in turns." So by the early law of France, only a husband or a wife who had no children could give property to the other, according to some old "*coutumes*," and then only in case they were equally alert and also equal in health, age, and belongings. *Loysel, Institutes*, 128. These early examples of legal restrictions on the undue influence of wives over husbands and husbands over wives are more interesting than important at present. They, however, recognize the very same danger which modern law

guards against in proper cases, as may be seen from the decision on Rollwagen's Will, in our own courts. 63 N. Y. 504. Human nature is much the same in different ages, and the law of testaments is a very old law and much the same in all countries for a thousand years past.

I will not forget that Alice Wood Van Ness was a wife in law, and I cannot overlook that as such she would be fairly entitled to some substantial provision out of her husband's estate. In this court she is entitled to all the legitimate inferences which, even in her particular case, attach to the most honorable and honored status of wife. But even an honored wife may be guilty of exerting undue influence over her husband in respect of his will. Each case of this kind is to be determined by its own circumstances, as is often said in the books of the law. The rules of courts of equity and courts of probate are, however, not the same in attaching the same specific presumptions of undue influence to confidential relations, such as guardian and ward, parent and child, and man and wife. In this court, in a testamentary cause, undue influence of the wife must always be established and never presumed from a mere relation of confidence. *Parfitt v. Lawless*, [1869] 2 P. & D. 462, 469. But, as I have stated at length before, an undue influence may always be established by circumstantial evidence only.

Old testamentary law recognized that any wife, good or bad, might be guilty of procuring a will by undue influence. *Swinb. pt. 7, § 2*. And ever since it is held in testamentary matters that an artful wife may readily subdue her husband to her own purposes so as to deprive him of a disposing mind which the law demands of a testator. *Mountain v. Bennett*, 1 Cox, 353, 355; *Rollwagen v. Rollwagen*, 63 N. Y. 504. While legitimate influence and persuasion are always permissible by a wife to a husband, if the wife ruthlessly disregard all propriety and all the rights of others dependent on testator in the process of attaining her own ends, that fact is a circumstance to be considered in determining whether her influence over her husband was in law legitimate or undue. In my inferences from the circumstantial evidence on this point I have endeavored to keep far within the range sanctioned by the decisions in such cases as *Rollwagen v. Rollwagen*. I have drawn no inference, and shall draw none, which by any chance or by the strictest rules of induction is not an irresistible inference.

[22] The situation of the parties, the condition of the testator's estate, and some of the circumstances, but not all, about the execution of the will of June 24, 1901, have now been regarded or considered. In order to establish any testamentary script as a will, *animus testandi*, or an intention to dispose of property by such instrument, or to designate the guardianship of a child, ought generally to be made apparent by a proponent. Now, Mr. Parshall testifies, with great distinctness, and he was the draftsman of the papers propounded as a will, that at the time the so-called will was drawn testator had so stripped himself of all his property by prior transfers to his young wife and her family that there was substantially nothing for the will to operate on. If the testator then understood that situation, and I fear he did not, for the

paper gave \$25,000 to his daughter, Mrs. Parsons, then there was no real intention on his part to dispose of anything by the paper propounded. The consequence is that there is shown by proponent's own witness, the attesting witness to the will, that there was a total absence of *animus testandi* or intention to dispose by will on the part of the alleged testator. This is a very singular fact, and, being true, as Mr. Parshall asserts, the will propounded is a mere cover for a further assurance or a sort of dragnet release to his wife, which is entitled to very little consideration in a probate court. If the script propounded was not intended to be a will by the testator, in the sense of being a final disposition of property, it rises no higher than a mere declaration calculated to protect proponent, or else it is a sort of makeshift further assurance in her favor. If this is the true situation of the papers propounded, and from Mr. Parshall's own testimony I must conclude that it is, it is apparent that the papers propounded are not so much a will of Mr. Van Ness as they are proponent's own papers, for they are beyond all proper contemplation of the Statute of Wills.

While the dispositive character of a testamentary paper is not much looked at in this jurisdiction before probate (*Matter of Meyer*, 72 Misc. Rep. 566, 571, 131 N. Y. Supp. 27; cf. *Van Giessen v. Bridgford*, 83 N. Y. 355; *Matter of Davis*, 182 N. Y. 468, 75 N. E. 530), the surrogate is fully persuaded that a resort to the Statute of Wills with an intention on the part of a testator to do something else than dispose of his estate under color of a will is a defiance of the Statute of Wills, or, if not so, it is, in any event, a circumstance which ought not to be ignored by the surrogate in a case of this character, if the evidence is conflicting. That Mrs. Alice Wood Van Ness placed very little reliance on the wills now presented for probate is disclosed by her sworn petition for letters of administration on Mr. Van Ness' estate. She then knew that there was a will; but, accepting her own statement that it was mislaid or lost, she never attempted to establish it as a lost will in any way. It is to be noticed, also, that her petition for administration makes the estate insignificant in value. She already enjoyed the estate in possession.

But to go back to the *factum* of will. It was on June 24, 1901, when the testator had nothing left to give, that the will now propounded purports to be made giving Mrs. Parsons, the testator's daughter, \$25,000, which testator then did not have to give, and about all the residue of nothing to this proponent, Alice Wood Van Ness. On January 24, 1902, another impotent paper, called a "codicil," was prepared by Mr. Parshall, which on its face took away from Mrs. Parsons even the \$25,000 that she never could have received, if Mr. Parshall's evidence of Mr. Van Ness' pecuniary situation is to be taken as correct. This codicil, if a bona fide attempt under the Statute of Wills, and not a merely colorable instrument by way of consistent concealment of the prior complete denudation of Mr. Van Ness by Alice Wood Van Ness, her family, and Mr. Parshall, is in the same position as the will regarded as a dispositive document. It disposes of nothing, and its proofs lack evidence of testamentary intention on the part of testator; that is, of "*animus testandi*" in

the complete sense of that established term of law. In England, whence New York derives much of its common law, a will would be refused probate because not dispositive. *Lister v. Smith*, 33 L. J. P. 29; *Nichols v. Nichols*, 2 Phill. 180; *Matter of Meyer*, 72 Misc. Rep. 571, 572, 131 N. Y. Supp. 27.

[23] But if we place no harsh construction on the codicil of January 24, 1902, and treat it also as an attempt to testamentate in good faith under the existing Statute of Wills, the evidence of its due execution by a competent and free testator is not very high. The codicil propounded was drawn by Mr. Parshall, and, like the will, the ceremony of its execution was performed at Port Jervis. It was witnessed by Mr. Parshall and by Dr. Lambert, a resident physician of Port Jervis. Necessarily Dr. Lambert's means of observing the testator were limited to their joint residence at Port Jervis, which was brief. This witness was the family physician of the Wood family. He could not remember whether or not Mrs. Van Ness was present when the codicil was executed. He came to the ceremony by Mr. Parshall's request. It was he, this witness, who sent Miss Wood away on the argonautic expedition which led to her marriage. The effect of testimony of attesting witnesses to a codicil like this has been discussed in *Marsh v. Tyrrell*, 4 Ecc. Rep. 46.

It is not necessary in a case of this kind to connect all the attesting witnesses with a conspiracy or the undue influence charged. Even persons of high character may be employed and fail to do their duty in a situation like that of Dr. Lambert and Mr. Van Ness. Mr. Van Ness was at Port Jervis, very old, among total strangers, and away from his only daughter and lifelong friends. He was then over 83 years of age. Yet there is no evidence that the physician took the slightest pains to examine Mr. Van Ness alone and apart from his wife or Mr. Parshall. He was not bound to unravel all the complicated conditions of his family relations or the tangled threads of Mr. Van Ness' past life. But he should have taken some pains to ascertain the facts he attested. This attesting witness was naturally most interested in the Wood family. He did not even know at the time of the codicil that Mr. Van Ness had an only daughter dependent upon him to some extent. It appears that this witness made himself only perfunctorily an attesting witness and a part of a testamentary ceremony conducted by Mr. Parshall in the presence of Mrs. Alice Wood Van Ness, the possessor of all of Mr. Van Ness' estate.

If we accept it all as true, the evidence of this attesting witness, Dr. Lambert, is not sufficient in itself to disprove the moral or physical subjection of Mr. Van Ness indirectly established by contestants at the time he executed this meaningless codicil. That the witness' part in the codicil was unobjectionable is all that can be said in favor of Dr. Lambert's testimony. This witness may have been duped by others, and his suspicions adroitly put at rest, so as not enable him to detect coercion and fraud, if any existed, as was said in *Marsh v. Tyrrell*. But without adopting any such harsh conjecture or inference as that fully justified by the decision in *Marsh v. Tyrrell*, the surrogate is of the opinion that Dr. Lambert's testimony is not sufficient in itself to disprove all the evidence against the codicil or in its disfavor. The

legal effect of all such evidence will be considered in my conclusion of this opinion.

[24] I come now to the consideration of an instrument in evidence in this cause which I regard as important and as most serious to the parties concerned in its preparation. Not content with this codicil, quite excluding the only daughter of testator from any possible participation in her father's estate, a formal paper was prepared, as the justification of the codicil. It was a minatory, heartless, and most unscrupulous writing to be prepared and witnessed by adults of the slightest respectability, if it was ever intended that it should be used against Mrs. Parsons; and subsequent events show that it was attempted to be so used as a means of subjecting the testator's only daughter, Mrs. Parsons, to a state of terror about the assertion of her claims to her father's property, whatever it was. Mrs. Parsons appeared in court, an elderly woman, and beyond all witnesses in my experience in her demeanor gentle and considerate. This lady had a large adult family, also of respectability and station. This extraordinary document, purporting to be made five days after the codicil, was in the handwriting of proponent and witnessed by Mr. Parshall, the draftsman of the will and codicil. I refer to the document reflecting on Mrs. Parsons' legitimacy and threatening her with exposure in the event that she ever attempted to commence a suit against Alice Wood Van Ness to break the wills.

This document purports to be signed by Mr. Van Ness himself, although it is wholly inconsistent with his fond letters in evidence to his daughter, and also with the single rather touching allusion in them to the very aged woman, once the wife of his youth. That single allusion denoted something in him long dormant. It ends all doubt on his once fond relations with Mrs. Parsons' mother. Of course, Mrs. Parsons being born in wedlock, her legitimacy was not open in law to such unscrupulous question as that attempted to be raised by this document. Any lawyer should have known that. In so far as the document itself purports to be executed by Mr. Van Ness, it is good evidence, to my mind, of his subjection to the very undue influence charged by contestants. No man in any other condition could have signed such a paper. There is not the slightest foundation for even suspicion that Mrs. Parsons was not the daughter of Mr. Van Ness and the legitimate wife of his youth. In any aspect, the paper now being considered is worthless, except in so far as it reflects on the person who wrote it and the lawyer who witnessed it. As to them it denotes a willingness to resort to means which were not in law or in morals legitimate to effect the testamentary dispositions they now cause to be propounded to me. Of this I must take notice. I will not have the honor of families needlessly aspersed in this court without some attempt to rebuke it. There must be some limit to cupidity here.

It is well established that a party defendant who bribes a juror admits to some extent guilt. I think that a party who resorts to such a paper as that now under my consideration, or who resorts to minatory and intimidating actions in a litigation, ought to be taken to admit to some extent the guilt charged. In this aspect this incriminating paper is most damaging to this proponent and to Mr. Parshall. It has been

said that a party is known by his witnesses. In re Benjamin's Will, 136 N. Y. Supp. 1073. This is a fortiori true of attesting witnesses to a will or a document. But I will say no more on this head. It was with great reluctance that I have said what is so obvious and at the same time so necessary to be said in the interest of justice.

[25] Many of the essential facts in this cause have now been touched on, but not all. After making the transfers and will and codicil in the manner already considered Mr. Van Ness lived on for 10 years apparently happily with his last wife. He died in the ninety-third year of his age. It is but just to proponent to say that there is evidence that throughout this period proponent conducted herself with propriety towards Mr. Van Ness. But he then still enjoyed an ample income of his own from the trust fund and this conduced to their joint comfort. There is proof that this income also he handed over to the last wife. That Mr. Van Ness was the better for his wife's kindly consideration and watchful care throughout this period is apparent. If it had not been for the gross evidence, already mentioned, a will of a man in favor of his wife would be entitled to great consideration in a probate court. It is said by some authorities that testamentary instruments procured by some kinds of coercion may be ratified when the coercion ceases, and Mr. Van Ness' subsequent declarations tend to show some sort of acquiescence or ratification in the various provisions for Mrs. Alice Wood Van Ness. That very excellent old commentator on wills, Swinburne, states of a will coerced by fear that:

"If testator afterwards, when there is no cause of fear, do ratify and confirm the testament, I suppose the instrument to be good in law." Swinb. pt. 7, § 2.

A very excellent modern commentator on the American law of wills is evidently of the same opinion. 1 Redfield on Wills, 514, 515. Text-book writers, with three-old exceptions, are not, however, in our law recognized as legitimate sources of law. Whenever cited, they are cited for illustration or consensus of interpretation, never by any chance as authority. But this same doctrine stated by Swinburne has been since often recognized in probate courts in cases where no change has been made for years by a knowing and competent testator alleged to have been coerced to making a will. It was regarded as a very cogent circumstance by the ecclesiastical courts when a coerced will was long abided by and not changed by testator after the coercion had ceased. But I think such acquiescence of late years is only regarded as evidence to rebut a presumption of complete coercion. In re Campbell's Will, 136 N. Y. Supp. 1100. I take it in any event that at the present day, when either undue influence or fraud is clearly established, such a constructive or presumptive ratification must be adequately made out in order to prevail in such a curious case as this. If there is any inherent circumstance which rebuts such presumption or inference, it is not applied.

It must be remembered that Mr. Van Ness was in about the eighty-fourth year of his age when he made the codicil, only six months after he had made the will now also in question. He had then stripped himself, or been stripped, by conveyances or assignments, of every bit of

tangible property he had in the world, even including his own favorite horses. What a lamentable situation for a man of property! There is no proof that at any time afterwards he ever did a single act of a serious business nature. There is some proof that he did not. He was, after the making of the will, as completely dead to all affairs of a business nature as a man could be and be alive. While there is some evidence of continued intelligence on his part in minor human interests, even this is not very marked. He lived on, a mere simulacrum of a once powerful man. He had abdicated his property and all business functions to his young wife. In what way should such a very old man so situated be held to a constructive ratification in such a case as this, or to a ratification by mere acquiescence? It is interesting to observe that in some countries, in no distant age, an abdication of all of his property by a man was regarded as the equivalent of his civil death. No further property rights inhered thereafter in such a man. He could do no civil act. He could neither act, nor ratify an act. He was civilly dead. While we are in no danger of mistaking such curiosities of by-gone laws for actual modern law, there is a pregnant suggestion to be deduced here from the old law cited.

Certainly, in this cause before me, if the acquiescence of Mr. Van Ness is held forth by proponent as a plea in condonation of an offense or offenses established, the acquiescence alleged should be made out, not presumptively, but actually, in order to prevail under the circumstances of this particular case. The fact that he was miserably old, entirely disassociated from all business affairs, and away from close association with the only being who in the ordinary course of nature could have had for him a profound or deep-seated affection (I refer to his only daughter), is to be taken into the account, and it requires proof of a free, intelligent, and complete ratification by Mr. Van Ness. His acquiescence should be made out by proofs as clear as the noon-day, if it is to prevail in this cause. The garrulous maunderings of a senile man in the presence of any stranger that he and his wife picked up in the course of foreign travel are not sufficient. Nor should they be construed into a ratification, or treated as a declaration of consequence, unless safeguarded by other relevant facts denoting freedom from all wifely pressure and influence.

Whether, indeed, a will procured by fraud or undue influence may ever be ratified in law is a very subtle and serious question, not distinctly answered by any modern case. In modern cases such ratifications by acquiescence are treated rather as presumptions rebutting circumstantial evidence of fraud and duress. A greater and even more distinguished Doctor of the Civil Law than Swinburne, one more familiar, if possible, with the fundamental principles of civil and canon law regulating wills and the practice in the ecclesiastical courts of England, once having jurisdiction of probate law (and in probate law this law and practice is yet of some authority here, even at this late time)—I refer to Ayliffe—in his well known *Parergon Juris Canonici* was of the opinion that a defect in a will affecting testator's freedom could never be taken away by ratification or by any subsequent act in law. Ayliffe distinguished between a will defective in some act of

solemnity and one procured by fraud or fear, maintaining, in substance that the latter defect was incapable of ratification. While Redfield is evidently of the opinion of Swinburne, I find no express authority on the point. But be this as it may, and the rule need not be considered further at this time, for the surrogate can find no adequate proof of ratification or acquiescence by Mr. Van Ness sufficiently apparent in this cause to condone the established *res gestæ* about the will and codicil.

[26] When acts of undue influence are proved no doubt the declarations of testator are competent to show the effect such acts had on his mind, and even to dispel and rebut any claim of imposition. *Cudney v. Cudney*, 68 N. Y. 152; *Matter of Nelson*, 141 N. Y. 157, 36 N. E. 3; *Matter of Corcoran*, 145 App. Div. 129, 132, 129 N. Y. Supp. 165. That there is evidence of such declarations by Mr. Van Ness is apparent to me and I have given them great consideration. But what are such declarations really worth in this instance, when the testator had become so old, so confessedly incompetent to manage his own business affairs, and when the tangled web of his new marriage relations, with its intricate meshes, involved every act of his entire life? It seems to the surrogate that in this particular case they are of little force or value. Such declarations, to carry weight, should also be proved to be the free and voluntary acts of a capable man. Such declarations, to be of value to a testamentary act, must have been made under other circumstances than those shown to exist in this cause. Otherwise their weight is trifling and insufficient to overbear facts clearly established by competent proofs.

[27] Before a will is admitted to probate the surrogate must be satisfied of the genuineness of the will and the validity of its execution. Section 2622, Code of Civil Procedure. That section means satisfied in accordance with probate law. Now, the burden is on proponent, in every probate cause and in every instance, to satisfy the conscience of the court that the instruments propounded constitute the last will of a free and capable testator. *Howland v. Taylor*, 53 N. Y. 628; *In re Campbell's Will*, 136 N. Y. Supp. 1102; *In re Van den Heuvel's Will*, 136 N. Y. Supp. 1125, and cases there cited. If a single ground for suspicion exist in a probate cause, the proof must be clear in order to establish a will. *In re Van den Heuvel's Will*, and cases there cited, 136 N. Y. Supp. 1125. In many cases where wills, charged to be the product of fraud, cupidity, and undue influence, have failed of probate, it has been because the burdens resting on a proponent, to satisfy the conscience of the court that the will propounded was the will of a free and capable testator, have not been adequately discharged. *Mortimer on Probate*, p. 80. On this ground alone the surrogate may decline probate, and in probate law the ground is good and sufficient.

Other reasons than those mentioned might be deduced from the proofs in this cause, and assigned by the surrogate in support of the conclusion reached. But the foregoing will suffice. It may be added that the proponent is not much affected by this decision. The property passing under the scripts propounded, if any, is so insignificant

as to be of no consequence to proponent. If the postnuptial settlements in her favor given in evidence, stand, and even postnuptial settlements inter partes are entitled to great consideration from courts of justice, the proponent has no need of the wills in her favor, and no one else, except the guardian, seriously contends for them. While such considerations as the effect of a decision are perhaps out of place in a court of probate, it is impossible for the surrogate to ignore the state of Mr. Van Ness' estate on an issue of the kind presented in this cause. The surrogate cannot help seeing that little or nothing purports to pass under the papers propounded. This entire proceeding for probate has been a vain and empty thing. It is not what it seems, but only the prelude to a more serious struggle, with which the surrogate has no concern. The parties are here contending only for an advantage elsewhere. The decree sought by proponent is to be used as a shield in other litigations, and not according to its tenor and real purport. For this reason the surrogate feels less regret at being obliged to withhold the seal and imprimatur of this court to the wills propounded.

The proponent has in no event adequately discharged the burdens resting on her in this cause. The surrogate is not satisfied that the testamentary scripts propounded in this cause were the free, the deliberate, and the conscious acts of a capable testator, and for this reason, and this reason alone, the probate sought is refused.

Settle decree accordingly. The special guardian only will be entitled to an allowance.

(79 Misc. Rep. 77.)

In re SMITH.

(Surrogate's Court, New York County. January 2, 1913.)

1. DEPOSITIONS (§ 25*)—LETTERS ROGATORY.

Under Code Civ. Proc. § 913, permitting letters rogatory to be issued by the County Court, etc., in a proper case, upon affidavit that there is good reason to believe that the ends of justice will be better promoted thereby than by the taking of a commission, where one is claiming the larger part of a large estate as an adopted daughter under the statute of distribution, and intestate's brother disputes her right on the ground that the adoption was invalid, letters rogatory are properly issued to take testimony of the German judge who approved the adoption.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 36; Dec. Dig. § 25.*]

2. DEPOSITIONS (§ 40*)—LETTERS ROGATORY.

Letters rogatory issued to obtain evidence of a German judge need not run to the judge, but should be addressed generally to the courts and magistrates of the German Empire.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 61; Dec. Dig. § 40.*]

3. DEPOSITIONS (§ 25*)—LETTERS ROGATORY—FOREIGN JUDGE.

While a German judge to whom letters rogatory are addressed to obtain his testimony may decline to answer any interrogatories he deems improper, that fact is not ground for refusal to issue the letters.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 36; Dec. Dig. § 25.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. DEPOSITIONS (§ 25*)—LETTERS ROGATORY.

The fact that the evidence of a German judge taken pursuant to letters rogatory addressed to him may be incompetent under the *lex fori* is not ground for refusing to issue the letters.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 36; Dec. Dig. § 25.*]

Judicial settlement of the account of proceedings of Elly Smith, as administratrix of Lucius Hopkins Smith, deceased. Application for letters rogatory to take testimony of a German judge. Application granted.

Merrill & Rogers, of New York City (Payson Merrill and Alfred Holbrook, both of New York City, of counsel), for applicant.

Bernard Gordon and Rounds, Schurman & Dwight, all of New York City, and Martin J. Keogh, Jr., of New Rochelle (George W. Schurman, of New York City, of counsel), opposed.

FOWLER, S. This is an application for letters rogatory to take the testimony of the right honorable the district court judge of the Royal Court at Berlin, Prussia, who is alleged to have approved the adoption by intestate of the young German girl now known as Ruth Hopkins Smith. The brother of intestate, Sidney A. Smith, disputes the validity of the adoption, and asks for letters rogatory in aid of his contention. The application for the letters is opposed by the administratrix and by Ruth Hopkins Smith for various intricate reasons. It is apparent that Ruth Hopkins Smith is claiming in this court to be entitled as such adopted daughter, under the statute of distribution of this state as now amended, to the larger part of the funds now in the hands of the administratrix for distribution. The brother of the intestate disputes the right and claim of the adopted daughter, and the issue is now here awaiting the decision of this court. The estate is large, and the several rights of the respective contestants will depend wholly on the conclusiveness of the adoption or arrogation in question. A claim to the estate of an intestate solely by virtue of a disputed foreign act of arrogation certainly demands consideration at our hands, and any competent testimony bearing upon the validity or invalidity of such act will be of consequence. At this stage the surrogate ought not to hold that none of the evidence sought is competent. A denial of the present application would be equivalent to just that decision, whereas our decision on the competency of the testimonial evidence should await, in this matter, the return to the letters rogatory, unless the proposed evidence is clearly irrelevant or incompetent. As I do not know what the honorable judge may testify, I am not disposed to prejudicate the case.

[1] It is the constant practice of this court to issue letters rogatory to officials of the German Empire, as ordinary commissions to take depositions of witnesses in Germany are not *ex comitate* executed freely or at all in the German Empire. There seems to be no provision in Germany for such commissions. It would appear that the applicant for letters rogatory has brought himself *prima facie* within section 913, Code of Civil Procedure.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[2] The letters rogatory will not necessarily run to the honorable judge whose evidence is desired. They will be in the usual form, I take it, and addressed generally to the courts and magistrates of a friendly power.

It ought not to be held at this stage that none of the desired testimony of the honorable judge is material or competent. The question is too serious for such a disposition. It would seem to me that the adjudications cited against the application are not quite in point. The foreign judge is to be asked as to matter of fact and not as to matter of law. I cannot assume that the honorable judge of the German tribunal will suffer himself to be interrogated as to matters of law or matters irrelevant to the issue before me or incompetent under our laws of evidence. It may be as asserted that the German judge will decline to answer the written interrogations to be propounded to him by virtue of the letters rogatory.

[3] He may regard them as *extra modum*. If he so thinks, he is not obliged *ex comitate* to violate his own conception of the judicial proprieties or to compromise his judicial dignity. He will in that event, I take it, simply decline to answer the interrogatories propounded. If he shall, on the other hand, be willing or able to make answer to such interrogatories, the competency of his evidence both *modo et forma* will then have to be decided by us under the *lex fori contentionis*. On all such matters decision I think should be reserved at this stage of this cause and the cause should not be prejudicated.

[4] It may be that some of the interrogatories to be propounded to the German judge will relate to matters not evidentiary under the *lex fori*. But at this stage it does not seem to the surrogate that this is a reason for denying the application altogether, for it may be that the honorable judge of the German court will or can testify to matter competent or material under the *lex fori*.

Application for letters rogatory granted, but without prejudice to any objections to the relevancy, materiality or competency of the proposed interrogatories or the answers thereto. All such matters will be reserved.

In re RAU'S ESTATE

(Surrogate's Court, Monroe County. January 14, 1913.)

1. WILLS (§ 488*)—CONSTRUCTION—EVIDENCE TO AID.

In an action to construe a will bequeathing to testator's niece 50 shares of bank stock, or if testator disposed of them before his death, "the equivalent of said shares at their par value; and in addition thereto the sum of \$6,000," evidence as to the execution of the will and the circumstances of the estate was admissible to show whether the testator intended that his niece should receive \$6,000 in addition to the stock, in any case whether he had disposed of the stock or not; the use of the semicolon rendering the will ambiguous in this respect.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1024, 1025, 1033-1036; Dec. Dig. § 488.*]

2. WILLS (§ 487*)—ACTION TO CONSTRUE—SUFFICIENCY OF EVIDENCE.

Evidence in such case *held* to show that testator intended his niece to receive the bank stock alone in case he died possessed of same.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 1026-1032; Dec. Dig. § 487.*]

3. WILLS (§ 465*)—CONSTRUCTION—SEMICOLON.

Where, to give effect to a semicolon in a will would import an unreasonable and unnatural intention to the testator, and to treat it as a comma will import a reasonable intention consistent with the circumstances under which the will was executed and the condition of the estate, and leave the meaning clear, the latter construction will be adopted.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 984; Dec. Dig. § 465.*]

Action to construe the will of Charles Rau, deceased. Frieda Rau Cormier found entitled under the will to bank stock only.

Charles M. Williams, of Rochester, for legatee Frieda Rau Cormier.

James M. E. O'Grady, of Rochester (John Desmond, of Rochester, of counsel), for executor and residuary legatee.

BROWN, S. The question to be determined upon this proceeding is as to the construction of the sixth clause of the will of the deceased, in order that the executor may be directed as to what is bequeathed to Frieda Rau Cormier under such clause.

[1] The said clause reads as follows:

"Sixth. I give and bequeath to my niece Frieda Rau Cormier of Rochester, N. Y. Fifty (50) shares of the Capital Stock of the National Bank of Rochester; and in the event of my disposing of said shares before my death, I give and bequeath to her the equivalent of said shares at their par value; and in addition thereto the sum of six thousand dollars (\$6,000)."

Two contentions have been raised. The legatee claims that she is entitled to the 50 shares of stock and the sum of \$6,000. The executor and the residuary legatee claim that she is only entitled to the 50 shares of stock; that the \$6,000 was to be given to her in case the testator disposed of said 50 shares of stock prior to his death; that the \$6,000 was simply given in case of such sale; but that, if

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the 50 shares were on hand at the time of his death, that alone passes to the legatee.

Reading the words of that clause without taking into consideration what results therefrom, or the facts connected with the making of the will and the condition of the estate of the deceased, and simply observing the technical punctuation, it would appear that the claim of the legatee was well founded, but it all depends upon whether or not the semicolon after the word "value" stands, and is to be regarded as decisive. Now, the courts have held that the natural sense in which words are used, as it appears from judicial inspection, always prevails over both punctuation and capitals, which are regarded as such uncertain aids in the interpretation of written instruments as to be resorted to only when all other means fail. *Kinkele v. Wilson*, 151 N. Y. 269, 276, 277, 45 N. E. 869.

In *Arcularius v. Sweet*, 25 Barb. 403, the court says regarding a semicolon giving a particular meaning and distinction to the will:

"A single dot over a comma, so easily inserted by mistake or design, and so different, if not impossible, in most instances, of proof or disproof, can never be allowed to overthrow the natural meaning of the written words, whether taken by themselves or in connection with the whole instrument. * * * Punctuation may perhaps be resorted to when no other means can be found of solving an ambiguity, but not in a case where no real ambiguity exists except what punctuation itself creates."

As the disagreement between the respective parties here rests upon whether or not the semicolon should stand and the construction be made technically under the rules of grammatical punctuation, I am of the opinion that this is a case of ambiguity which is caused by punctuation, and therefore the court has full power and authority to consider the evidence offered relative to the execution of the will and the circumstances of the estate, to arrive at the intent of the testator.

[2, 3] It appears from the evidence that the testator came to the office of his attorney and requested him to make his will; that from that conversation the attorney dictated the will to his stenographer, who prepared the same on the typewriter, brought it back to the attorney, and he then read the same to Mr. Rau, the testator; that at the time of the execution of the will Mr. Rau did not read the same personally, and immediately after hearing it read he executed the will in question, which has been heretofore admitted to probate. There is no evidence to show that Mr. Rau ever read the will personally. The reading aloud of the will to the testator by his attorney would not necessarily disclose the punctuation, and accordingly, nothing appearing to the contrary, it is to be presumed that Mr. Rau did not know the punctuation.

Now, if the semicolon after the word "value" was omitted and either a comma stood there, or no punctuation, an entirely different construction would be placed upon the language. In that case it would appear that the stock was given to the legatee; then, in case of the sale of the stock, the legatee would receive \$5,000, and, in addition thereto, \$6,000, making \$11,000. It appears from the evidence that at the

time of the making of the will the stock in question was worth about \$220 per share market value, and the stock quotation of said shares was about the same. The book value of said shares was \$228.81 per share. At the time of the death of the testator the value of the stock was substantially the same as at the time of the making of the will. The par value of the shares was \$100 per share. Now, if we make a computation as to the value of this gift in the two contingencies and under the different claims, it appears as follows: Under the claim of the legatee, Mrs. Cormier, if the testator died owning the stock, she would receive the 50 shares of stock, worth \$220 per share, amounting to \$11,000, and the sum of \$6,000, making her legacy in such case worth \$17,000. On the other hand, if the testator had disposed of said stock in his lifetime, she would receive the par value of said 50 shares, to wit, \$5,000, and said sum of \$6,000, making her legacy in that case worth \$11,000. In other words, there would be a difference in the value of her legacy of \$6,000, depending upon the contingency whether or not the testator sold said stock in his lifetime.

The contention of the executor and residuary legatee is that, in case the testator died owning the stock, the value of the legacy to Mrs. Cormier would be the value of 50 shares at \$220 a share, to wit, \$11,000. In case he had died having sold the stock, she would be entitled to the par value of 50 shares at \$100 a share, equalling \$5,000, plus the \$6,000, making \$11,000, which makes the legacy practically of the same value, whichever contingency existed at the time of his death, the ownership or the nonownership of the stock.

Now, with the semicolon after the word "value" eliminated and left as a comma, or no punctuation mark, it would be perfectly clear that the testator intended to give the legatee the 50 shares of stock only provided he possessed them at the time of his death, and, in case he did not possess them, then the sum of \$5,000, and, in addition thereto, the sum of \$6,000. Leaving the semicolon there after the word "value," the \$6,000 would be a separate gift in addition to either the stock or the \$5,000, according to the contingency. But this construction is neither a reasonable nor natural construction to give to this language as the true intent and purpose of the testator. It is not reasonable to suppose that the testator intended to make a difference of \$6,000 in the value of the legacy that he was giving to Mrs. Cormier. He was attempting to give an alternative legacy in case he did not own the stock. He died owning the stock, and it is not reasonable to suppose that he intended to give her \$6,000 on top of the stock, when that \$6,000 added to the par value of the stock, taken together, make an alternative legacy of equal value substantially to the legacy of the stock alone. The construction sought for by the legatee would give this semicolon a force and effect unknown to the rules of construction established by the common law. In such a case it should not be allowed to confuse a construction otherwise clear.

The testator had no children. His wife had died prior to his demise. He had no lineal descendants. The legatee was a niece. Nothing in the surrounding circumstances of the execution of the will, or

of the condition of the affairs of the testator, nor of the will itself, show any grounds for assuming or believing that the testator had in mind the making of such difference in the value of the alternative legacies, but, on the other hand, it appears to the court that the alternative legacy was intended to make good to the legatee the value of the stock in case the stock was sold, and, in case the stock was not sold, the alternative legacy had no force and effect, but that all that the legatee was entitled to under said sixth clause in that case would be the stock.

I find as conclusions of law that the legatee is entitled to the stock in question, in full of her claim under said legacy, except that the dividends on the stock from the time of testator's death (said stock being a specific legacy) should also be allowed the legatee, if it has not already been paid to her.

Let findings be prepared in accordance with the terms of this decision and decree entered thereupon in the decree of judicial settlement, upon five days' notice or voluntary appearance of counsel in court, without costs to either party as against the other.

(79 Misc. Rep. 120.)

ROCKWELL v. UTZ.

(Supreme Court, Trial Term, Westchester County. January 27, 1913.)

1. DEEDS (§ 145*)—CONDITIONS OR COVENANTS—CONSTRUCTION.

Conditions are not favored by the courts because they tend to destroy estates, and, where it is doubtful whether a clause is a condition or a covenant, it will be construed to be a covenant, leaving the grantor to his action for damages for its breach.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 471; Dec. Dig. § 145.*]

2. DEEDS (§ 145*)—CONDITIONS—COVENANT—DISTINGUISHED FROM CONDITION.

Premises were conveyed to the grantee, after payment of their full value, by a deed containing the clause, "provided, always, and this indenture is made upon condition," that the grantee within two years from its delivery build upon each lot a dwelling house to cost not less than \$5,000. Defendant built such a dwelling house upon one of the lots within the two years, and did not commence to build a house upon the other until after the grantor's action was brought. *Held*, that the clause was not a condition, but a covenant.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 471; Dec. Dig. § 145.*]

3. COVENANTS (§ 124*)—ACTION FOR BREACH—DAMAGES.

Where property does not revert to the grantor for breach of a clause providing for the building of a house thereon, the measure of damages for the grantee's breach of covenant to build a sidewalk is the difference between the value of the grantor's remaining land with the sidewalk and its value without such sidewalk.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 225-230, 255, 256, 259; Dec. Dig. § 124.*]

4. COVENANTS (§ 124*)—BREACH—NOMINAL DAMAGES.

In an action for a grantee's breach of a covenant to build a sidewalk fronting the lots, where the grantor offers no proof of damage, the court may only assume that he has suffered nominal damages.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 225-230, 255, 256, 259; Dec. Dig. § 124.*]

Action by Harriet R. Rockwell against Amalie Utz. Stipulation by the parties that the court should direct a judgment reserving its decision. Verdict directed in favor of defendant upon plaintiff's action for ejectment and in favor of the plaintiff for six cents upon plaintiff's action for breach of covenant.

Clark & Close, of White Plains, for plaintiff.

Frank M. Tichenor, of New York City, for defendant.

TOMPKINS, J. For many years the plaintiff has been the owner of a large tract of land situated at Bronxville, N. Y., a portion of which the plaintiff has laid out into lots and offered for sale for residential purposes. On July 21, 1904, the plaintiff sold two of those lots to the defendant. The deed contained the following clause:

"Provided always, and this indenture is made upon condition, that the said party of the second part, her heirs or assigns, shall within two years from the delivery of this deed, build upon each plot of the said premises, a dwelling house which shall cost not less than five thousand (\$5,000) dollars."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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The defendant built such a dwelling house upon one of the lots during the time limited, but did not commence to build a dwelling house upon the other until after this action was commenced. The first cause of action set forth in the complaint is for the ejectment of the defendant from the last mentioned lot. Both causes of action turn upon the question whether the above-quoted clause is a condition or a covenant.

[1] Conditions are not favored by the courts because they tend to destroy estates, and, if it is doubtful whether a clause is a condition or a covenant, it will be construed to be a covenant, so as to avoid forfeiture, and the grantor will be left to an action for damages for its breach, even though the clause may be designated as a condition by the instrument in which it is contained. *Post v. Weil*, 115 N. Y. 361, 22 N. E. 145, 5 L. R. A. 422, 12 Am. St. Rep. 809; *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. 655; *Zweig v. Sweedler*, 140 App. Div. 319, 125 N. Y. Supp. 171; *Union Stockyards Co. v. Nashville Packing Co.*, 140 Fed. 701, 72 C. C. A. 195.

[2] In *Avery v. N. Y. C. & H. R. R. Co.*, 106 N. Y. at page 154, 12 N. E. at page 624, the court says:

"The fact that the deed uses the language upon condition when referring to the conveyance by the grantors is not conclusive that the intention was to create an estate strictly upon condition. The question is always what was the intention of the parties, and, while such intention is to be gathered from the language used, yet its construction may frequently be aided by reference to all the circumstances surrounding the parties at the time of the execution of the deeds, because the court is thus enabled to be placed exactly in their situation, and to view the case in the light of such surroundings."

From all the circumstances surrounding the execution of the deed here in question, it must be held that the above-quoted clause is not a condition, but a covenant by the grantor to build upon each plot within two years a dwelling house to cost not less than \$5,000. Same cases, and *Hawley v. Kafitz*, 148 Cal. 393, 83 Pac. 248, 3 L. R. A. (N. S.) 741, 113 Am. St. Rep. 282; *Stone v. Houghton*, 139 Mass. 175, 31 N. E. 719; *Cassidy v. Mason*, 171 Mass. 507, 50 N. E. 1027. The premises in question were conveyed to the defendant after payment of their full value by a deed that does not contain a provision for re-entry by the plaintiff, and this case must be distinguished from those in which land was conveyed upon nominal consideration or to public service, religious or social bodies for public or quasi public purposes.

[3] The second cause of action is for breach of the covenant to build a sidewalk 500 feet in length along part of the street frontage of the plot mentioned in the first cause of action. The plaintiff claims that she is entitled to the reasonable cost of the construction of such a sidewalk. If the property reverted to her for breach of the clause providing for the erection of the house, this would have been the proper measure of damages. As the plot does not revert to her, the proper measure of damages is the difference between the value of the plaintiff's remaining land with the sidewalk in question laid in front of the plot in question and the value of the plaintiff's remaining land without such sidewalk laid. *Brooklyn Hills Improvement Co. v. N. Y. & Rockaway Beach R. R. Co.*, 80 App. Div. 508, 81 N. Y. Supp. 187.

[4] As there has been offered no proof of such damage, the court may only assume that the plaintiff has suffered nominal damages.

Under the stipulation, the court will direct a verdict in favor of the defendant upon the first cause of action and a verdict in favor of the plaintiff for six cents upon the second cause of action.

TRADESMAN'S NAT. BANK OF CONSHOHOCKEN v. BOLDT et al.

(Supreme Court, Appellate Division, Fourth Department. January 8, 1913.)

1. MECHANICS' LIENS (§ 115*)—PAYMENT TO CONTRACTOR—RIGHTS OF SUBCONTRACTORS.

A husband made a contract for the construction of a building on his wife's land. A subcontractor who did part of the work filed and served a notice of lien after the time for filing liens had expired. Thereafter the husband paid the amount still due to the principal contractor, and took a bond of indemnity against the subcontractor's claim. *Held*, that a personal judgment in favor of the subcontractor could not be rendered against the husband, he not having contracted with the subcontractor, nor become liable because of the ineffective notice of lien, nor because of the indemnity bond taken for his own protection.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 150-159; Dec. Dig. § 115.*]

2. INTEREST (§ 19*)—UNLIQUIDATED DEMANDS.

In an action on an unliquidated demand, interest was properly denied.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 35-40; Dec. Dig. § 19.*]

3. APPEAL AND ERROR (§ 1177*)—DISPOSITION—GRANTING NEW TRIAL.

In a subcontractor's action to foreclose a mechanic's lien, upon reversal of a personal judgment against the owner, where facts may be shown upon another trial making him personally liable, a new trial will be granted, instead of dismissing the complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4620; Dec. Dig. § 1177.*]

4. MECHANICS' LIENS (§ 271*)—PERSONAL JUDGMENT—COMPLAINT.

A subcontractor suing to foreclose a mechanic's lien should, if he wishes to hold the owner personally liable, allege the facts showing such liability, and demand a personal judgment.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 494-513; Dec. Dig. § 271.*]

Appeal from Judgment on Report of Referee.

Action by the Tradesman's National Bank of Conshohocken against George C. Boldt, Sr., the J. Franklin Whitman Company, and others. From a judgment against the defendants named, and dismissing the complaint as to the other defendants, plaintiff and the defendant Boldt bring cross-appeals. Affirmed in part, and reversed in part.

Argued before McLENNAN, P. J., and KRUSE, ROBSON, and FOOTE, JJ.

J. H. O'Brien, of Watertown, for plaintiff.

Joseph Atwell, of Watertown, for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

KRUSE, J. The action is in form for the foreclosure of a mechanic's lien. The defendant George C. Boldt, Sr., contracted with the defendant J. Franklin Whitman Company for the construction by that company of a building to be located upon his wife's lands, known as Heart Island, situate in the St. Lawrence river in this state. The plaintiff's assignor was a subcontractor under the J. Franklin Whitman Company for a part of the work. After the work had been commenced, Mrs. Boldt, the owner of the lands, died intestate, leaving her husband and two children. The subcontractor did not complete the work called for by its contract by September 17, 1903, as the contract required, but the referee found that the provision as to time of completion was waived. However, the work still being incomplete on December 9, 1903, the J. Franklin Whitman Company directed the plaintiff's assignor to quit work, which it did on or before December 11, 1903. The notice of lien was filed the 14th day of March, 1904, and also served on the defendant George C. Boldt, Sr., on or about March 11, 1904, by letter, as the referee finds. At the time of the filing and serving of the notice of lien, there was owing by the defendant George C. Boldt, Sr., to the J. Franklin Whitman Company a sum in excess of \$3,000, which was subsequently paid over to the Whitman Company by Boldt, Sr., upon his receiving a bond of indemnity against the claim of the plaintiff's assignor. The referee held that the notice of lien was not timely filed or served, but directed a personal judgment upon the claim of the subcontractor, which had been assigned to the plaintiff, not only against the contractor, the defendant the J. Franklin Whitman Company, but also against George C. Boldt, Sr., and dismissed the complaint without costs as against the defendants George C. Boldt, Jr., and Clover Boldt, the children of Mrs. Boldt, who had died, as above stated.

[1] I am unable to see upon what principle George C. Boldt, Sr., is liable to the plaintiff upon the contract made by J. S. Moser & Co., its assignor, with the J. Franklin Whitman Company. Boldt, Sr., was not a party to that contract. His contract was with the J. Franklin Whitman Company. It was the latter whom he promised to pay for doing the work upon the building. J. S. Moser & Co. were subcontractors under the J. Franklin Whitman Company. It is true that the subcontractor undertook to intercept what was due from Boldt, Sr., to the J. Franklin Whitman Company by filing notice of lien, but the notice was not filed or served within the time limited by the statute, and the referee has decided that they have no lien. While Boldt, Sr., took back a bond of indemnity when he paid over to the contractor, to whom he was liable, that, I think, does not make him liable to the subcontractor. He had a right to do that, and it was very proper that he should do so, because it had not been established that the lien filed was not effective.

The claim for extra work done by the plaintiff's assignor seems to stand upon the same footing as the rest. The referee finds that such extras were furnished at the request of J. Franklin Whitman Company. There is no finding that there was any new contract made between Boldt, Sr., and the subcontractor. Even if the notice of lien

had been effective, the lien would have been against the property, not against Boldt, Sr. He was not even the owner of the land. The property belonged to Mrs. Boldt, and apparently the title is now in her children, subject to the life estate of Boldt, Sr., as tenant by the curtesy. Of course, if the lien had been effective and Boldt, Sr., had then paid to the J. Franklin Whitman Company, he would not be permitted to urge that payment against the subcontractor. But that is not this case.

The case of *Terwilliger v. Wheeler*, 81 App. Div. 460, 81 N. Y. Supp. 173, and similar cases cited by plaintiff's counsel, do not, I think, sustain his contention that a personal judgment may be awarded against Boldt, Sr. That case holds that a personal judgment may be awarded in favor of a plaintiff against such defendants as are indebted to him. But, as has been seen, there is no finding in this case that Boldt, Sr., is indebted to the plaintiff or any facts from which such an inference may be found.

I think the judgment in favor of the plaintiff against the contractor, J. Franklin Whitman Company, was proper, but not against George C. Boldt, Sr. As to him, the judgment should be reversed.

[2] The plaintiff by its appeal challenges the amount of the judgment, contending that interest should have been allowed. I think the referee correctly decided that the claim was unliquidated, and that the plaintiff was not entitled to the interest.

[3, 4] Personally I am of the opinion that no new trial should be awarded, but that the judgment as against George C. Boldt, Sr., should be reversed and the complaint as to him dismissed, especially in view of the amendment of 1912 (Laws 1912, c. 380) to section 1317 of the Code of Civil Procedure. The plaintiff seems to rely entirely upon the findings made by the referee, to which its exceptions contained in the record are directed. No case was made, and the evidence is not before us. But a majority of the court seem to be of the opinion that facts may be shown upon another trial which will make the defendant George C. Boldt, Sr., personally liable. Possibly that may be so, at least for extra work (*Mitchell v. Dunmore Realty Co.*, 135 App. Div. 583, 120 N. Y. Supp. 771), and I am willing to yield to that suggestion. In that view, however, it may be well for the plaintiff to amend its complaint by alleging appropriate allegation showing how the defendant Boldt, Sr., is liable and demanding a personal judgment.

The judgment should therefore be reversed as to George C. Boldt, Sr., and a new trial ordered as to him, with costs to the appellant George C. Boldt, Sr., to abide the event; and, as to the other defendants, the judgment should be affirmed, without costs. All concur, McLENNAN, P. J., in result only; LAMBERT, J., not sitting.

SAITCH v. KELLEY.

(Supreme Court, Appellate Division, Fourth Department. January 8, 1913.)

1. SALES (§ 467*)—CONDITIONAL SALES—CONSTRUCTION—QUESTIONS FOR COURT.

Where there is no evidence of intent nor any disputed facts, the construction of the waiver in a contract, providing that a purchaser waived all the benefits of the provisions of the Lien Law (Consol. Laws 1909, c. 33), the printed blank on which the contract was drawn having been printed when such provisions were contained in the Lien Law, but which provisions when the contract was drawn had been repealed and re-enacted in the Personal Property Law (Consol. Laws 1909, c. 41), was solely for the court.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1354, 1358-1364; Dec. Dig. § 467.*]

2. SALES (§ 467*)—CONDITIONAL SALES—FORFEITURES—CONSTRUCTION.

A contract drawn by a vendor which is designed to work a forfeiture of goods sold and money paid thereon on certain conditions is to be strictly construed against the vendor.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1354, 1358-1364; Dec. Dig. § 467.*]

Appeal from Trial Term, Monroe County.

Action by Joseph Saitch against Elmer W. Kelley. Judgment for defendant, and plaintiff appeals. Reversed.

The action was commenced on the 24th day of February, 1912, to recover the sum of \$415 which had been paid to the defendant by the plaintiff's predecessors in interest under a contract of conditional sale of an automatic player piano.

Argued before McLENNAN, P. J., and KRUSE, ROBSON, FOOTE, and LAMBERT, JJ.

Merle L. Sheffer, of Rochester, for appellant.

Charles B. Bechtold, of Rochester, for respondent.

McLENNAN, P. J. There is practically no dispute in the evidence. On July 28, 1910, the defendant sold to one Charles Fine the piano in question under a contract of conditional sale, which, among other things, provided that the purchase price of \$983 should be paid in monthly installments, and that the title to the piano should remain in the defendant until the purchase price had been paid in full. After Fine had paid \$115 on the contract, he assigned his interest therein for a valuable consideration to one Frank Mildahn. The defendant thereupon procured from Mildahn a new contract, reciting the previous payment of \$115 by Fine. Thereafter Mildahn assigned his interest therein to one Samuel Finkelstein. Prior to the assignment Mildahn had paid defendant \$270 on account of the contract, making a total of \$385 at that time which had been paid to defendant. The defendant procured from Finkelstein a new contract, bearing date August 1, 1911, reciting previous payments of \$385, and taking from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Finkelstein notes payable monthly for the balance of \$598. This contract contained the following provisions, among others not material here:

"This contract cancels and takes the place of contract dated Dec. 5, 1911, signed by Frank Mildahn, who assigns all his right and equity in said instrument to undersigned Samuel Finkelstein, whose residence address is 114 Reynolds St., City of Rochester, N. Y."

"Should there be any failure to pay drafts or other demand of cash payment, and to execute such notes for deferred payments when presented, it is agreed that the full amount of the purchase price shall at once become due and payable.

"Should there be any default in the payment of any notes, it is agreed that all the remaining shall at once become due and payable, anything in the notes to the contrary notwithstanding. In the default of any notes you or your agents may take possession of, and remove said Inst. without legal process, and in such a case all payments heretofore made by the undersigned under this order, shall be deemed and considered as having been made for the use of said instrument, during the time said instrument remains in the possession of the undersigned and shall be retained and kept by E. W. Kelley as such payments, and for myself and successors in interest, I waive the benefit of all provisions of the Lien Law, and any cause of action thereby given."

Finkelstein paid one note of \$30, and then sold his interest in the piano to the plaintiff, together with all stock of wines, whiskies, cigars, etc., by bill of sale dated September 29, 1911. Default occurred in the payment of the notes due on October 1, November 1, and December 1, 1911, and thereafter defendant took possession of the instrument, and removed it to his place of business, where it remained at the time of the trial; no further proceedings as to the sale of the instrument having been taken by defendant. It appears that the defendant recovered judgment against Finkelstein at some time prior to the trial for the balance of the purchase price. Plaintiff's attorney testified that in about the first week of October, 1911, he told defendant's office manager the interest that his client had in the piano in question, but the nature or character of such interest as claimed in such conversation is not disclosed.

Plaintiff alleged in his complaint that more than 60 days had elapsed since defendant had taken possession of the piano, and that the defendant had not sold the piano at public auction as provided by section 65 of the Personal Property Law, nor served any notice of such sale as provided by section 66 of that law.

Defendant by his answer admitted that he did not sell the piano or give any notice of any kind to the plaintiff, but alleged that in waiving the benefit of all provisions of the Lien Law the plaintiff's assignor intended to and did waive all the benefits of the provisions of the Personal Property Law. Defendant further alleged that plaintiff abandoned the piano and that for that reason defendant had taken possession of it, and further set up a counterclaim for the use of the piano by plaintiff and his predecessors in the sum of \$415. It is stated in defendant's brief that the contract between defendant and Finkelstein was made on one of the old printed forms used by the defendant at the time when the provisions relating to conditional sales were a part of the Lien Law, and such statement is not controverted

by plaintiff's attorney. When the Consolidated Laws were enacted in 1909, the several sections of the former Lien Law relating to contracts of conditional sale were repealed, and the same sections were then enacted as a part of the Personal Property Law, where they have since remained. So that the waiving of the provisions of the Lien Law by the plaintiff's assignor is claimed by defendant to be practically meaningless, unless it be held that the Personal Property Law was thereby intended to be referred to.

The court charged the jury as follows:

"They are supposed, when they made that contract, when they signed that paper, to know that the provision which was formerly in the Lien Law was in the Personal Property Law at present, and the question is, Did they understand they were to waive that provision which had existed in the Lien Law and which is in the Personal Property Law now? If so, they did waive it, and, if Finkelstein waived it, he did not confer any further right on Saltch than he had, and, if he had no right to enforce it, Saltch had none, because he holds under Finkelstein. * * * If there was a waiver, then defendant is entitled to a verdict. * * * Unless there is a waiver, the plaintiff is entitled, under the statute, for the money paid in on the purchase price. I leave it for you to say."

To this charge plaintiff excepted, and such exception presents the only important question to be considered upon this appeal.

[1] We think the court erred in leaving the interpretation of the contract to the jury. There was no evidence of intent before the court, except as is to be gathered from the contract itself. There were no disputed facts upon this question, and it was therefore a question of law for the determination of the court. The language employed was plain and unambiguous, and, if by waiving the provisions of the Lien Law the plaintiff's assignor really waived no rights, the defendant cannot complain.

[2] He is seeking to have enforced a contract which, as he alleges, contains provisions designed to work a forfeiture of the rights of the plaintiff, and the defendant should in such case be the one to suffer if the contract prepared by himself does not accomplish that result. The court should not, nor should the jury be permitted to, infer any provisions in defendant's favor not found in the contract itself, to uphold a waiver of the provisions of the statute. Contracts of this sort containing waivers of the purchaser's rights have been considered by the courts in several cases, but have always been strictly construed against the vendor.

It follows that the judgment and order appealed from should be reversed, and a new trial granted, with costs to the appellant to abide the event.

Judgment and order reversed and new trial granted with costs to appellant to abide event. All concur.

HUSCHER v. NEW YORK & QUEENS ELECTRIC LIGHT & POWER CO.

(Supreme Court, Trial Term, Queens County. January 21, 1913.)

1. ELECTRICITY (§ 19*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Where a street lamp, from contact with which plaintiff's intestate received an electric shock causing his death, was suspended in the usual and ordinary way, so that it could be lowered for the purpose of trimming, and was intended to be and at frequent intervals was so lowered, and the evidence showed that there was no defect in the light or apparatus by which it was raised or lowered, in so far as the raising or lowering, or security of it when raised, were in question, the mere fact that the lamp in some way had been lowered from its normal position until it hung about four feet above the street was not evidence of negligence, or that the lamp fell by reason of some defect in the apparatus which held it in place.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

2. ELECTRICITY (§ 16*)—DEFECTS—CONSTRUCTIVE NOTICE.

Where a street lamp had been lowered from its normal position only about an hour and a half, and the fact was in no way indicated at the power house, the finding that the electric light company had constructive notice was contrary to the evidence.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 9; Dec. Dig. § 16.*]

3. ELECTRICITY (§ 19*)—FINDINGS—INCONSISTENT FINDINGS.

In an action for death from an electric shock, caused by contact with a street lamp which had in some way become lowered from its normal position, the jury's answer to special interrogatories that they did not know whether the electric light company exercised reasonable care in erecting its lamps, poles, and apparatus thereon, or in maintaining them, was inconsistent with a special finding that the lamp fell because of a defect in the apparatus holding it in place, and with a general verdict for plaintiff.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

4. TRIAL (§ 352*)—SPECIAL INTERROGATORIES—FORM.

While special interrogatories as to whether an electric light company exercised reasonable care in the erection of its lamps, poles, and apparatus, and in maintaining them, were objectionable because plural in their character, their submission did not prejudice plaintiff, since, if there was negligence in the maintenance of any lamp or pole, the jury should have so answered the questions.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 840–842, 844, 845; Dec. Dig. § 352.*]

Action by Florence Huscher, as administratrix, against the New York & Queens Electric Light & Power Company. On motion to set aside a verdict for plaintiff. Motion granted.

Frank F. Davis, of New York City, for plaintiff.

Rasquin & Rasquin, of New York City, for defendant.

JAYCOX, J. The plaintiff's intestate came to his death by reason of an electric shock received while crossing a street in Jamaica, Queens county, N. Y. He was walking with an umbrella over his head, and the point of this umbrella came in contact with a lamp of the defend-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ant, which by some means had been lowered from its normal position some 10 or 12 feet above the street, until it hung at a point above the street where such lamps are "trimmed" or the carbon points renewed; it being then about 4 feet above the street. These are the facts as claimed by the plaintiff.

The defendant disputed to some extent the cause of decedent's death, but the evidence was sufficient to warrant the finding made by the jury.

In addition to taking the general verdict, the court submitted to the jury certain specific questions to be answered by it, and which were answered, as hereinafter stated. The general verdict was in favor of the plaintiff. The questions and the answers are as follows:

"First Question: Was the falling of the lamp of itself evidence of negligence? Answer: Yes.

"Second Question: Was there a sufficient lapse of time the evidence shows the lamp was down to the time the accident happened to indicate that the defendant had notice of the lamp being down, or with reasonable diligence could have obtained knowledge of that fact? Answer: Yes.

"Third Question: Did the lamp fall by reason of any defect in the apparatus which held it in place? Answer: Yes.

"Fourth Question: Did the defendant exercise reasonable care in the erection of its lamps and poles and the apparatus thereon? Answer: We do not know.

"Fifth Question: Did the defendant exercise reasonable care in maintaining said lamps, poles, and other apparatus thereon? Answer: We do not know."

The first question was submitted because the court was in grave doubt as to whether the happening of this particular accident was evidence of negligence or not.

[1] No case of exactly similar nature has been called to the court's attention, and some considerable examination by the court has failed to discover one. All of the cases to which attention has been called are cases where a wire or some appliance intended to be stationary has fallen to the street; but no case has been cited where the appliance which caused the injury was movable, and in the course of the regular and ordinary operation of it was raised and lowered as this arc lamp concededly was.

The evidence showed that the lamp was suspended in the usual and ordinary way from an arm projecting into the street; that it was raised to its normal position by means of a rope running through a pulley; that when it was drawn up to its normal position a ring or other projection upon this rope slipped into a slot and held the lamp thus suspended. The other end of the rope was then attached to a ring in the pole, but the weight of the lamp was not carried upon this rope; it was entirely suspended by means of the ring or projection in the slot, as above mentioned. It could only be lowered, as it was lowered for the purpose of trimming, by pulling upon the end of the rope fastened to the pole until the lamp was raised some six or eight inches above the slot, when the rope and ring slipped into another groove of larger dimensions, which permitted it to be lowered to the street. To do this a rope was attached to the end of the rope fastened to the pole, and that end allowed to go up until it came in contact with the pulley.

These lamps were thus raised and lowered every time they were trimmed, and every time they needed attention for any other reason.

There is still serious doubt in my mind, in spite of the finding of the jury, as to whether or not this constituted sufficient proof of negligence merely to show that this lamp was down in the position above described. If it had been some stationary part of the defendant's apparatus, which could only be lowered by reason of some defect or break in it, I think an entirely different situation would be presented. But this could be lowered by any person endeavoring to do so, without there being any defect whatever in the apparatus which raised and lowered it and held it in position. The case which, to my mind, comes most nearly to being analogous to this is the case of *Jones v. Union Railway Co.*, 50 Misc. Rep. 651, 98 N. Y. Supp. 757. There a piece of wire was found dangling from the feed wire of the defendant company; but the wire was a different kind of wire from that used by the defendant company. There was no evidence as to how long it had been in that position, and the court held that there was, under these circumstances, no evidence of negligence to submit to the jury; that the circumstances pointed irresistibly to the conclusion that some mischievous person had thrown the loose piece of wire over defendant's wire.

The evidence in the present case showed beyond question that there was no defect in the lamp or apparatus by which it was raised or lowered, in so far as the raising or lowering, or security of it when raised, were in question. The very lamp itself was brought into court and exhibited to the jury, and, so far as I was able to understand, no claim was made that it was in any way defective. This, I think, clearly indicates that the answer to the third question was contrary to the weight of evidence. I am unable to discover in the evidence any proof upon which such a finding could be based, unless it is based upon the contention that the method in vogue by which these lamps were raised and lowered and held in position is, in and of itself, defective and dangerous. Unless the court is prepared to hold that this method of suspending lamps is a dangerous and improper one, I can see no basis either for the jury's finding that the happening of the accident itself was evidence of negligence, or that the lamp fell by reason of some defect in the apparatus which held it in place.

And there is not any conclusion of the court that the manner of suspending these lamps was dangerous and improper negatived by the jury's answer to the fourth question, in effect, that it was unable to find any negligence in the erection of the lamps and poles.

[2] As to the second question, I think the finding of the jury is clearly erroneous. The most liberal view of the evidence would only show that the lamp was down from an hour to an hour and a half. I do not think that reasonable care required an inspection so frequent as to discover a defect existing only that length of time. If the lamp had been in contact with the ground, or the accident had been of such a character as to cause any disturbance at the power house, a different situation would be presented, and a different rule would necessarily be applicable; but the accident here described was in no way indicated at the power house.

[3, 4] The answers to the fourth and fifth questions submitted are inconsistent with the answer to the third question, and inconsistent with the general verdict. If the jury was unable to find that negligence existed either in the erection, care, and maintenance of the lamps and poles of the defendant, its verdict should have been in favor of the defendant. Without finding the defendant guilty of any negligence, the jury has found a verdict against it. This verdict, I think, should not be permitted to stand. The plaintiff's attorney urges that the fourth and fifth questions, by relating to lamps and poles, instead of the lamp and pole in question, are ineffectual to have any bearing upon the general verdict. I do not agree with this contention. The defendant might well have objected to the questions being plural in their character, but certainly the plaintiff did not suffer thereby. If there was negligence in the maintenance of any lamp and pole, then the answer would be in the affirmative. As the jury was unable to determine whether any negligence existed or not, the verdict ought to have been in favor of the defendant.

Motion to set aside verdict granted.

(78 Misc. Rep. 422.)

BLASS v. LINSLEY.

(Supreme Court, Trial Term, Cayuga County. December, 1912.)

1. NEW TRIAL (§ 74*)—GROUNDS—RECOVERY OF NOMINAL DAMAGES.

In an action for assault willfully provoked by plaintiff, where the costs of the action are substantial, though plaintiff is entitled only to nominal damages, a verdict for defendant will be set aside and a new trial granted, unless the defendant enters into a written stipulation waiving costs and disbursements.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 150; Dec. Dig. § 74.*]

2. WITNESSES (§ 140*)—COMPETENCY—TESTIMONY AS TO TRANSACTIONS WITH PERSONS SINCE DECEASED.

Where the question of a right of way over land was involved in an action for assault, but the determination of the jury reached no further than the action, a witness, other than either of the parties, was not incompetent under Code Civ. Proc. § 829, providing that a party or person interested in the event shall not be examined as a witness in his own behalf against the representative of a decedent as to a transaction or communication with the decedent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 598-618; Dec. Dig. § 140.*]

3. NEW TRIAL (§ 35*)—GROUNDS—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

The exclusion of testimony of a competent witness does not require the setting aside of the verdict, where his testimony would have been purely cumulative.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 51-55; Dec. Dig. § 35.*]

Action by Floyd Blass against Evelyn M. Linsley. Motion to set aside a verdict for plaintiff, and for a new trial. Granted on condition.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Oscar Tryon, of Auburn, for plaintiff.
E. H. Kellogg, of Wolcott, for defendant.

SAWYER, J. This was an action for assault. The jury rendered a verdict of no cause of action, and plaintiff now moves to set that verdict aside and for a new trial upon various grounds.

[1] That the defendant unjustifiably assaulted plaintiff is established by his own testimony, as well as by other evidence; but that such assault was willfully provoked is, likewise, very clearly shown. The determination of the jury that no real damage was suffered by plaintiff, and that, under the circumstances, punitive damages should not be awarded, was, in my opinion, a just and correct disposition of the matter. The plaintiff was unquestionably, however, entitled to a verdict for nominal damages. Defendant opposes this motion on the strength of the well-understood rule that a new trial will not be granted to enable a plaintiff to recover nominal damages only. *McConihe v. New York & Erie Railroad Co.*, 20 N. Y. 495, 75 Am. Dec. 420; *Nolan v. Harris*, 52 How. Prac. 409; *Hopkins v. Grinnell*, 28 Barb. 533; *Chase v. Bassett*, 15 Abb. Prac. (N. S.) 293.

The difficulty in the application of that rule here seems to be that the plaintiff has not only been deprived of his right to a verdict for nominal damages, but has become, as a direct consequence of this verdict, subjected to the payment of the very substantial costs of the action. He is, therefore, entitled, as a matter of right, to have the case so disposed of as to relieve him from this unjust situation.

Mr. Justice Balcom in *Chase v. Bassett*, *supra*, seems to have overlooked the fact that a verdict for defendant carries full costs, but in all others involving this question which have come under my observation the distinction is clearly marked out and followed. The true rule seems to be that new trials will not be granted to allow a technical correction, but where the costs involved are substantial in amount the rule is not applicable.

[2] My attention is also called to the exclusion of the evidence of plaintiff's witness, Leon J. Blass, on the ground that the witness was incompetent to testify under the provisions of section 829 of the Code.

The only persons interested in the event of this action were the parties thereto; while the question of a right of way crossing this land was involved the determination of the jury upon it reached no further than this action, and did not conclude the question of its establishment by grant, license, or prescription. The rule as to what interest is necessary to disqualify a witness is quoted with approval from *Greenleaf* by the court in *Miller v. Montgomery*, 78 N. Y. 282-285, and is as follows:

"The true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action."

It is clear, therefore, that this witness was not interested in the event of the action and that the exclusion of his evidence was erroneous. Under different circumstances this error would in and of itself demand a setting aside of the verdict.

[3] The facts attempted to be proven by him were, however, purely cumulative. The claimed existence of this right of way was testified to by other witnesses and shown in other ways. Giving to that evidence all the force which can be claimed for it, and all the effect which it could have if substantiated by this excluded evidence of Mr. Blass, would in no manner alter or modify the situation as it was presented. The facts remain that defendant committed an assault upon plaintiff; that the jury were justified in finding from the evidence that no actual damage resulted; and that plaintiff having deliberately invited that assault was not entitled to punitive damages. The only harm which has come to plaintiff by the verdict is by the imposition upon him of the costs of the action. If he be relieved from this burden, there will be no justification for directing a new trial to enable him to recover nominal damages.

The motion is therefore granted, the verdict set aside, and a new trial directed, unless defendant shall within 10 days after service of the order hereon waive by stipulation in writing all costs and taxable disbursements of the action, and consent to entry of judgment on this verdict without costs. If such stipulation be filed, the motion is denied. No costs.

Order may be entered in accordance with the foregoing.

Ordered accordingly.

JUDD v. LAKE SHORE & M. S. RY. CO.

(Supreme Court, Appellate Division, Fourth Department. January 15, 1913.)

1. APPEAL AND ERROR (§ 927*)—REVIEW—JUDGMENT—NONSUIT.

On appeal from a judgment of nonsuit, plaintiff is entitled to the benefit of all reasonable inferences from the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.*]

2. MASTER AND SERVANT (§ 141*)—NEGLIGENCE.

Where decedent's yardmaster directed him to get certain cars from switch No. 3, it was negligence to also order another engine to work on the switch from the other end without promulgating rules to govern such joint use of the switch by different train crews.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 283; Dec. Dig. § 141.*]

3. MASTER AND SERVANT (§ 286*)—INJURIES—JURY QUESTION—NEGLIGENCE.

In an action for a yard brakeman's death by being crushed between cars as a result of two engines operating on the same switch, whether it was negligent to so operate the trains without special rules relating to such operation for the protection of employes held a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

4. MASTER AND SERVANT (§ 288*)—INJURIES—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

In an action for a yard brakeman's death by being crushed between cars while two engines were switching on the same switch, whether

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

decedent assumed the risk of injury from two engines operating at the same time *held* a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068–1088; Dec. Dig. § 288.*]

5. MASTER AND SERVANT (§ 289*)—INJURIES—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

In an action for a yard brakeman's death by being caught between cars while his own and another engine were both switching on the same switch, whether decedent was guilty of contributory negligence *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092–1132; Dec. Dig. § 289.*]

Appeal from Trial Term, Erie County.

Action by Maybelle A. Judd, as administratrix, against the Lake Shore & Michigan Southern Railway Company. From a judgment dismissing the complaint, and an order denying a motion for new trial, plaintiff appeals. Reversed, and new trial granted.

Argued before McLENNAN, P. J., and KRUSE, ROBSON, FOOTE, and LAMBERT, JJ.

Philip A. Laing, of Buffalo, for appellant.

Thomas D. Powell, of Buffalo, for respondent.

McLENNAN, P. J. Upon the trial the plaintiff sought to show that this action is maintainable under the Employer's Liability Act (Consol. Laws 1909, c. 31, §§ 200–204), but, inasmuch as it was stipulated that the action was commenced on the 24th day of November, 1910, that the accident occurred on the 11th day of August, 1909, and that plaintiff was appointed administratrix on the 18th day of September, 1909, this contention is clearly wrong, because the Employer's Liability Act provides that an action brought under the provisions of that act must be commenced within one year from the happening of the accident causing the injury.

[1] There is practically no dispute in the evidence, and, a nonsuit having been granted, the plaintiff is entitled to the benefit of all reasonable inferences which may be drawn from such evidence. At the time of the accident, which occurred between 10 and 11 o'clock of the night of the 11th day of August, 1909, plaintiff's intestate was in defendant's employ as brakeman, and was engaged in the performance of his duties as such in the defendant's freightyards in the city of Buffalo. He had worked in such yards for a period of about two years prior to the accident. The yard in question is called in the evidence the Scott street yard in Buffalo. Such yard consisted, first, of an east-bound main track and, second, immediately south of it of a west-bound main track, and south of it six side tracks, all of such tracks being practically parallel and running in an easterly and westerly direction.

The deceased was a member of a crew which was operating engine No. 4528. The engine of such crew had been ordered shortly before the accident onto track No. 3, which meant to go east and to couple onto a string of cars standing on such track and take them to East Buffalo; the order being given by the assistant yardmaster. He also

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gave the deceased the same instructions, telling him to go down and get the yard off from track No. 3, which meant that he should get upon track No. 3 certain cars that were on said track and take them to East Buffalo. While thus engaged, also by order of defendant's yardmaster, cars were being moved on track No. 3 by engine No. 4511 from the westerly end of such yard, and this operation by engine No. 4511 and the movement of cars by it upon such track was in no manner communicated to the deceased or any other member of the crew of engine No. 4528, with the result that the deceased was caught between two cars and killed.

[2] It would hardly seem necessary to recite the details of the movement of these respective engines. The crew of the engine of which the deceased was a member was proceeding from the east end of such yard on track No. 3 to do the work which such crew was directed to do, and without any knowledge or information on their part or the part of any of them that orders had been given to move cars on such track from the other end of the yard by engine No. 4511.

[3] We think that such method of doing business was dangerous in the extreme; that the exercise of ordinary care and prudence would have dictated to the defendant the promulgation and enforcement of a rule which would not have permitted cars to be moved on a switch track by two engine crews operating engines from each end of such yard on the same track without notifying the different crews that such operation was taking place.

This court has recently affirmed a verdict in favor of a plaintiff in a case brought to recover for the negligent killing of a railroad employé under very similar circumstances. *Pendergast v. New York Central & Hudson River Railroad Co.*, 152 App. Div. 955, 137 N. Y. Supp. 1133, decided at the October Term, 1912. In that case the failure to promulgate a rule for the protection of the employés of the company working under such conditions was one of the principal grounds of negligence.

It is true that in the case at bar there is no evidence that other railroad corporations had made rules for such cases, nor was any witness called, experienced in railroad work, to show that such a rule was practicable under the conditions shown. We do think, however, that in this case such evidence was unnecessary. Such has been held to be the law where the danger is so obvious and the consequences so serious that a jury may find the necessity of such a rule without evidence of its existence in other cases. *Van Alstine v. Standard Light, Heat & Power Co.*, 128 App. Div. 58, 112 N. Y. Supp. 416. And, again, in *Bell v. New York Central & Hudson River Railroad Co.*, 128 App. Div. 730, 113 N. Y. Supp. 185, it was held that the necessity or propriety of a rule may be determined by a jury in the absence of its existence in other places only when the circumstances are such that the practicability of the rule is obvious to persons of ordinary understanding. See, also, *Eastwood v. Retsof Mining Co.*, 86 Hun, 91, 34 N. Y. Supp. 196, affirmed 152 N. Y. 651, 47 N. E. 1106; *Burns v. Palmer*, 107 App. Div. 321, 95 N. Y. Supp. 161; *Berrigan v. New York, Lake Erie & Western Railroad Co.*, 131 N. Y. 582, 585, 30 N. E. 57; *Free-*

mont v. Boston & Maine Railroad Co., 111 App. Div. 831, 98 N. Y. Supp. 179, affirmed 187 N. Y. 571, 80 N. E. 1109. It would seem to be perfectly obvious to a person of ordinary understanding that the operation of two switch engines from opposite directions upon the same track would be attended by great danger without the promulgation and enforcement of a proper rule for the protection of the employes engaged in the work, and that it was not necessary for the plaintiff to suggest or formulate such rule, nor to produce expert testimony as to the practicability of it in order to warrant the submission of the question to the jury.

[4] It is urged, however, by the respondent that plaintiff's intestate assumed the risk. As above stated, he had been employed in defendant's yard for about two years, for the first year as a switch tender, and for about a year before his death as a yard brakeman. I do not think that we should hold that plaintiff's intestate assumed the risk in this case as a matter of law, in view of the fact that the deceased was acting under the direction of the defendant's yardmaster and the assistant yardmaster, and might be found to have relied, as he had a right to do, upon their superintending the movements of the different engines in the yard in such manner as to protect him from injury.

[5] The only remaining question is whether or not there was any evidence which would justify the court in submitting to the jury the question of the intestate's freedom from contributory negligence. We think upon the evidence that the question was one of fact for the jury. Plaintiff's intestate was caught and crushed between the bumpers of two cars which he was trying to get coupled together, and was in a place where the jury might infer that he had a right, and might be expected to be, in the performance of his duties. We therefore conclude that the judgment and order appealed from should be reversed, and a new trial granted, with costs to appellant to abide event.

Judgment and order reversed and new trial granted, with costs to appellant to abide event. All concur.

In re MOFFETT.

(Supreme Court, Appellate Division, First Department. January 17, 1913.)

ATTORNEY AND CLIENT (§ 54*)—MOTION TO DISCIPLINE—PLEADING AND PROOF.

Where the charges of petitioner on motion to discipline an attorney are mainly general and indefinite, and unsustained by the slightest evidence, excepting some general statements by petitioner as to matters upon which he could have no personal knowledge and there is nothing reflecting on the attorney's professional conduct, the proceedings will be dismissed.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 73; Dec. Dig. § 54.*]

Motion to discipline Robert L. Moffett, an attorney. Dismissed. Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Robert Leslie Moffett, in pro. per.

William J. Underwood, of New York City, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 139 N.Y.S.—35

INGRAHAM, P. J. It appears that the petitioner had a claim against a corporation, known as the Queen Aëroplane Company, to recover which he brought two actions, one in the Municipal Court of the city of New York, the other in the City Court of the city of New York; that in those actions the respondent appeared as the attorney and counsel for the defendant, and the petitioner succeeded in recovering judgments. The petitioner, apparently considering that the respondent's defense to these actions had been improper, presented charges against the respondent to the Association of the Bar of the City of New York, which, after investigation, the association refused to prosecute. The petitioner then presented the same charges to the New York County Lawyers' Association, which also investigated and likewise refused to prosecute. Whereupon the petitioner, in his own behalf, presents the charges to this court.

There seem to be eleven separate specifications: First, that respondent entered into a conspiracy with one McCormick with the intent of defrauding the plaintiff of his claim; second, that he interposed an answer to the actions known to be false; third, that in the Municipal Court action the respondent gave testimony which was perjury; fourth, also relates to respondent's testimony in that action; fifth, that by interposing a false answer he deceived the court; sixth, that after the Municipal Court action was decided in favor of the petitioner the respondent filed an answer in the City Court action, which was false; seventh, also relates to this answer; eighth, that in the Municipal Court action the respondent approached a witness subpoenaed by the petitioner and had a talk with said witness, the result of which was that the testimony of said witness was not as satisfactory as it should have been; ninth, that respondent had made statements to petitioner that, unless petitioner took \$750, the respondent would keep the case in the courts for several years; tenth, that respondent "used" unprofessional conduct all through the trial of the cases; eleventh, that the respondent made an application for an open commission to take testimony in St. Louis in bad faith and in the hope of delaying the trial and obtained an improper affidavit.

Now, these most general and indefinite charges are unsustained by the slightest evidence except some general statements by the petitioner with respect to most of which it was impossible that he should have had any personal knowledge. So far as there are any statements of fact in the petition, which could be known to the petitioner, they fail to establish the slightest ground for any charges against the respondent. A large number of exhibits, letters, and telegrams are annexed to the petition between the petitioner and other parties connected with the Queen Aëroplane Company, but which are not connected with the respondent. The respondent has submitted a complete answer to all of these somewhat irrelevant allegations. An examination of all the papers satisfies us that the charges are without any foundation. The petitioner having submitted these charges to the two Bar Associations in New York, and they having refused to entertain them on the ground that there was nothing to support them, the petitioner's personally presenting them to this court would appear to be in bad faith and

solely for the purpose of injuring the respondent. Such a proceeding under the circumstances is one that the court cannot too strongly condemn. It suffices to say, however, that an examination of all these papers satisfies us that the charges are without foundation, and that nothing that appears in the papers submitted to us reflects at all upon the respondent's professional conduct.

The proceedings are therefore dismissed. All concur.

NAPPA v. ERIE R. CO.

(Supreme Court, Appellate Division, Fourth Department. January 8, 1913.)

1. APPEAL AND ERROR (§ 1099*)—LAW OF CASE—DECISION ON FORMER APPEAL—QUESTIONS DECIDED.

Though plaintiff's counsel, on the former appeal in a freight handler's action for injuries from a platform skid slipping, urged that defendant was liable because of the foreman's negligence in requiring work to be done before the skid was fastened, where that ground of liability was not submitted at the first trial, and the judge then charged that the negligence relied on was in failing to properly secure the skid as an appliance under the Employer's Liability Act, it could not be claimed on a second appeal that the judgment on the former appeal settled the question of the foreman's negligence so as to preclude reliance thereon on the subsequent appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.*]

2. MASTER AND SERVANT (§ 190*)—MASTER'S LIABILITY—NEGLIGENCE OF SUPERINTENDENT.

A railroad company would be liable for the negligence of its freight-house foreman in directing freight handlers to work upon a skid known to be insecure, though it was not a defect in the ways, etc.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.*]

3. MASTER AND SERVANT (§ 286*)—INJURIES—JURY QUESTION—NEGLIGENCE.

Evidence, in an action for injuries to a freight handler by a skid slipping from a platform and permitting him to fall, *held* to make it a jury question whether the foreman was negligent in directing the men to work upon an insecure skid.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

4. MASTER AND SERVANT (§ 252*)—NOTICE OF INJURY—SUFFICIENCY OF NOTICE.

A notice of injury, in a freight handler's action for injuries by the slipping of a skid, permitting him to fall, stated that the injuries were caused by the falling of a skid on which plaintiff was standing, causing him to fall and a barrel of sugar to fall upon him; that the skid fell because of the unsafe manner in which it was secured; that it was furnished by defendant's superintendent as plaintiff's place of work; and that it was the superintendent's duty to have provided a safe place of work, which he neglected to do. *Held*, that the notice sufficiently stated the cause of the injury under Labor Law (Consol. Laws 1909, c. 31) § 201, requiring it to state the time, place, and cause of a servant's injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 806; Dec. Dig. § 252.*]

McLennan, P. J., and Foote, J., dissenting.

Appeal from Trial Term, Erie County.

Action by Frank Nappa against the Erie Railroad Company. From a judgment of nonsuit and an order denying a new trial, plaintiff appeals. Reversed, and new trial ordered.

See, also, 195 N. Y. 176, 88 N. E. 30, 21 L. R. A. (N. S.) 96.

Argued before McLENNAN, P. J., and KRUSE, ROBSON, FOOTE, and LAMBERT, JJ.

Eugene M. Bartlett, of Buffalo, for appellant.

Helen Z. M. Rodgers, of Buffalo, for respondent.

KRUSE, J. On the afternoon of November 25, 1904, the plaintiff, a freight handler in defendant's employ, was assisting in unloading barrels from a freight car into a freighthouse. The barrels were rolled over an iron skid or running board, about three feet square, one end of which was placed on the floor of the car and the other on the platform of the freighthouse. Usually the skid was secured by nailing a wooden cleat on the platform at the end of the skid, but upon this occasion that was not done, and the skid was not secured in any way. It fell while the plaintiff was standing with one foot on the skid and the other on the platform, engaged in his work, and he fell with it, a barrel falling against his leg, and he was hurt.

The plaintiff seeks to recover damages for the injuries thus sustained. A notice was served so as to bring the case within the provisions of the Employer's Liability Act, now embodied in the Labor Law (Consol. Laws 1909, c. 31, §§ 200-204). The nature of the notice will be more fully stated hereafter. The case has been twice tried. On the first trial the plaintiff had a verdict. The judgment entered thereupon was, on appeal, affirmed by this court (123 App. Div. 915, 108 N. Y. Supp. 1141), but the Court of Appeals reversed the judgment and ordered a new trial. 195 N. Y. 176, 88 N. E. 30, 21 L. R. A. (N. S.) 96. Upon the second trial, at the close of the plaintiff's case, a nonsuit was granted, and from the judgment entered thereupon and the order denying the plaintiff's motion for a new trial, the plaintiff appeals.

Upon the first trial the case was submitted to the jury upon the theory that the insecure skid was such a defect as might bring the case within the provisions of the Employer's Liability Act, but the Court of Appeals held that the skid and cleat, moved by workmen from car to car, were no part of the ways, works, or machinery, within the meaning of that act, nor of the safe place to work at under the common law, but tools and appliances furnished the freight handlers, and if one was injured by the negligent act of another in using the same it would be a risk of the employment, imposing no liability upon the master, and that the defendant was entitled to have charged, as it in substance requested, that the use of the skid and cleat was a mere detail of the work, and not covered by the Employer's Liability Act.

[1] It is now contended on behalf of the plaintiff that there was negligent superintendence in directing the men to work upon the insecure skid. But the defendant insists that the former appeal necessarily involved that question, and that it was passed upon by the Court of Appeals adversely to the plaintiff. I am of the opinion that the

question is still open. While counsel for the plaintiff did urge upon the former appeal that the defendant is liable for the negligence of the foreman in requiring the workmen to proceed before the skid was fastened, that was not a ground of liability submitted to the jury on the first trial. The judge held, and charged the jury, that the skid, the floor, the freighthouse, and the cleat used to secure the skid were all appliances or ways, within the Employer's Liability Act, stating that the grounds of negligence were in failing and negligently omitting to properly secure the appliance or skid, and explicitly instructed the jury that they must find that the accident was the result of the neglect on the part of the defendant to properly secure the cleat, to entitle the plaintiff to recover.

It appears that one car had been unloaded. The skid was then moved from that car and placed in position for unloading the car in question. The cooper, who was around the freighthouse, usually secured the skid. He carried the hammer, nails, and cleat. He was called by the workmen upon this occasion to secure the skid, first by the foreman or boss, as he is called by the witnesses, and then several workmen called to him; but he did not come. Thereupon the foreman told the workmen to go ahead with their work, saying, according to the testimony of the witnesses, that bye and bye the cooper would come and fix the skid. While this was taking place, the plaintiff was absent getting a drink of water. He returned and went to work with the other men. The skid was not secured; it fell, and the plaintiff was hurt, as has been stated.

[2] Although the insecure skid was not a defect in the ways, works, or machinery, and the moving and securing of the skid was a mere detail of the work, as has been held by the Court of Appeals, the defendant may still be liable, if the foreman was negligent in superintending the work by directing the men to work upon the skid, knowing that it was insecure.

[3] I think the evidence sufficient to make out a case of negligent superintendence. *Guilmartin v. Solvay Process Company*, 189 N. Y. 490, 82 N. E. 725.

[4] But it is further contended, upon the part of the defendant, that the notice served is insufficient to hold the defendant liable for negligent superintendence under the Labor Law. The statute requires the notice to state the time, place, and cause of the injury. Labor Law, § 201. The notice states that the injuries were caused—

"by the falling of the platform or skid on which said Frank Nappa was then standing, causing him to fall and precipitating a barrel of sugar upon him, and that the falling of said platform or skid was caused by the unsafe and improper manner in which it was placed and secured, and that said platform or skid was furnished by you and your superintendent as the way and place for said Frank Nappa to use in his work, and that it was the duty of you and your superintendent to have provided a safe and proper way and place for said Frank Nappa to work. This you and your superintendent neglected to do, and you are hereby notified that the said Frank Nappa has a claim against you for five thousand dollars (\$5,000.00) for the injuries sustained by him, under the statute in such cases made and provided, and by reason of such negligence as aforesaid."

I think the notice is sufficient. *Greif v. Buffalo, L. & R. Ry. Co.*, 205 N. Y. 239, 98 N. E. 462. While the notice does not specifically state that there was negligent superintendence, it states the cause of the injury, which is all the statute requires; and the complaint itself states a case of negligent superintendence, as I think.

The judgment and order should therefore be reversed and a new trial ordered, with costs to the appellant to abide the event. All concur, except McLENNAN, P. J., and FOOTE, J., who dissent upon the authority of the decision in same case on former appeal, reported at 195 N. Y. 176, 88 N. E. 30, 21 L. R. A. (N. S.) 96.

In re STEELE.

(Supreme Court, Appellate Division, Fourth Department. January 8, 1913.)

1. PLEADING (§ 406*)—WAIVER OF DEFECTS—AGREEMENT FOR TRIAL ON MERITS.

An agreement by parties to try the proceeding upon the merits waives any defect in the petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1355-1359, 1361-1365, 1367-1374, 1386; Dec. Dig. § 406.*]

2. LANDLORD AND TENANT (§ 139*)—TENANCY FROM YEAR TO YEAR—NATURE AND INCIDENTS.

One renting farm land under an oral lease at a yearly rental, without provision as to how long he should have the premises, became a tenant from year to year, and had no implied right to remove crops which matured after the termination of his tenancy.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 492-507; Dec. Dig. § 139.*]

3. LANDLORD AND TENANT (§ 53*)—TENANCY FROM YEAR TO YEAR—TERMINATION—ESTOPPEL BY LANDLORD.

The grantee of the lessor of farm land leased from year to year, who about two or three months after the purchase sent men to work the farm and then first became aware of the tenant's claim to hold the farm for another year, on which he did not reside, and then demanded that he cease attempting to cultivate it, and remove his tools from the land, was not estopped from proceeding to remove the tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 129-131, 134, 135; Dec. Dig. § 53.*]

4. LANDLORD AND TENANT (§ 116*)—TENANCY FROM YEAR TO YEAR—TERMINATION—NOTICE.

A tenancy from year to year may be terminated at the end of any year by either the landlord or the tenant without previous notice of intention to do so.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 382-388, 395-400; Dec. Dig. § 116.*]

5. LANDLORD AND TENANT (§ 90*)—TENANCY FROM YEAR TO YEAR—RIGHTS OF LANDLORD.

Where a tenant from year to year holds over, the landlord may either treat him as a wrongdoer, and eject him without notice, or waive the right of possession, and recover the rent for another year, on the ground that by holding over he has become a tenant for another year.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 284-289; Dec. Dig. § 90.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. LANDLORD AND TENANT (§ 308*)—ACTION FOR POSSESSION—SUFFICIENCY OF EVIDENCE—IMPROVEMENTS BY TENANT.

In a proceeding for the removal of a tenant holding from year to year, evidence *held* insufficient to show that the tenant had put a new roof on the barn under a verbal agreement that he should remain as tenant until the rental reimbursed him for the amount so expended.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1314-1316; Dec. Dig. § 308.*]

Appeal from Erie County Court.

Petition by Katharyn A. Steele against Jacob Weber to recover possession of certain premises. From an order awarding petitioner possession, with costs of the proceedings, Weber appeals. Affirmed.

The proceeding was commenced on the 5th day of July, 1912, by the filing of a petition asking for the removal of Jacob Weber from certain premises consisting of 64½ acres of land and a barn, located about three miles from the village of Hamburg, in the town of Hamburg, Erie county. The court, after hearing evidence of both parties, granted the order awarding the possession of the premises to the petitioner, Katharyn A. Steele, upon the ground that Jacob Weber was holding the same over after the expiration of his term of tenancy thereof without the consent of the landlord, which tenancy, the court found, was one from year to year.

Argued before McLENNAN, P. J., and KRUSE, ROBSON, FOOTE, and LAMBERT, JJ.

William F. Wierling, of Buffalo, for appellant.

Henry W. Willis, of Buffalo, for respondent.

McLENNAN, P. J. In March, 1897, Mary Gifford, then the owner of the farm in question, leased it to Jacob Weber at a rental of \$45 a year, and at that time there was nothing said about how long Weber should remain or how long he could have it. The leasing was oral, and Weber continued thereafter for 15 years to occupy the farm, the rent being increased from \$45 to \$60 and then to \$75 per year, and later to paying the taxes and the interest on a \$1,200 mortgage. On January 15, 1912, Mary Gifford made, executed, and delivered to Katharyn A. Steele a deed of the premises in question, and the deed was recorded on January 23, 1912. On January 27, 1912, Mrs. Gifford's husband wrote to Jacob Weber as follows:

"Dear Sir: We have transferred or sold our farm. So you will have to deal with new owners. We have got nothing more to say in regard to farm. Its all over. Yours truly."

There were no buildings on the premises other than a barn, and during all the period of his tenancy Weber's occupancy consisted only in working the farm in season and storing crops and tools in the barn. He lived some two miles from the farm. Mrs. Steele sent men to work the farm commencing April 10, 1912, and thereafter at various times some crops were put in by men in her employ and some hay was cut by them. Weber, however, also put in some crops in the spring, and drew away the hay which had been cut, and as a result of the conflicting attempts of both parties to cultivate the farm this proceeding was brought.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The petitioner alleged as grounds for the removal of Weber from the premises, first, that he had intruded into and squatted upon the premises without permission; second, that he was holding over without permission after the termination of the tenancy of one year; and, third, that he had forcibly entered upon the premises and detained possession thereof from the petitioner.

[1] However objectionable in form this petition may have been, the parties agreed to proceed to try the proceeding upon the merits, thereby waiving any defect in the petition. A claim was made by Weber that, under the terms of his agreement with Mrs. Gifford, he would in any event be entitled to a crop of winter wheat which was sowed by him in the fall of 1911, and which would not mature, and be ready for harvest until after March, 1912. There is no evidence in the record to show that Katharyn A. Steele had any notice of Weber's alleged rights concerning this crop of wheat, and Mrs. Gifford and her husband deny that permission was given to Weber to sow it with the understanding that he would be allowed to harvest it. In fact, they state that they told him, if he sowed this wheat at all, he did so at his own risk. Weber says that he saw Mr. Gifford some time in August before he sowed the wheat, and said to Mr. Gifford, "You folks telling about selling the farm, how about if I put in wheat and stuff?" to which Mr. Gifford replied: "Never mind, you sow the wheat. Improve the place. Make it look better, and you get your pay. You keep it." It will thus be seen that, according to Weber's own version of the transaction, he sowed the wheat upon the assurance of Mr. Gifford that he would get his pay, and not upon any express agreement that he should have the right to remove it when it was ripe.

[2, 3] Weber having rented the premises in the manner above shown, without any agreement in writing, became a tenant from year to year, and there was no implied right under the law to remove crops which matured after the termination of his tenancy; nor was any express agreement to that effect claimed, nor were facts shown sufficient to raise an estoppel in Weber's favor. *Reeder et al. v. Sayre*, 70 N. Y. 180, 26 Am. Rep. 567.

[4] A tenancy from year to year may be terminated at the end of any year by either the landlord or the tenant without previous notice of intention so to do. *Adams v. City of Cohoes*, 127 N. Y. 175, 28 N. E. 25. The giving of the notice contained in the letter of January 27th was therefore immaterial, except that it served to give Weber knowledge of the fact that a change in ownership had taken place, and that from thenceforth he must deal with the new owner.

[5] Where a tenant from year to year holds over, even for a few days, after the expiration of any particular year, a landlord has the option of treating the tenant as a wrongdoer, and bringing proceedings to eject him, and is not required before so doing to serve a tenant with any notice to quit, or the landlord may waive the right to possession and recover the rent for another year, for the reason that the tenant by remaining over has impliedly become a tenant for another year. *Adams v. City of Cohoes*, *supra*.

No claim is made in this case that Mrs. Steele elected to treat Weber as a tenant for another year, nor that she did anything to recognize him as a tenant after the expiration of his term, nor that she did any acts which would in any way estop her from asserting her right to immediate possession. It will be remembered that Weber did not live upon the farm and the evidence does not disclose any facts tending to show that Mrs. Steele became aware of Weber's claim to the right to hold the farm for another year until the 10th day of April, 1912, or shortly thereafter, when both parties commenced to put in crops, and from that time on Mrs. Steele demanded of Weber that he desist in his attempts to cultivate the farm and that he should remove from the farm everything that belonged to him, and served a formal notice upon him to that effect about the 29th of May, 1912.

[6] It is claimed by Weber that in the summer of 1909 he put a new roof on the barn at a cost of about \$125, and that it was verbally agreed between him and the Giffords that he should remain as a tenant on the farm until such time as he had received from the rental reimbursement for the amount paid for the roof. This was denied by the Giffords, and the court apparently found against Weber upon that proposition, and his finding was clearly sustained by evidence, for it appears that in the two years that Weber remained there thereafter he deducted nothing to apply upon the amount claimed to be due him for the roof, but, on the other hand, paid the stipulated rental. The court apparently was convinced that as to this amount he accepted the promise of the Giffords to pay him at some time, as concededly was the case in reference to another \$25 which he loaned to the Giffords. If Weber has been harshly and unjustly treated by the Giffords, it is owing to carelessness upon his part in failing to obtain a lease in writing with sufficient provisions to protect him in case of a sale of the premises, and also as to the right to renew the lease at the expiration of any yearly term.

It follows that the order appealed from should be affirmed, with costs. All concur.

(79 Misc. Rep. 117.)

YOUNG v. ROGERS.

(Supreme Court, Special Term, Orange County. January 18, 1913.)

LANDLORD AND TENANT (§ 134*)—ABANDONING PREMISES—INJUNCTION.

An owner, leasing a building to defendant, who used it as a hotel, but later surrendered the hotel license and took out a saloon license, cannot prevent the defendant filing an abandonment of the premises, under Liquor Tax Law (Consol. Laws 1909, c. 34) § 8, subd. 9, as added by Laws 1910, c. 494, as amended by Laws 1911, c. 298, providing that there could only be one saloon for each 750 persons, but that saloons which were running at the time of the passage could be abandoned and the business moved to another place by the person holding the license.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 482-486; Dec. Dig. § 134.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On motion by George Young to restrain Benjamin H. Rogers from filing a notice of abandonment of the premises occupied by him, and owned by the plaintiff, under the Liquor Tax Law. Denied.

Frank Lybolt, of Port Jervis, for plaintiff.

H. B. Fullerton, of Port Jervis, for defendant.

TOMPKINS, J. This is a motion by the plaintiff for an injunction pendente lite, in an action to restrain the defendant from filing a notice of abandonment of the premises occupied by him, and owned by the plaintiff, under subdivision 9 of section 8 of the Liquor Tax Law (Consol. Laws 1909, c. 34, as added by Laws 1910, c. 494, as amended by Laws 1911, c. 298). The plaintiff leased the premises to the defendant, who conducted a hotel upon said premises until October 1, 1912, at which time he surrendered his hotel license and took out a saloon license. His lease of the premises is about to expire, and the complaint alleges that he intends to abandon said premises for saloon purposes, and resume the same business upon other premises. There are already in the city of Port Jervis saloons and hotels in excess of one for every 750 population.

The facts are not in dispute, except, perhaps, as to whether the plaintiff's building complies with the law in respect to hotels, under subdivision 1 of section 8 of the Liquor Tax Law, and whether the defendant is entitled to a hotel license; but for the purpose of this motion I will assume that the defendant's hotel license, surrendered by him last year, was good, and that he had a right to a new certificate entitling him to traffic in liquors as a hotel keeper when he took out his saloon license the 1st of last October.

This is the view of the facts most favorable to the plaintiff, and yet I must hold that the plaintiff cannot maintain this action, and hence is not entitled to an injunction pendente lite. When the plaintiff rented the premises to the defendant, he assumed the risk of the defendant at any time changing his business from a hotel to a saloon business; and as a matter of fact the defendant did, upon the expiration of his last year's hotel license, apply for and receive a saloon license, and under that has been operating ever since. This was apparently without objection on the plaintiff's part; but I doubt whether any objection or action on his part could have prevented the defendant doing as he did, and taking out a saloon license instead of a hotel license. There was no provision in the lease limiting the defendant's right to the use of the premises for hotel purposes.

The defendant, now having a saloon license, is given absolute right by the statute to abandon the premises occupied by him, by filing a notice of abandonment under subdivision 9 of section 8 of the Liquor Tax Law, and the consent of the owner is not necessary; and I cannot see how this court can restrain the defendant from doing that which the Liquor Tax Law expressly authorizes him to do.

Motion denied, with \$10 costs to the defendant, to abide the event.

BROWN et al. v. SULLIVAN.

(Supreme Court, Appellate Division, Fourth Department. January 15, 1913.)

JUSTICES OF THE PEACE (§ 190*)—APPEAL—ORDERING NEW TRIAL.

Under Code Civ. Proc. § 3063, which provides that, where the judgment is against the weight of the evidence, the appellate court may reverse and order a new trial, the County Court, reversing a judgment of a justice's court on the ground that the verdict was against the weight of the evidence, should order a new trial before the same justice.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 734; Dec. Dig. § 190.*]

Appeal from Cattaraugus County Court.

Action by George Murray Brown and another, as executors, etc., against Cornelius Sullivan. From a judgment of the County Court, reversing a judgment for defendant, he appeals. Modified, so as to provide for a reversal of the judgment of the justice's court and the granting of a new trial before the same justice, on the ground that the verdict was against the weight of the evidence.

Argued before McLENNAN, P. J., and KRUSE, ROBSON, FOOTE, and LAMBERT, JJ.

P. S. Collins, of Olean, for appellant.

F. J. Shaffer, of Olean, for respondent.

PER CURIAM. While the evidence is such as might sustain a finding that there was an agreement so as to give the defendant a lien under the Lien Law (Consol. Laws 1909, c. 33) upon the cow for pasturing and boarding her, entitling him to the possession of the animal, it is evident, from the colloquy between the justice and the jury and the verdict rendered, that the jury charged the defendant with the value of the cow and allowed the same upon the counterclaim for the keeping, fixing the amount of the counterclaim at \$5 more than the value of the cow, and rendering a verdict for the excess. The County Court evidently held the allowance excessive, and properly reversed the judgment; but we think a new trial should have been ordered in the justice's court, as may be done under section 3063 of the Code, where the verdict is against the weight of the evidence.

Judgment of County Court modified, so as to provide for a reversal of the judgment of the justice's court without costs, and the granting of a new trial before the same justice, upon the ground that the verdict is against the weight of the evidence, with costs in this court to the appellant to abide the event. New trial to be had on the 29th day of January, 1913, at 10 a. m.

RESCHKE v. SYRACUSE, L. S. & N. R. CO.

(Supreme Court, Appellate Division, Fourth Department. January 8, 1913.)

1. CARRIERS (§ 320*)—PASSENGER'S ACTION FOR INJURIES—QUESTIONS FOR JURY.

Where plaintiff testified that he was forced between a motor car and a trailer, and injured, by the pressure of the crowd, in attempting to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

board such cars, and his account of the accident was borne out by two other witnesses, the jury was justified in adopting it as the true one, although a witness for defendant testified that plaintiff was injured while attempting to board the moving car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

2. CARRIERS (§ 287*)—DUTY TO PROTECT PASSENGERS FROM INJURY BY CROWDING.

An electric surface railroad company, transporting passengers to and from a resort where large crowds frequently assembled and where it maintains a station, is bound to anticipate that crowding will occur in boarding its cars, and to use all reasonable care to protect passengers from injury from such crowding, even though its station grounds are sufficiently large to accommodate the crowd.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1154-1166; Dec. Dig. § 287.*]

3. CARRIERS (§ 320*)—PASSENGER'S ACTION FOR INJURIES—QUESTIONS FOR JURY.

The question whether a railroad company should have furnished more than six men to assist in controlling a crowd at a station where crowds were frequent should have been submitted to the jury, where such force was insufficient upon the occasion when plaintiff was injured by the pressure of the crowd.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

4. CARRIERS (§ 320*)—PASSENGER'S ACTION FOR INJURIES—QUESTIONS FOR JURY.

The question whether reasonable care required an electric railroad company to erect barriers at a station where crowds were frequent, to prevent passengers being forced against or between moving cars, was properly submitted to the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

5. CARRIERS (§ 317*)—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action by a passenger, who was forced by the pressure of the crowd at a station between a motor car and a trailer, evidence of the precautions taken at other points and upon other roads to prevent such injuries was properly admitted, where its weight and effect and the purpose of its admission were clearly and directly stated by the trial judge.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1295-1306; Dec. Dig. § 317.*]

McLennan, P. J., dissenting.

Appeal from Trial Term, Onondaga County.

Action by Herman Reschke against the Syracuse, Lake Shore & Northern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before McLENNAN, P. J., and KRUSE, ROBSON, FOOTE, and LAMBERT, JJ.

William Nottingham, of Syracuse, for appellant.

W. J. McClusky, of Syracuse, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LAMBERT, J. The appellant operates a street surface electric railroad between the cities of Syracuse and Oswego, and furnishing service to various summer and pleasure resorts along Onondaga Lake, including one known as Long Branch, at the north end of the lake. Long Branch is about 7 miles from Syracuse. The railroad does not own the resort, but maintains a special service to it, and has a station located at the entrance to the grounds. This station, which is merely a shelter or waiting room, is located upon a triangular piece of ground 220 feet long, with a base of 110 feet, lying between the main line of the defendant's road and the loop which furnishes service to this resort. This piece of land is level, open, and unfenced, except that, extending on to the north, from the base of this triangular piece of land, the right of way of the appellant, along the loop, was fenced with pickets or posts, which prevented access thereto except at the station. The station stands about 26 feet from the rail, at its nearest point.

During the summer season large crowds of people attend this pleasure resort, and the facilities afforded for their transportation to and from the city are all furnished by the appellant. On July 31, 1911, the Assumption Church of Syracuse gave a church picnic on these grounds. Through arrangement between the church and the appellant, tickets affording transportation over appellant's line were sold by the church, and settlement thereafter made between the church and the railroad. It is conceded that 7,732 tickets had been so sold upon this occasion. Plaintiff had been in attendance upon this picnic, and, desiring to return to the city, came to this station at about 11 o'clock p. m. to board one of defendant's cars. He says that there were then waiting at this station about 1,500 people, and that before the car arrived the crowd had increased to 2,000 or 2,500, all evidently awaiting transportation. Plaintiff assumed a position about 20 or 25 feet south from the right of way posts and some 3 or 4 feet from the rail. Almost immediately upon his arrival a motor car and a trailer passed, stopped for passengers, and departed. Plaintiff did not board that car. Five or six minutes after another train, similarly made up, came along. It was moving very slowly; the motorman says so slowly that he could have stopped it within a foot. As this train came opposite plaintiff, the crowd surged forward to secure seats. In spite of his efforts, plaintiff was carried with the crowd and up against the motor car. As that car continued to move along, by the pressure of the crowd, plaintiff was forced between the motor and the trailer, and the front truck of the trailer ran over one of his legs and onto the other. The car was stopped, and then, to permit the extrication of the plaintiff, was backed off from him, again passing over his leg. These injuries necessitated the amputation of the one leg.

[1] Plaintiff's freedom from contributory negligence is well shown by the evidence. He came to this station, the place provided by the appellant, to secure the convenience offered by the appellant to the public, and all of his actions appear to have been those of the average person, situated as he was. It is true that one witness, called by the defense, testified as to the occurrence of the accident far differently from the claim of plaintiff. According to that witness, plaintiff received his injury while attempting to board the moving car. If this

version was to be adopted, then there could be no recovery; but plaintiff's version is borne out by two other witnesses, and the jury was well justified in adopting it as the true one.

[2] Plaintiff sought to establish the negligence of defendant, by reason of its lack of care in handling this crowd, while loading the cars, in such manner as to prevent such crowding and pushing. Such action by the crowd was reasonably to be expected. It appears that it was not unusual for the daily attendance at this resort to reach 25,000 to 30,000 persons, and some realization, by appellant, of the attendant dangers, is shown by the fact that it did furnish a few men to assist in preventing such occurrences. The witness Marvin, called by the defendant, seems to have had general charge on the evening in question, and to have performed similar duties upon other occasions. He testified that he had frequently seen crowds rush for the cars, and that on the day of the accident, between 5 p. m. and the time of the accident, he had at least 50 times gone in front of the crowd and pushed it back from the car. That crowds, under such circumstances, will rush forward, is also a matter of daily observation, and the helplessness of one caught in such a rush is well understood.

When the appellant assembled these people upon its property, for purposes of financial gain to itself, it assumed the responsibility of using all reasonable care to protect the individuals from injury from causes reasonably to be anticipated. Such a measure of duty upon the part of transportation companies and others handling large numbers of persons has been frequently recognized by the courts. *Dawson v. New York Brooklyn Bridge*, 31 App. Div. 537, 52 N. Y. Supp. 133, and cases therein cited. It knew, or should have known, that at that hour of the evening large numbers of these people would wish to enter its cars to return to the city, and that the desire to secure passage would result in forceful effort to secure such entrance. It is no answer to say that the station grounds were sufficiently large to accommodate this crowd. The danger arose in the loading of the cars, and appellant was bound to anticipate the expected movement of these people.

[3] Plaintiff suggested two means to prevent the result here experienced; i. e.: (1) More extensive policing; and (2) the erection of barriers, which would permit access to the car of only a limited number of people at one time. It was shown upon the trial that on this occasion there were six men furnished by appellant to assist in controlling this crowd. The court then withdrew from the jury the right to find defendant guilty of negligence in not furnishing more men for that purpose. I cannot justify such a position. The force was insufficient upon this occasion, at least, and it seems to me that the jury should have been permitted to say whether the defendant had discharged its full duty in that regard.

[4] The jury was permitted, however, to predicate negligence upon the failure to erect barriers, and it was found that reasonable care and prudence would suggest the erection of the same, in view of the apparent dangers. I think this conclusion is well supported by the proof. Everyday observation and the experiences of the appellant in the past clearly demonstrated such dangers to be present. The erec-

tion of barriers, turnstiles, and similar contrivances are so common, and such an effectual means for obviating such dangers, that it seems to me that prudence and foresight would have suggested their use in this instance.

[5] I see no error in the exception to the evidence of the precautions taken at other points and upon other roads. The weight and effect of such testimony and the purpose of its admission were very clearly and correctly stated by the trial justice.

The judgment and order should be affirmed, with costs. All concur, except McLENNAN, P. J., who dissents, upon the ground that the defendant was not shown guilty of negligence, especially in view of the charge of the court that sufficient police protection was furnished.

(78 Misc. Rep. 445.)

ALMIND v. SEA BEACH CO.

(Supreme Court, Special Term, Kings County. December, 1912.)

INJUNCTION (§ 21*)—SUBJECTS OF RELIEF—PUBLICATION OF PHOTOGRAPH.

Under Civil Rights Law (Consol. Laws 1909, c. 3) § 51, giving to any person whose portrait is used for advertising purposes or for purposes of trade the right to an action to enjoin such use, a complaint to enjoin the use of a picture of plaintiff seated in a trolley car, designed for use on a placard in defendant's cars, to illustrate, with other pictures, the right and wrong way to get on and off cars, will be dismissed, where the facts and circumstances satisfy the court that plaintiff orally consented to such use of her picture.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 19; Dec. Dig. § 21.*]

Action by Mary Clarissa Almind against the Sea Beach Company for an injunction against the use of plaintiff's photograph, in violation of Civil Rights Law (Consol. Laws 1909, c. 3). Judgment dismissing complaint.

L. J. Weinberger, of New York City, for plaintiff.

Geo. D. Yeomans and J. W. Carpenter, both of Brooklyn, for defendant.

KAPPER, J. In the view I take of this case it is unnecessary to decide that the use made of the plaintiff's picture was either for advertising or for trade purposes within the meaning of the statute. Civil Rights Law (Consol. Laws 1909, c. 3) § 51. The picture complained of purports to show the plaintiff seated in a trolley car with a number of other persons, and the figure of a man holding one of the car stanchions, while a portion of his body lay upon the ground as though he was being dragged. The car was not being used for transit at the time, but solely for the purposes of photography. This particular picture is about eight inches long and four inches wide, and was designed for and used by the defendant on a placard in its cars to illustrate, in conjunction with four other pictures on the same placard which showed a woman in the act of boarding and alighting from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cars, the "right" and "wrong" way to get on and off cars. The face of the plaintiff on the picture is so small that I should have had difficulty, in the absence of plaintiff's assertion and defendant's acknowledgment that it was her photograph, in recognizing it as such. However, that may not be so material on the trial before me in equity in which a permanent injunction against the use of the picture by the defendant is sought, coupled with the further application that the cause be remitted after interlocutory judgment to the Trial Term for an assessment of plaintiff's damages by a jury. The facts relating to the taking of the picture and the circumstances under which it was taken satisfy me that plaintiff fully knew the use to which it was to be put by the defendant, and that she willingly and quite eagerly agreed to sit in the car for that very object. And so the question is whether or not the plaintiff's oral consent may be substituted by a court of equity for the written consent required by the statute, without which the statute forbids the use of another's picture for advertising or trade purposes.

Finding as I do, as a matter of fact, that the plaintiff orally consented to the particular use to be made of her picture by the defendant, I think the conclusion should follow that a court of equity, whatever might be the rights of a person in a court of law who claims to have been so injured, should refuse injunctive relief, unless the statute is to be regarded as favoring deception.

The statute requires as a prerequisite to the use of such a picture a written consent, but this I regard as but evidentiary, presumptive of the right of action only, and not conclusive in a case like this. Otherwise, one who may be compensated to pose for the use of his photograph by another for an object of which he was fully cognizant and to which he had wholly agreed could have both his pay and his injunction, regardless of the expense to which the user was put in the adaptation of the photograph to his business purposes, and in addition thereto there could follow, under those circumstances, an award by a jury of exemplary damages against the user.

To say that this statute can be made the instrument for the accomplishment of such an injustice seems to me to amount to a characterization of the law as ridiculous. I had occasion in *Wendell v. Conduit Machine Co.*, 74 Misc. Rep. 201, 133 N. Y. Supp. 758, to deny a temporary injunction sought under the statute where the plaintiff voluntarily posed for a portrait to be used in his employer's business, and the views there expressed I deem it in the interests of justice to apply to this case where the claim is being tried in equity upon the merits.

I do not understand that the statute under review commands a court of equity to grant equitable relief to the destruction of all equitable principles which have been applied to all equity actions since time out of mind; and, where a complainant in a court of equity is shown to have acted in such a way as to raise an estoppel against him or has assented by word or conduct to the adverse claim or injurious conduct of the defendant, he will be deprived of his right to the interference of a court of equity. The plaintiff could have elected to sue

at law and claimed damages under the statute. These would undoubtedly have been assessed in the light of plaintiff's conduct which was the inducing cause of the defendant's alleged illegal use of her picture. She has chosen, instead, to seek equitable relief in the expectation undoubtedly that the interlocutory judgment granting an injunction would be an adjudication of impelling force and result in an increased award of damages against defendant. That election requires me to act as a court of equity should and to deny the plaintiff the remedy she has sought.

Judgment will be for the defendant, dismissing the complaint, with costs.

Judgment dismissing complaint.

CANANDAIGUA NAT. BANK v. CLEVELAND, C., C. & ST. L. RY. CO.

(Supreme Court, Appellate Division, Fourth Department. January 15, 1913.)

CARRIERS (§ 57*)—CARRIAGE OF GOODS—BILL OF LADING—DUTIES OF CARRIER.

Where the owner takes a bill of lading, "Order of (consignee), notify" C., and attaches a draft to the bill of lading and delivers it to a bank for value, the title to the goods passes to the bank, and the carrier is liable to the bank for conversion, if it delivers the shipment without surrender of the bill of lading; the fact that the consignor and consignee were the same not altering the contract obligations of the carrier as expressed in the bill of lading.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 169-178; Dec Dig. § 57.*]

McLennan, P. J., dissenting.

Appeal from Supreme Court, Trial Term, Ontario County.

Action by the Canandaigua National Bank against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before McLENNAN, P. J., and KRUSE, ROBSON, FOOTE, and LAMBERT, JJ.

Daniel M. Beach, of Rochester, for appellant.

Arthur S. Hamlin, of New York City, for respondent.

LAMBERT, J. This action involves the value of a car load of apples, shipped from Farmington, N. Y., to Terre Haute, Ind. The shipment originated upon the Lehigh Railroad, and the defendant was the delivering carrier. The apples were loaded by the Manchester Produce Company, which concern owned the fruit, having collected and purchased same in the vicinity of Farmington.

Through a pre-existing arrangement, this fruit was to be shipped to John W. Neumann & Co., a copartnership, which was to market the apples, first remitting to the Produce Company the cost price thereof, and ultimately the Produce Company and Neumann & Co. were to share equally in any profits of the venture. Similar practices had been engaged in by these two business concerns prior to this particular

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

shipment. At the request of Neumann & Co. and in pursuance of prior arrangements, and for the purpose of facilitating the marketing of these apples, this car was billed out as though Neumann & Co. were the shippers. They were named in the bill of lading as consignors. As between these two concerns, at least, this manner of shipment was not intended to evidence any change of title to the property, but was merely adopted for convenience. The actual title to the apples still remained in the Produce Company.

In the bill of lading, the consignees were named as follows: "Order John W. Neumann & Co. Notify Dan Case." This manner of naming the consignees, under the terms of the instrument had a particular significance. Upon the face of the bill of lading and across the end thereof, in heavy type, is printed:

"If the word 'order' is written immediately before or after the name of the party to whose order the property is consigned, the surrender of the bill of lading, properly endorsed, shall be required before the delivery of the property at destination, as provided by section 9 of the conditions of the uniform bill of lading, on the back hereof."

And on the back of this instrument, and by said section 9, it is provided:

"If the word 'order' is written hereon immediately before or after the name of the party to whose order the property is consigned, without any condition or limitation other than the name of a party to be notified of the arrival of the property, the surrender of this bill of lading, properly endorsed, shall be required before the delivery of the property at destination. If any other than the aforesaid form of consignment is used herein, the said property may, at the option of the carrier be delivered without requiring the production or surrender of this bill of lading."

It is to be observed that this contract is definite and certain in its terms, and the obligations and rights of the carrier therein clearly expressed. That this shipment was within those express provisions is not controverted.

After initiating this shipment and receiving this bill of lading, the Manchester Produce Company attached to the bill of lading a draft, drawn upon Neumann & Co. for the cost price of these apples, and then sold the draft and bill of lading to the plaintiff. The draft and bill of lading were in the due course of business presented for payment to Neumann & Co., and such payment was refused, upon the claim made that the Produce Company was then largely indebted to Neumann & Co.

Upon the arrival of this car at destination, the defendant, upon the written order of Neumann & Co., delivered same to "Dan Case," who was named therein to be notified of its arrival without requiring the production, indorsement, or surrender of the bill of lading. Upon this state of fact plaintiff brings this action for conversion. It must be conceded that the defendant breached the contract of carriage by not complying with its provisions, and, further, that conversion is the proper remedy, if any exists in plaintiff. The sole question presented, of consequence, is whether plaintiff is in a position to assert the contract obligation of the bill of lading as against the defendant.

This manner of shipping property has the sanction of usage, and,

based upon the carrier's agreement to require the surrender of the original bill of lading, a commercial practice has become established, whereby the shipper is enabled, through banking institutions, to secure the value of the property consigned, in advance of its delivery at destination by the sale or pledge of the bill of lading. Such sale or pledge, in effect, secures the value advanced by pledging the property represented thereby. Such a course of commercial dealing has long had the sanction of our courts. It has been uniformly held that the transfer of the bill of lading transfers the title to the property represented thereby, and that such transfer of the bill of lading may be by mere delivery thereof when such is the intention. *City Bank v. R. W. & O. R. R. Co.*, 44 N. Y. 136; *Commercial Bank v. Pfeiffer*, 108 N. Y. 242, 15 N. E. 311; *Leinkauf Co. v. Grell*, 62 App. Div. 278, 70 N. Y. Supp. 1083; *Canandaigua Bank v. Southern Ry. Co.*, 64 Misc. Rep. 327, 118 N. Y. Supp. 668. It is also well settled that the bill of lading is valid and enforceable in the hands of a bona fide transferee in all its terms and provisions. *Merchants' Bank v. U. R. R. & T. Co.*, 69 N. Y. 373; *Nat. Com. Bank v. Lackawanna Co.*, 59 App. Div. 270, 69 N. Y. Supp. 396.

The only question remaining is whether the sale by the Manchester Produce Company to plaintiff transferred any title. We can discover no reason why it did not. The Produce Company was concededly the owner of the apples. It had bought and paid for them. It had not transferred the title to any other person, and its right to effect a sale thereof was unlimited except that such sale was required to be subject to its contract for the transfer of such title to Neumann & Company, upon payment of the draft. The title of the Produce Company being complete, there was no restriction upon its right to sell the same, and that object was accomplished by the transfer of the bill of lading. The bank was then in a position to insist upon all the carrier's obligations, as expressed in the bill of lading.

Nor does the fact that the Produce Company named Neumann & Co. as consignors have any effect upon the status of the parties. Such fact did not work to the detriment of the carrier in any manner, and hence no estoppel could arise. The bill of lading makes no restriction upon the shipment in the name of the consignee instead of the consignor. Under its plain provisions, even if Neumann & Co. had actually initiated the shipment, its obligation to require the surrender of the bill of lading remained unchanged. Under such circumstances, the rights of third parties were just as likely to intervene shipment and delivery. In fact, it is not an infrequent practice for the consignor of goods to ship them to his own order, with an accompanying direction to notify third parties, and then to dispose of the bill of lading to banking institutions, as was done in this case, thus securing his money for the shipment in advance of its delivery. Such a transaction is evidenced and sustained by the case of *National Commercial Bank v. Lackawanna Company*, *supra*. It will thus be seen that the naming of Neumann & Co. as consignors did not affect the contract obligation of the carrier. The only safe course for the carrier was to observe its contract. By so doing it could sustain no loss, while by its violation it would necessarily defeat the intervening property rights

of third persons, who might deal with the bill of lading, upon the faith of the agreement of the carrier to require its production before making delivery. This is equally true, whether the railroad supposed Neumann & Co. to be the consignors or not. It cannot be said that the delivery in this instance was induced, in any way, by the manner in which this shipment was made. The carrier chose to violate the plain obligation it had assumed and with entire disregard to the rights of the plaintiff. Because of such delivery the defendant was unable to surrender the property to the plaintiff and a conversion thereby arose, for which the defendant should be held liable.

The judgment appealed from should be affirmed, with costs. All concur, except McLENNAN, P. J., who dissents.

WIGHTMAN et al. v. COTTRELL et al.

(Supreme Court, Appellate Division, Fourth Department. January 8, 1913.)

1. HUSBAND AND WIFE (§ 14*)—ESTATE BY ENTIRETY—EASEMENTS.

The fee in the street in front of property of tenants by the entirety is in both, subject to the public easement, and the consent of the husband to a private party to lay pipes therein is not binding on the wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 71-89; Dec. Dig. § 14.*]

2. JUDGMENT (§ 743*)—RES ADJUDICATA.

In an ejectment to compel defendants to remove water pipes in the street in front of plaintiff's property, a decision in a prior action by the defendants to restrain him from interfering with the pipes that the defendants had a revocable license estops such defendants to claim more.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1253, 1275-1277; Dec. Dig. § 743.*]

3. LICENSES (§ 44*)—DISTINGUISHED FROM EASEMENT.

Where plaintiff said that he had no objections to defendants putting pipes in the street in front of his property, provided the defendants would allow him to put in hydrants for three dollars per year, it was no more than a revocable license, and could not be construed to give an easement.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 97-99; Dec. Dig. § 44.*]

4. WATERS AND WATER COURSES (§ 192*)—USE OF STREETS—PRIVATE WATER PIPES—RIGHTS OF ABUTTING OWNERS.

Where city authorities allowed defendants to put water pipes in the street, but no contract was entered into, and defendants were not obliged to furnish water to any one they did not choose to serve, the defendants had no right to keep them in the street without the consent of the abutting property owners.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 279; Dec. Dig. § 192.*]

Exceptions from Trial Term, Steuben County.

Action by Henry A. Wightman and another against Delano D. Cottrell and another. Verdict was directed for plaintiff, and the defendants brought exceptions, directed to be heard in the first instance by the Appellate Division. Exceptions overruled.

See, also, 152 App. Div. 955, 137 N. Y. Supp. 1149.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Argued before McLENNAN, P. J., and KRUSE, ROBSON, and LAMBERT, JJ.

William H. Nichols, of Bath, for plaintiffs.

James O. Sebring, of Corning, for defendants.

ROBSON, J. This action is in ejectment. Plaintiffs' purpose is to compel defendants to remove a 1¼-inch water main placed by defendants in the highway in front of plaintiffs' premises. Plaintiffs' title to the fee of the portion of the street in which this part of the pipe line is laid seems to be unquestioned. Defendants assert their right to maintain the pipe as laid for the following reasons:

(1) That it was placed in the street with plaintiffs' consent and for an adequate consideration; and defendants thereby acquired the right as to plaintiffs to maintain it in the street.

(2) That it was so placed with the consent of the public authorities authorized to grant such privilege and in the manner required by law.

[1] In considering the first claim of defendants, it should be borne in mind that title to the fee of the premises subject to the public easement is in both plaintiffs, who apparently hold as tenants by the entirety. There is an entire absence of any evidence to show that the wife, who is the plaintiff Sarah A. Wightman, ever consented in any way to the laying of the pipe. As to her, therefore, this first defense must necessarily fail. As to the other plaintiff, this issue was conclusively determined in his favor in a prior action brought by the present defendants as plaintiffs against him as defendant therein to restrain him from interfering with this pipe and taking water therefrom.

[2] The complaint in that action, among other things, contains the allegation "that, before laying said pipe in front of defendant's premises, one of the plaintiffs for a valuable consideration duly acquired from him the right to lay said pipe." This was denied by the defendant, and the court in that case found in effect, and the judgment as amended entered in that action in terms determines "that the plaintiffs have from defendant a revocable license to maintain their water pipes on defendant's premises in said highway in front thereof." This issue was tendered by plaintiffs in that action and as an incident of the trial litigated and expressly determined. Under such circumstances, the judgment in that action estops defendants in this action from questioning at least as to plaintiff Henry H. Wightman, who was a party to that action, the fact that their occupation of this part of the highway was solely by virtue of a revocable license. *Pray v. Hege-man*, 98 N. Y. 351; *Barber v. Kendall*, 158 N. Y. 401, 53 N. E. 1.

[3] Even if it should be held that the former judgment does not operate as an estoppel, I think that the proof on this trial shows that no grant to the defendants to maintain the water pipe in the highway was proved, and, at most, they had a mere naked license to place the pipes in the highway which continued only so long as it remained unrevoked by the owners of the fee. The agreement, if any, under which defendants laid the pipe in the highway, appears in the evidence of the defendant Van Doren, being a conversation he had with

plaintiff Henry A. Wightman just before the pipe was laid. His version is as follows:

"I said to Mr. Wightman that we were contemplating putting in a water pipe. 'Would you have any objections to our running a pipe down by your property?' He said, 'Not in the least,' to go ahead, and that he was willing if we could place a hydrant on his line where he could get water for his buildings to pay us \$3 a year for each one of his houses," etc.

This does not seem to establish even a license based on a consideration, much less a grant in form necessary to convey an easement. Such an easement to do some act of a permanent nature upon the lands of another cannot be created by a license even when in writing and based upon a good consideration. Of course, a license protects the licensee while it lasts; but after it has been revoked its protection ceases. *White v. Manhattan Railway Co.*, 139 N. Y. 19, 34 N. E. 887.

[4] Second. Neither can defendants establish a right to occupy plaintiffs' premises with their water pipes by asserting the permission given them by the town authorities to lay their pipes in the highway. Though defendants insist that they are maintaining a public water system, yet it is clear that the pipe was laid and has since been operated, as the evidence shows, to serve their private uses. It is true that as maintained any family could use water from the limited hydrant supply by paying them \$3 per year for the privilege. But no contract was made with any municipal body, or official, for supplying water for public use; and no obligation by express, or implied, agreement, or otherwise rested upon defendants to furnish it to any one other than such persons as they might choose to serve. The case of *Cary v. Dewey*, 127 App. Div. 478, 111 N. Y. Supp. 261, seems to be an authority decisive of this point.

Defendants' exceptions should be overruled, motion for a new trial denied, and judgment ordered for the plaintiffs upon the directed verdict, with costs. All concur.

MUMM v. DANCE.

(Supreme Court, Appellate Division, Fourth Department. January 8, 1913.)

1. TRIAL (§ 337*)—VERDICT CONTRARY TO INSTRUCTIONS.

Where, in an action for damage by a collision between plaintiff's and defendant's teams after defendant's team had run away, the court charged that if the strap with which defendant tied the team was a proper strap, and the horses were hitched by tying the strap to the outside horse as testified, defendant should recover, a verdict for plaintiff could not be sustained on the ground of negligence because only the outside horse was tied by the strap in front of the other horse, so that it might be broken by the untied horse coming in contact with it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 790; Dec. Dig. § 337.*]

2. MUNICIPAL CORPORATIONS (§ 706*)—NEGLIGENCE—RUNAWAY TEAM.

Evidence in an action for injuries to plaintiff's team by collision with defendant's runaway team *held* not to sustain a verdict for plaintiff on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & *Rep'r Indexes*

the ground of negligence in only tying the strap to the outside horse, so that the inside horse came in contact with it, and broke it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.*]

McLennan, P. J., dissenting.

Appeal from Trial Term, Erie County.

Action by Frederick J. Mumm against Frank T. Dance. From a judgment for plaintiff, and an order denying a motion for new trial, defendant appeals. Reversed.

Argued before McLENNAN, P. J., and KRUSE, ROBSON, FOOTE, and LAMBERT, JJ.

Wende & Wende, of Buffalo, for appellant.

George Keating, of Buffalo, for respondent.

KRUSE, J. The defendant's team ran away and collided with the plaintiff's team, which plaintiff was driving in one of the public streets in the city of Buffalo, killing one of the plaintiff's horses. The jury rendered a verdict in favor of the plaintiff for the value of the horse, predicated upon negligence.

The evidence shows that the defendant was delivering a load of coal to a certain church. The team was in charge of a driver, who testified that after reaching the church he tied the outside horse of the team to an iron railing, and then left the team and entered the church basement. The reason he hitched the outside horse, as it seems, was because that horse was young and full of life; the other was not. Apparently, the horses became frightened, broke the tie strap, and ran away. One part of the tie strap was still hanging to the bridle after the team was caught. The other was tied around the railing, as several witnesses testify, although one of the witnesses, who caught the horses, did not observe the broken tie strap hanging from the bridle. The broken tie strap was produced in court, and seems to have been suitable for hitching purposes. The weight of the evidence is that the horse was tied as the defendant's driver testified, and the learned trial judge so held, saying in his opinion delivered upon the motion for a new trial that, if the case is to turn upon the simple fact as to whether the horse was tied to the railing, the verdict should be set aside as against the weight of the evidence. But he seems to have concluded to sustain the verdict upon the theory that the jury might find that the team was not properly secured, because only one of the horses was tied, and that one the outside horse, with the tie strap running across and in front of the other horse to the iron railing, so that, if the team became frightened, the tie strap might easily be broken by the untied horse coming in contact with it.

[1] I think this phase of the question was covered by the main charge, but the difficulty in sustaining the verdict upon that theory is that the judge charged the jury afterward, at the request of the defendant's counsel, that if the jury believed that the strap was a proper strap, and that the horses were hitched as testified to, then the defendant would be entitled to a verdict of no cause of action.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[2] That necessarily excluded the other grounds. I think the evidence is insufficient to sustain the verdict upon that theory, or at least the verdict is against the evidence upon that question.

The judgment and order should therefore be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur, except McLENNAN, P. J., who dissents in a memorandum

McLENNAN, P. J. (dissenting). This case as to the facts is very simple, and no question of law is involved. The defendant was delivering a load of coal to a church on Walden avenue in the city of Buffalo, N. Y., by means of a coal wagon and team of horses, which team and wagon were in charge of a driver employed by the defendant. When the driver (defendant's employé) reached a point in the public street in front of the church at which the coal was to be delivered, it was apparently necessary for him to ascertain just how and where such coal should be delivered, and at that time he stopped his team and alighted from the wagon, and in securing his team until such information could be obtained he hitched the off or outside horse by a strap extending across the breast of the other horse, and fastened to an iron railing in front of such church. While the driver was investigating as to how or where the coal should be delivered, the team became frightened, the strap extending across the breast of the other horse to the railing was broken, and the horses ran away, doing the damage complained of by the plaintiff. It is conceded that the plaintiff was not guilty of contributory negligence.

The jury has found a verdict for the plaintiff. As I have said, it is expressly stipulated that the plaintiff was free from contributory negligence, and it is not urged that the verdict is excessive. Therefore, the only question presented is whether or not the defendant was guilty of actionable negligence.

I think that the manner in which the team in question was hitched by the defendant's employé was sufficient to justify the finding of the jury that such employé was negligent in hitching such team. By such hitching from the outside horse to the railing the inside horse was unrestrained from pressing his entire weight against the hitching strap which was supposed to hold the team. As it seems to me, it was impossible for the strap thus fastened to hold the team, and it was a question of fact whether under those circumstances the team was properly fastened.

It is suggested by the prevailing memorandum in this case that the trial judge charge the jury, in substance, that if the team was tied in the manner testified to by the plaintiff's witnesses, to wit, from the bits of the outside horse across the breast of the horse next to the curb, and then attached to the railing, no recovery could be had. It seems to me that that is not the meaning of the charge. The court said:

"Well, it is the duty, of course, to securely fasten—that is, to use every reasonable precaution to securely fasten—them. If the testimony of the plaintiff is true that this hitching strap was broken, as far as the mere tying is concerned it appeared to have been sufficient, as far as being securely tied—

if the testimony is true. But the rule is that one should use reasonable care to secure his team."

Counsel for the defendant asked the court to charge as follows:

"I ask your honor to charge the jury that if they believe that the strap (Exhibit 2) was a proper strap, and that the horses were hitched as testified to, that then the defendant is entitled to a verdict of no cause of action.

"The Court: I think I will so charge."

It appears that the strap with which the horses were hitched was submitted to the jury, and their verdict indicates that they thought that the strap was not a proper strap for hitching horses under the situation disclosed by the evidence in this case.

My conclusion is that the manner of hitching the team in question was negligent in the extreme, and, that the jury having found that the strap used for the purpose of such hitching was inadequate and improper, their verdict that the defendant was guilty of negligence which resulted in the injury complained of was amply sustained by the evidence.

I therefore recommend that the judgment and order appealed from be affirmed, with costs.

POWELL v. NEW ENGLAND COTTON YARN CO.

(Supreme Court, Appellate Division, Fourth Department. January 8, 1913.)

1. SALES (§ 288*)—WARRANTY—OPERATION—ACCEPTANCE.

Where an oral contract for the sale of yarn contained an express warranty that it should be of a quality equal to that contained in a sample of cloth exhibited to the buyer at the time of the sale, such express warranty survives acceptance of the goods.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 817-823; Dec. Dig. § 288.*]

2. SALES (§ 442*)—ACTION FOR BREACH OF WARRANTY—DAMAGES—DIFFERENCE BETWEEN ACTUAL VALUE AND VALUE AS WARRANTED.

Where an article is delivered to a buyer with an express warranty, the measure of the buyer's damages on breach of such warranty is the difference between the value of the article if it had been as warranted and its actual value.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442.*]

3. SALES (§ 440*)—BREACH OF WARRANTY—DAMAGES—EVIDENCE.

In an action for breach of an express warranty that yarn should be of a quality equal to that contained in a sample of cloth exhibited to the buyer at the time of the sale, proof that underwear manufactured from the yarn furnished was worth 50 cents per dozen less than if manufactured from such yarn as defendant was to furnish was not the proper mode of showing the difference in value, and hence the admission of such proof was error.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1261-1276; Dec. Dig. § 440.*]

Appeal from Trial Term, Oneida County.

Action by Charles A. Powell against the New England Cotton Yarn Company. From a judgment of the Supreme Court upon a verdict of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a jury in favor of plaintiff in the sum of \$10,115.21, damages and costs, and from an order denying defendant's motion for a new trial made on the minutes of the court, defendant appeals. Judgment and order reversed, and new trial granted.

Argued before McLENNAN, P. J., and KRUSE, ROBSON, FOOTE, and LAMBERT, JJ.

J. L. Moore, of Ft. Plain, for appellant.

Everett E. Risley, of Utica, for respondent.

McLENNAN, P. J. The plaintiff is a manufacturer of knit underwear, and for the purposes of that business ordered from the defendant, which is engaged in the manufacture and sale of cotton yarn, 250,000 pounds of yarn known as 14/1 combed peeler cops, to be delivered at the rate of 50,000 pounds per month, at 28 cents per pound.

[1] Upon the evidence the jury were warranted in finding that the contract for the sale of the yarn was made orally, and contained an express warranty that the yarn should be of a quality equal to that contained in a sample of cloth exhibited to the plaintiff at the time of the sale, and it is well established by authority that an express warranty of that nature survives acceptance of the goods. As soon as the first installment of yarn was delivered, defects were discovered by the plaintiff, and he immediately notified the defendant that he would not accept such yarn in fulfillment of the contract, but would hold the defendant liable for damages for the breach of its warranty as to the quality of the yarn. The subsequent installments of yarn were defective, and similar complaints were in each instance made by the plaintiff, and, while payment in full was made, each payment was accompanied by a letter stating that payment was made under protest, and without waiving any of the rights which the plaintiff claimed to have under the contract.

The only evidence given by the plaintiff as to the amount of damages sustained by him was to the effect that a certain number of dozens of underwear were manufactured from the yarn furnished, and that they were worth 50 cents per dozen less than they would have been if made from such yarn as the defendant contracted to furnish. This evidence was received over the objection and exception of the defendant, which claimed that it was not the proper measure of damages in the case. The court in its charge stated the measure of damages to be the difference between what the goods would have been worth if as represented and what they were actually worth in the form they were furnished, and referred to evidence above stated. At the close of the charge, defendant's counsel requested the court "to instruct the jury that the only measure of damages that can be considered is the difference between the sample and the delivered yarn, if any difference existed, and that no consideration can be had of any comparative values in the manufactured garments in this case." To this the court replied:

"Well, I so charge. The measure of damages here, gentlemen, is the difference in the value of the yarn actually furnished, and that which the defendant agreed to furnish, and did not furnish."

[2] We think that the court correctly charged as to the measure of damages:

"It has long been the settled law of this state that, where an article is delivered to the purchaser with an express warranty, the measure of the purchaser's damages on the breach thereof is the difference between the value of the article if it had been as warranted and the actual value." *Isaacs v. Wannamaker*, 189 N. Y. 122, 81 N. E. 763. See, also, *Muller v. Eno*, 14 N. Y. 597.

[3] There was, however, in the case no evidence upon which the jury could determine the amount of damages sustained by the plaintiff under the proper rule of damages.

The plaintiff relies upon the case of *Parks v. Morris Axe & Tool Co.*, 54 N. Y. 586, to sustain the judgment. In that case it appeared that the plaintiff had contracted to deliver to the defendant steel of a certain quality; that the steel delivered was not as represented, but contained certain defects not discoverable upon inspection at the time of delivery, but which became patent when the steel was manufactured into axes. It further appeared that the plaintiff understood that the steel furnished was to be used in the manufacture of axes. The defendant, relying upon the plaintiff's warranty, manufactured axes from the steel, and upon the trial was allowed to show that the axes so manufactured were worth a certain amount less per dozen than they would have been if the steel furnished had been of the quality represented. The Court of Appeals held that this was a competent method of arriving at the damages sustained by the defendant for the breach of the warranty in that case.

We think, however, that that case is not an authority to sustain the contention of the respondent in the case at bar. It there appears, as above stated, that the defendant used the steel in the manufacture of axes, relying upon the expressed warranty of the plaintiff. In the case at bar it appears without contradiction that the defects in the yarn were discovered by the plaintiff before it had been used in the manufacture of underwear, and it cannot be said that the plaintiff used the yarn relying upon the expressed warranty of the defendant. While it is true, as stated in the case of *Parks v. Morris Axe & Tool Co.*, supra, "that the rule of damages is the difference in value, and that the market price is one mode, but by no means the only mode, of arriving at that difference," we think that in the case at bar the plaintiff did not adopt the proper mode of showing the difference in value, and that the court committed error in receiving the evidence as to the difference in the value of the manufactured garments. There was no other evidence in the case from which the jury could determine what the damages were, and, even if there had been, evidence of the difference in value of the manufactured garments should not have been received because it would only serve to confuse the question in the minds of the jury.

We therefore conclude that the judgment and order must be reversed and a new trial ordered with costs to the appellant to abide the event, for the reason that the court committed error in the reception of the

evidence above referred to as to the difference in value between the manufactured garments.

Judgment and order reversed, and new trial granted, with costs to appellant to abide event. All concur.

PEOPLE ex rel. WOGAN v. RAFFERTY.

(Supreme Court, Appellate Division, Second Department. January 17, 1913.)

1. **CONSTITUTIONAL LAW (§ 70*)—JUDICIAL FUNCTIONS—PROPRIETY OF STATUTE.**
The courts cannot determine the propriety of a statute, but merely its constitutionality.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.*]
2. **CONSTITUTIONAL LAW (§ 48*)—VALIDITY OF STATUTE—DUTY OF COURTS.**
While it is presumed that a statute is constitutional, the courts should not hesitate to hold a statute unconstitutional if it clearly appears so.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]
3. **COURTS (§ 41*)—COUNTY COURTS—NATURE.**
The present County Courts are essentially new courts, being first created by the Constitution of 1846, and are not merely continuances of the Courts of Common Pleas and General Sessions of the Peace.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 162, 181-183; Dec. Dig. § 41.*]
4. **CLERKS OF COURTS (§ 3*)—APPOINTMENT—CONSTITUTIONALITY OF STATUTE.**
Laws 1909, c. 35, known as the "Judiciary Law," as amended by Laws 1911, c. 640, and chapter 826, conferring upon the county clerk of Kings county the power to appoint a chief clerk of the County Court for the term of five years with power of removal for cause, is not unconstitutional as invading the constitutional rights of the county clerk, in that, while under the Constitution he is elected for only two years, the statute authorizes him to appoint a chief clerk to hold for five years.
[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 4-7; Dec. Dig. § 3.*]
5. **OFFICERS (§§ 2, 49*)—TERMS—POWER OF LEGISLATURE.**
The Legislature has power to provide for a fixed or indeterminate term of office as to officers whose terms are not fixed by the Constitution, and even the power of removal of subordinates by constitutional officers may be restricted.
[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 2, 70; Dec. Dig. §§ 2, 49.*]
6. **CLERKS OF COURTS (§ 3*)—APPOINTMENT—POWER OF LEGISLATURE.**
In view of Const. art. 6, § 19, merely providing that the several county clerks shall be clerks of the Supreme Court with powers and duties prescribed by law, the Legislature has power to provide for all other clerkships, including clerks of the County Court.
[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 4-7; Dec. Dig. § 3.*]
7. **CONSTITUTIONAL LAW (§ 20*)—CONSTRUCTION.**
A uniform construction of constitutional provisions and statutes enacted thereunder often has controlling weight in determining a constitutional question.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 14, 15; Dec. Dig. § 20.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

8. OFFICERS (§ 110*)—DUTIES—STATUTORY CONTROL.

The Legislature has power to regulate the duties of locally elected officers.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 176-179, 182; Dec. Dig. § 110.*]

9. QUO WARRANTO (§ 55*)—TRIAL OF TITLE—BURDEN OF PROOF.

In an action to try title to an office, the party whose title is assailed must show by what authority he holds the office.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. §§ 63-65; Dec. Dig. § 55.*]

Appeal from Trial Term, Kings County.

Quo warranto by the People, on the relation of Thomas F. Wogan, against John T. Rafferty. From a judgment for relator (77 Misc. Rep. 258, 136 N. Y. Supp. 4), defendant appeals. Affirmed.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

Hugo Hirsh, of Brooklyn, for appellant.

Henry P. Molloy, of New York City, for respondent.

WOODWARD, J. This appeal brings up for review a judgment of the Supreme Court of Kings county in an action of quo warranto instituted by the people of the state upon the relation of Thomas F. Wogan (hereinafter styled the plaintiff) against John T. Rafferty (hereinafter styled the defendant) to test the title to the office of chief clerk of the County Court of Kings county, now held by the defendant, and to which plaintiff claims title by virtue of an appointment for the term of five years, made in July, 1911, and which will not terminate until July, 1916. The judgment appealed from held that the plaintiff was entitled to the office in question, and that the defendant was holding it without lawful warrant, and that he be ousted and excluded therefrom, and the defendant has appealed from this judgment.

The facts in the case are simple and undisputed, and present only a question of law, which is clean cut and sharply defined, though presenting interesting aspects for discussion.

On June 30, 1911, Henry P. Molloy, who was county clerk of Kings county, appointed the plaintiff, Mr. Wogan, to the position in question for the term of five years, beginning July 13, 1911. This appointment was made under authority of chapter 35 of the Laws of 1909, known as the "Judiciary Law," as amended by chapters 640 and 826 of the Laws of 1911, and which conferred upon the county clerk the power to make such appointment for the term of five years. Under the laws theretofore in force the power of appointment to the position of chief clerk had been lodged in the county judges of Kings county, who had like authority to make such appointment for a term of five years. The legislation transferring the power of appointment to the county clerk is said to have been partisan in its nature.

[1] We cannot, however, in the exercise of the judicial functions to which we are confined, consider the nature, or even propriety, of a given act of the sovereign legislative power of the commonwealth,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

but only its validity in relation to constitutional restraints, and, tested by this standard, we are constrained to hold that the conclusion reached by the trial justice of the court below was legally sound, if not upon all of the grounds formulated in its opinion, nevertheless upon the substantial foundations of its conclusion.

The term of office of County Clerk Molloy expired at the close of the year 1911, at which time Mr. Wogan was serving under his appointment by Mr. Molloy as chief clerk of the County Court, having acted as such continuously since his appointment on June 30, 1911. On January 1, 1912, Charles S. Devoy, who had himself served as chief clerk of the County Court from November, 1902, until June 30, 1911, when he was retired, entered upon the duties of county clerk of Kings county, to which he had been elected at the preceding election, and immediately upon taking office appointed the defendant John T. Rafferty to the position of chief clerk of the County Court of Kings county, describing the office, however, to which Mr. Rafferty was appointed as that of "deputy county clerk of Kings county to act and be known as the chief clerk of the County Court of Kings county." Mr. Rafferty entered upon the discharge of the duties of chief clerk of the County Court on January 1, 1912, excluding the plaintiff, Mr. Wogan, therefrom, and in March, 1912, the present action was begun to test the title of the conflicting claimants to the position.

The plaintiff, Mr. Wogan, claims that, under the laws authorizing his appointment, he cannot be lawfully removed from office except for misconduct, until the expiration of his five-year term. On the other hand, it is claimed on behalf of the defendant that the legislative acts referred to, under which a five-year appointment to the office in question was authorized, are unconstitutional, in that they deprive the county clerk of constitutional powers, duties, and prerogatives as clerk of the County Court, and transfer them to a stranger not even appointed by him, and for a term extending several years beyond his own term of office.

It is clear that the sole question involved in the solution of this controversy is whether the acts of the Legislature which assumed to confer authority upon the county clerk of Kings county, whoever he might be at a given time, to appoint the chief clerk of the County Court for a period extending beyond the county clerk's own term of office, was in conflict with any express or necessarily implied provision or prohibition of the state Constitution. If the laws in question are repugnant to constitutional limitations, they must be declared null and void.

[2] While the courts approach determination of constitutional questions with a presumption in favor of the validity of a given legislative act, they should not hesitate, in the performance of their sworn duty, to hold the Legislature within the limits of power that have been imposed by the people themselves through their organic constitutional law. If, on the contrary, the laws referred to do not so intrench upon constitutional restrictions, they are valid, and must be given force and effect, regardless of consequences or other considerations, or of

what our views may be as to the propriety of such legislation, or the motives which inspired it.

The salient point urged by the appellant is that the county clerk of Kings county is a constitutional officer, and that among his duties and responsibilities are those of clerk of the County Court of said county, and that the recent acts of the Legislature providing for the office of chief clerk of the County Court of Kings county and for the appointment of such a chief clerk for a period of five years, where the county clerk himself is elected for only two years, deprives the county clerk of certain substantial rights, powers, and duties vested in him by the state Constitution. The learned counsel for the appellant has presented to us in support of his contention a brief showing painstaking research, ingenuity of thought, and fullness of argument; but we are not able to follow him to the conclusion for which he contends. The claim of the appellant is that, although the County Courts of the state as now existing were first designated as such in the state Constitution of 1846, they are as a matter of law only continuations of the Courts of Common Pleas and the Courts of General Sessions of the Peace which had long prior thereto existed and whose jurisdiction was essentially confined to their respective counties; and he frankly admits that if this position is not sound the case of the appellant must fail.

[3] While the decisions in which this question has, in some form, presented itself may not have squarely passed upon the proposition, several authorities, involving the question more or less directly, have treated the present County Courts of the state as essentially new courts brought into being for the first time by the Constitution of 1846, and from the examination that we have given to the matter we should feel constrained so to hold, were this consideration vital and the sole ground for reaching a conclusion in the present case. *Frees v. Ford*, 6 N. Y. 176; *People v. Bradner*, 107 N. Y. 1, 13 N. E. 87; *Foot v. Stevens*, 17 Wend. 483.

While this consideration would of itself dispose of the present contention adversely to the appellant, there are other substantial grounds, as we view the case, necessitating a like conclusion. In the first place, while for a period of years the chief clerk of the County Court of Kings county was appointed by the judges of the County Court and the validity of such procedure was unquestioned, the recent amendments under which the appointments of both the plaintiff and the defendant were made confer upon or restore such power of appointment to the County Clerk himself, so that, in view of the fact that the county clerk cannot in person act as special deputy clerk in all of the different numerous parts of the Supreme and County Courts constantly in session in a great county like Kings, he still has his appointee and representative acting as clerk of the County Court, which practically makes the situation in the County Court the same as in the Supreme Court in counties in which the county clerks appoint the clerks of the Supreme Court. The act defining the duties of the chief clerk of the County Court (section 283 of the Judiciary Law), under its latest amendment by chapter 640 of the Laws of 1911, provides that the

chief clerk shall have all the powers and fulfill all the duties of the county clerk of Kings county at any sitting or term of the County Court with respect to the business transacted thereat, and that such chief clerk and his deputies and assistants shall perform such duties as are imposed upon them by law as deputies and assistants of said County Clerk and such other duties as the judges may from time to time impose upon them, not inconsistent with their duties as deputies and assistants of the county clerk. These provisions confer upon the chief clerk of the County Court substantially only such duties as are performed by a special deputy clerk in the Supreme Court. It should also be noted in this connection that, while section 283 of the Judiciary Law, as finally amended and above referred to, speaks of the chief clerk of the County Court and "his said deputies and assistants," and requires such deputies and assistants to perform such duties as are now imposed upon them by law as deputies and assistants of said county clerk, these deputies and assistants, under the amendment of section 195 of the Judiciary Law (Laws of 1911, c. 826), are themselves appointed not by the chief clerk of the court, but by the county clerk, and such appointments do not even require the approval of the county judges, as was formerly the case. It does not seem important or vital to the determination of the question before us to analyze closely the proposition as to whether the chief clerk of the County Court is an independent officer from the county clerk, or to what extent he is subordinate to the county clerk. He and all of his assistants are appointed by the county clerk, and, while the Legislature has fixed his term at five years, he may be removed from office by the county clerk himself prior to the expiration of his term, for cause, after trial, upon charges and an opportunity to be heard and to defend. Judiciary Law, § 282, as amended by Laws of 1911, c. 640.

[4] The further point, however, is made that the constitutional rights of the county clerk are invaded by the fact that while the county clerk himself, under the state Constitution, is elected for two years in Kings county, the power given to a given county clerk to appoint the chief clerk of the County Court for a term of five years enables a given county clerk, as in the present case, to make an appointment which overlaps the entire period for which the next county clerk is elected. We are unable to concur in the validity of this objection for various reasons. In the first place, the appointment of the chief clerk of the County Court must now be made by the official known as the county clerk, for which power both parties in the present action contend. The duration of the term of appointment of the chief clerk goes merely to the tenure of office, and not to its character or duties. There appears to be no constitutional prohibition against extending the term of office of an appointee of a given official beyond the term of the particular incumbent of the office making the appointment. Cases might possibly arise in which such a law might be unconstitutional, but we do not think the present situation is of that kind. The Constitution provides that county clerks shall be chosen by the electors of the respective counties, and that all county officers whose election or ap-

pointment is not provided for by the Constitution shall be elected by the electors of the respective counties, or appointed by such other county authorities as the Legislature shall direct. Constitution, art. 10, §§ 1, and 2. As has been shown, under the law as it now stands, the chief clerk of the County Court is appointed by the county clerk, who is himself elected by the electors of the county, and who can, therefore, be given authority by the Legislature to appoint other county officers, even if we assume that in providing for a chief clerk of the County Court the Legislature created a new office, which, however, we do not think can reasonably be maintained. Even if the appointment of the chief clerk of the County Court for a period exceeding the term of the county clerk making the appointment should be objectionable if this period had been made absolute, such objectionable feature is probably eliminated in the present case by the power of removal, which is given for cause, prior to the expiration of the appointee's term.

[5] The Legislature undoubtedly has power to provide for a fixed or even indeterminate tenure of office as to officers whose terms are not fixed by the Constitution, and especially as to subordinates appointed by other officers, whether themselves elective or appointive, and much of the Civil Service Law is based upon this principle. In other words, even constitutional officers may be restricted in their power of removal of their appointees or subordinates by legislative provision, without invading any constitutional right of such official.

Another interesting point is to be noted. The Constitution does not prescribe the duties of any county clerk in any respect except that it provides, specifically, that the clerks of the several counties shall be clerks of the Supreme Court, with such powers and duties as shall be prescribed by law. Constitution, art. 6, § 19. There is no provision that the county clerks shall be clerks of the County Courts, such duties having been conferred solely by statute, so far as there is any express provision of law on the subject. It is contended, however, that as the county clerks were clerks of the courts which preceded the County Courts, and that the County Courts are only continuations of such courts, the right of county clerks to continue as clerks of the County Courts is as great or greater by implication than is their right, expressly given by the Constitution, to act as clerks of the Supreme Court.

[6] Even if the present County Courts were but continuations of prior courts, to which, as we have already stated, we cannot assent, we should hesitate to follow the logic of this contention, but should rather be disposed to hold that as the present Constitution and several prior Constitutions have expressly provided that the County Clerks should be clerks of the Supreme Court, and made no reference to their rights or duties as clerks of any other court, it was the intention of the framers of the Constitution to empower the Legislature to make provision for all such other clerkships.

[7] We find, indeed, that practically from the reorganization of the judicial system of the state by the Constitution of 1846, down to the present time, the Legislature and the courts have given a con-

struction to the constitutional provision relating to the county clerks as the clerks even of the Supreme Court, recognizing the right of the Legislature to provide for the appointment by the courts themselves of special deputy clerks and other officers and attendants in and upon courts, and such constant and uniform construction of constitutional provisions and of legislative powers thereunder has great and often controlling weight in the determination of a constitutional question. *People ex rel. Williams v. Dayton*, 55 N. Y. 367; *People v. Home Ins. Co.*, 92 N. Y. 328; *People ex rel. Lardner v. Carson*, 10 Misc. Rep. 237, 30 N. Y. Supp. 817, affirmed 86 Hun, 617, 35 N. Y. Supp. 1114; *Stuart v. Laird*, 1 Cranch, 299, 2 L. Ed. 115. It is, indeed, doubtful whether a clerk of the Supreme Court, or even of the County Court, can properly be deemed a county officer, but is not rather, essentially, a state officer, connected with the administration of the law of the state. We do not deem it necessary, however, to dispose of this particular proposition categorically.

[8] Under the well-recognized power of the Legislature to regulate, increase, or diminish the duties of even a locally elected officer, functions formerly performed by sheriffs and county clerks have been, from time to time, transferred to newly created officials, and such legislative powers, often arising from the necessities of a situation, have not been questioned. *People ex rel. Met. St. R. Co. v. Tax Commissioners*, 174 N. Y. 421, 67 N. E. 69, 63 L. R. A. 884, 105 Am. St. Rep. 674. In this way the county clerks of New York county and Kings county have been shorn of their powers and duties as recorders of deeds, and such functions transferred to newly created officers, known as "Registers of Deeds." Laws of 1852, c. 83; Laws of 1856, c. 190; *People ex rel. Kingsland v. Palmer*, 52 N. Y. 83.

So the former duties of county clerks as to drawing juries have in the larger counties been transferred to specially appointed commissioners of jurors, appointed otherwise than by the county clerks, and in no way subject to the authority of such county clerks, and such acts have been held constitutional. Laws 1858, c. 322. Coming to the courts themselves, a large number of laws have from time to time been passed, providing for the appointment of special deputy clerks and other court officers who attend upon courts by the courts themselves, and not by the county clerks, and the validity of such legislation has been generally recognized, alike by the Legislature, the state departments, local authorities, and the courts. *Fink v. Wallach*, 109 App. Div. 718, 96 N. Y. Supp. 543. It is not likely that this long continued recognition of legislative power will be, or should be, disturbed.

Finally, it is doubtful whether the defendant in the present action can be regarded as a party aggrieved by the judgment appealed from, so as to entitle him to appeal therefrom, irrespective of the right or lack of right of the plaintiff to the office of chief clerk of the County Court of Kings county now under consideration. The plaintiff claims the office by virtue of a statute which, if valid, justified his appointment. The defendant was, however, appointed to the office before the expiration of the term of plaintiff, and the plaintiff was ousted from the office before the expiration of his term. If the defendant's con-

tention that the statute under which plaintiff was appointed was unconstitutional, he places himself in the predicament of claiming to hold the office without warrant of any statute whatsoever, as in such case there would appear to be no warrant for defendant's appointment.

[9] In an action to test the title to a given office, it appears to be the law and practice that it is incumbent upon the party whose title to office is attacked to show by what right and authority he assumes to hold the office and to exercise its functions, and this the defendant does not appear to have attempted in the present case. *People ex rel. Bush v. Thornton*, 25 Hun, 456; *People ex rel. Judson v. Thacher*, 55 N. Y. 525, 14 Am. Rep. 312; *Vincent v. County of Nassau*, 45 Misc. Rep. 247, 92 N. Y. Supp. 32, affirmed 110 App. Div. 730, 96 N. Y. Supp. 446.

In view of the importance of the questions involved on this appeal, however, we have not deemed it advisable to rest our decision upon this technical foundation, but have considered the controversy in its larger aspects and on the merits, and have come to the conclusion that the judgment appealed from must be affirmed. All concur.

CASEY v. AUBURN TELEPHONE CO.

(Supreme Court, Appellate Division, Fourth Department. January 8, 1913.)

1. DEATH (§ 39*)—ACTION—LIMITATION.

Action by one's representative for his death from negligent injury is barred, he having died after the three years in which he could have sued for the injury, without having sued therefor within such time.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 54, 55; Dec. Dig. § 39.*]

2. LIMITATION OF ACTIONS (§ 195*)—EVIDENCE—PRESUMPTIONS—DEATH.

It will, in an action for death of one from an injury that he received more than three years before his death, be presumed that within the three years after the injury he commenced no action therefor, which is still pending, with the result of keeping alive the cause of action for death.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 711-716; Dec. Dig. § 195.*]

3. RELEASE (§ 29*)—EFFECT—JOINT WRONGDOERS.

A release of one joint tort-feasor, unless expressly reserving the right to pursue the others, releases them.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. §§ 64-70; Dec. Dig. § 29.*]

4. RELEASE (§ 29*)—EFFECT—JOINT WRONGDOERS—ESTOPPEL.

As regards the rule that release of one joint tort-feasor will release the others, it is immaterial that one claimed by the injured person to be liable, and who was released by him for a consideration, was in fact not liable; the party releasing thereby being estopped to claim such non-liability.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. §§ 64-70; Dec. Dig. § 29.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. APPEAL AND ERROR (§ 854*)—AFFIRMANCE—EFFECT.

Reasons, other than those stated by the trial court in the opinion on decision of a motion, existing for affirmance of the order thereon, its affirmance is not necessarily an adoption of such reasons.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3430; Dec. Dig. § 854.*]

Action by James A. Casey, as administrator, etc., of Mary E. Ramsey, deceased, against the Auburn Telephone Company. Defendant moves for a new trial on a case containing exceptions ordered to be heard at the Appellate Division in the first instance, after a verdict for plaintiff at the Cayuga County Trial Term. Motion granted, and judgment directed for defendant.

See, also, 148 App. Div. 900, 132 N. Y. Supp. 1123.

Argued before McLENNAN, P. J., and KRUSE, ROBSON, FOOTE, and LAMBERT, JJ.

Frank S. Coburn, of Auburn (Robert J. Burritt, of Auburn, on the brief), for plaintiff.

E. C. Aiken, of Auburn, for defendant.

ROBSON, J. [1, 2] Plaintiff's action, in which he has obtained a verdict against defendant, was based upon the allegation that his intestate came to her death by reason of an injury received because of a fall on a defective sidewalk in the city of Auburn, for the defective condition of which defendant was responsible. Intestate's injury, which, as the jury has found, caused her death, was received in April, 1907. She died about three years and ten months later. Defendant by its answer pleaded as a separate defense that plaintiff's cause of action had not accrued within three years of his intestate's death, that at the time of her death defendant was not liable to any action in her favor for the acts stated in the complaint, and further pleaded the statute of limitations as a bar to plaintiff's action. Though plaintiff alleged in his reply to defendant's answer that his intestate within three years after she was injured began an action against this defendant to recover damages therefor, which action was still undetermined at the date of her death, no proof establishing this fact was offered on the trial. At the close of plaintiff's case, defendant's counsel moved for a nonsuit, and at the close of all the evidence again moved for a directed verdict upon the separate ground, among others:

"That the action is barred by the statute of limitations; that three years from the date of the accident had expired before the death of Mary E. Ramsey, and no cause of action survived her death, or vested in her representatives."

Each motion was denied, and defendant's counsel duly excepted. This court has held in *Kelliher, as Adm'x, etc., v. New York Central & Hudson River Railroad Co.*, 138 N. Y. Supp. 894 (not yet officially reported), that, if a person having a claim for damages for injury due to another's negligence had during his life permitted the statute to become a bar to his claim, no cause of action for his death, though due to that injury, would survive, or accrue to his representative. Plaintiff's

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

intestate having survived the injury for more than three years, her cause of action was for that reason presumptively barred by the statute at the time of her death. It was therefore necessary for the plaintiff, in order to avoid the effect of that presumption, to show that the statute was in fact not a defense available to the defendant at the date of the death of his intestate. This, as I have said, he failed to do. The motion for a nonsuit should therefore have been granted for that reason.

[3, 4] It was shown on the trial that, after intestate was injured, she began an action against the city of Auburn to recover the damages she claimed to have sustained by reason of her injury, which she alleged was due to the negligence of the city. The city interposed an answer, and while the action was still at issue she made with the city a settlement of her cause of action against it for the sum of \$100, and in consideration thereof gave to it a general release and discharge, under seal, and without reservation of any kind, fully covering any and all claims or demands against it, which she then, or at any time prior thereto, had, or might have had, howsoever the same might have arisen or accrued. This release it is conceded operated to discharge the city from all further liability by reason of the cause of action alleged in her complaint; and would equally be a bar to any claim dependent upon that injury, or her death resulting therefrom, which could be made after her death by her personal representative. "Where the release contains no reservation, it operates to discharge all the joint tort-feasors; but, where the instrument expressly reserves the right to pursue the others it is not technically a release, but a covenant not to sue, and they are not discharged." *Gilbert, as Recr., etc., v. Finch et al.*, 173 N. Y. 455-466, 66 N. E. 133, 61 L. R. A. 807, 93 Am. St. Rep. 623. As has been stated, the release in this case contained no reservation whatever. Its effect, therefore, was to discharge, not only the city, but all tort-feasors liable for the same injury or tort, for there was but one tort, or injury, and the person injured can have but one satisfaction. This principle is tersely stated by Miller, J., in *Lovejoy v. Murray*, 3 Wall. (70 U. S.) 1, 17, 18 L. Ed. 129, as follows:

"But when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damage. But it is not easy to see how he is so affected, until he has received full satisfaction, or that which the law considers as such."

The learned trial justice in submitting this case to the jury charged, in effect, that the discharge given by plaintiff's intestate to the city would operate as a satisfaction of her claim and release all other persons who were liable to respond in damages for that injury, provided the jury should also find that the city was in fact liable for the injury as a tort-feasor; but also instructed the jury that, in the event they should find there was no liability of the city to respond to plaintiff's intestate in damages for the injury, then the release did not operate to discharge the person who was in fact liable therefor. The correctness of this instruction is presented by proper exceptions. It is true that the law as charged by the court is not without some support in

adjudicated cases. In *Hirschfield v. Alsberg*, 47 Misc. Rep. 141, 93 N. Y. Supp. 617, it is so stated. But the case which the court cites in support of that principle (*Atlantic Dock Co. v. Mayor, etc.*, of the City of New York, 53 N. Y. 64) does not seem to be a controlling authority for the proposition. In the latter case the effect of the decision seems to be that where the tort, or injury, is not single, but separable, so that each tort-feasor is liable not for the whole injury, but for separate injuries, then payment to the injured person of the whole damages by one liable only for a distinct part thereof will not extinguish the liability of the other tort-feasor for his part of the damages so as to prevent the former, to whom the party injured has assigned his claim, from recovering of the latter the amount of damages for which the latter was otherwise separately liable to the party injured. The court says:

"The defendants' position is this, then: That a good cause of action against them upon their conceded liability to the plaintiff is lost or is taken away by a wrong done to another not in any way connected with the defendants in the transaction. This cannot be so. A wrong done to one will not extinguish a right against another."

The clear weight of argument and authority seems, on the other hand, to establish that a release of one liable for an injury or tort releases all, who are also liable therefor, even though the one released was not in fact liable. This is so because as was said in *Hubbard v. St. Louis & M. R. R. Co.*, 173 Mo. 249, 256, 72 S. W. 1073, 1074:

"It does not lie in the mouth of such a plaintiff to say he had no cause of action against the one who paid him for his injuries, for the law presumes that the one who paid committed the trespass and occasioned the whole injury."

The same principle is thus expressed in *Brown v. City of Cambridge*, 85 Mass. (3 Allen) 474, 476:

"It is an ancient doctrine that a release to one joint trespasser or a satisfaction from him discharges the whole. The same doctrine applies to all joint torts and to torts for which the injured party has an election to sue one or more parties severally. Where for example a master is liable for the tort of his servant, a satisfaction from one discharges both, though they cannot be sued jointly. If it were not so, a party having a claim against several persons on account of a single tort might sue one and settle the suit, receiving damages. He might then sue another and settle in the same way, and repeat the proceeding as to all but one, and then sue him and recover the whole damage as if nothing had been paid by the others. A door would thus be opened for a class of speculations that do not deserve encouragement. The rule of law which makes one satisfaction or release a bar to further claims for the same tort is founded in good reason. The plaintiff is estopped to say that he had no claim against the waterworks for the tort, but compelled them to buy their peace by the settlement of a claim that was groundless, and therefore malicious, for this would be an allegation of his own wrongful act. He is to be regarded as having prosecuted his claim against them in good faith, and they admitted its validity so far as to compromise it."

Among the cases in which this rule of law has been applied, see *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107; *Miller v. Beck & Co.*, 108 Iowa, 575, 79 N. W. 344; *Tompkins v. Clay Street R. R. Co.*, 66 Cal. 163, 4 Pac. 1165; *Seither v. Philadelphia Traction Co.*, 125 Pa.

397, 17 Atl. 338, 4 L. R. A. 54, 11 Am. St. Rep. 905. It follows that the release given by plaintiff's intestate to the city of Auburn was a bar to plaintiff's action against this defendant.

[5] Plaintiff's counsel, however, urges that this question has already been decided by this court in favor of plaintiff in this same action. The case was before this court on a prior appeal from an order denying defendant's motion for judgment on the pleadings. The release in question was pleaded by defendant as a defense to plaintiff's cause of action. Plaintiff's reply to the answer referred to this release; but the allegations therein could not properly be taken as an admission of the execution and delivery of the release under circumstances warranting the conclusive inference that it was as to this defendant a bar to plaintiff's action. Other grounds existing for the affirmance of the order its affirmance is not necessarily to be considered an adoption by this court of the reasons stated by the trial court in its opinion on decision of the motion. *Uvalde Asphalt Paving Co. v. City of New York*, 149 App. Div. 491, 134 N. Y. Supp. 50; *Kelliher, as Adm'x, v. New York Central & Hudson River Railroad Co.*, supra.

In view of the fact that the defendant's motion to set aside the verdict must for the reasons above stated be granted and judgment directed for defendant, it is deemed unnecessary to consider the other exceptions presented by the record.

Defendant's exceptions sustained, order denying motion for the direction of a verdict in defendant's favor reversed, with costs, and judgment directed for the defendant with costs. All concur.

(79 Misc. Rep. 93.)

STEWART v. GILLETT.

(Supreme Court, Equity Term, Allegany County. January, 1913.)

1. VENDOR AND PURCHASER (§ 16*)—CONTRACT TO CONVEY—ACCEPTED OFFER.

Where a written offer to sell land was duly accepted and performance tendered by the purchaser before its withdrawal, the accepted offer became a contract binding on the vendor.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 17, 20; Dec. Dig. § 16.*]

2. VENDOR AND PURCHASER (§ 82*)—CONTRACT TO CONVEY LAND—BINDING EFFECT.

A vendor was not relieved from his contract to convey land by a subsequent agreement as to the manner in which the obligations of each party should be performed, or by the fact that the purchaser made an unaccepted compromise proposal.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 138, 139; Dec. Dig. § 82.*]

3. VENDOR AND PURCHASER (§ 175*)—CONTRACT TO CONVEY DOWER—DAMAGES FOR BREACH.

Where a vendor fails in his agreement to deliver a deed executed by his wife, the purchaser may retain out of the purchase money the present value of the wife's inchoate right of dower in the land.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 360-363; Dec. Dig. § 175.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. VENDOR AND PURCHASER (§ 174*)—BREACH BY VENDOR—DAMAGES TO PURCHASER—RIGHT TO RECOVER.

Where the vendor, while in default under his agreement to convey, took down and removed a building from the premises, the purchaser was entitled to retain its value out of the purchase money.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 358, 359; Dec. Dig. § 174.*]

5. VENDOR AND PURCHASER (§ 198*)—BREACH OF CONTRACT TO CONVEY—LIABILITY FOR TAXES.

Where a vendor while in default of his obligation to perform his contract to convey received the profits from the land, he, and not the purchaser, was chargeable with the taxes for such period.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 408-412; Dec. Dig. § 198.*]

6. VENDOR AND PURCHASER (§ 174*)—BREACH OF CONTRACT TO CONVEY—RIGHT TO DAMAGES.

Where a vendor, while in default of his obligation to perform his contract to convey, retained possession, and the purchaser was deprived of the use of the purchase money by reason of it being deposited in a bank pursuant to their agreement until the vendor should perform, the purchaser was entitled to an allowance on the purchase price for the amount of his damages.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 358, 359; Dec. Dig. § 174.*]

7. VENDOR AND PURCHASER (§ 174*)—BREACH OF CONTRACT TO CONVEY—MEASURE OF DAMAGES.

The measure of damages in such case for the purchaser's being deprived of the use of the premises was the interest on the purchase money from the time that it was placed at the vendor's disposal.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 358, 359; Dec. Dig. § 174.*]

Action by Allan B. Stewart against Dwight D. Gillett to compel specific performance of a contract for sale of real estate. Judgment for plaintiff.

G. W. Harding, of Hume, and Elba Reynolds, of Belmont, for plaintiff.

D. D. Dickson, of Angelica, for defendant.

BROWN, J. On the 15th day of July, 1910, the plaintiff and defendant entered into an agreement in writing, whereby the defendant gave to the plaintiff an option to purchase from the defendant certain real estate situate in the town of Hume, Allegany county, N. Y.; the plaintiff having 60 days in which to accept the option. In the event the plaintiff should accept said option, he was to pay to the defendant the sum of \$2,600 as the purchase price, and, upon receiving such payment, the defendant was to execute and deliver to the plaintiff a good and sufficient full covenant deed of such real estate. On September 9, 1910, the plaintiff went to the defendant's residence with a notary public and a deed as described in the option agreement, stating to the defendant that they had come to close the transaction, and had brought the notary along to acknowledge the deed. The deed was produced, the plaintiff again stating to defendant and defendant's wife that he had come to get the matter closed up, get the deed signed, and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaintiff asked the defendant's wife to sign it, the wife stating that she did not care to do it. The defendant claims that the plaintiff agreed to accept the deed without the signature of his wife, and he states that he thereupon signed the deed, acknowledged its execution before the notary, who thereupon signed the acknowledgment. The plaintiff and the notary claim that the defendant signed the deed and acknowledged its execution before the defendant's wife was asked to sign, and before her refusal. There is some discrepancy as to the narrative of facts occurring after defendant signed and acknowledged the deed. The defendant testified that he refused to deliver the deed to the plaintiff without being paid the purchase price. The plaintiff testified that he told defendant that he had the purchase money in the shape of drafts, and would meet the defendant at the State Bank of Fillmore that afternoon, pay the purchase price, and take the deed, provided it was executed by defendant's wife; that the defendant agreed to have his wife with him at the bank. The plaintiff and the defendant did meet at the bank at the appointed time. The defendant's wife refusing to join with her husband in the execution of the deed, it was agreed by the plaintiff and the defendant that the purchase price of \$2,600 should be deposited with the cashier of the bank for the defendant, and that the money would be paid to the defendant upon the defendant's delivering to the cashier for the plaintiff a deed signed by himself and wife, approved by the notary. The plaintiff did so deposit such money. The defendant has never furnished such conveyance. The money has since remained on such deposit for defendant. The plaintiff brings this action for specific performance and damages for defendant's default.

[1] The defendant says that, the option being a unilateral agreement with no obligation on the part of the plaintiff, it cannot be specifically enforced by a court of equity, citing *Levin v. Dietz*, 194 N. Y. 376, 87 N. E. 454, 20 L. R. A. (N. S.) 251. It is not believed that such authority relieves the defendant herein. In that case the giver of the option by failure to appear at time for performance virtually withdrew his offer before acceptance. In that case there was no acceptance before withdrawal of the offer to sell. The offer to sell being given by that defendant without any consideration, he was at liberty to withdraw the same at any time before acceptance. That case is not authority for the proposition that if the defendant therein had not withdrawn his offer, and the plaintiff had accepted the same, tendered the purchase price and demanded a deed, that the contract would not have become a mutual one and enforceable in equity. It is elementary that an offer or option made without any consideration to uphold it may be withdrawn at any time before acceptance. It is also elementary that an offer duly accepted while the offer is in force constitutes a contract. It is then that the minds of the parties meet, and there springs into existence a mutuality of obligations that completes the contract. This mutuality of obligations constitutes the consideration essential to establish a valid contract, and has always been held to be enforceable in equity. The Court of Appeals in *Levin v. Dietz*, supra, expressly refused specific performance upon the ground that there was no agreement by the vendees to buy. There was no ac-

ceptance by the vendees of the promise of the vendor except such as was involved in their offer to perform at a time when he had withdrawn from his promise, and that there was no mutuality of obligations.

[2] It cannot be claimed from the transaction on the 9th day of September, 1910, that the defendant Gillett withdrew his offer to sell at any time. The finding must be that the offer to sell remained in full force; that the plaintiff accepted the same, became bound to purchase. The conversation and acts of the parties constitute a performance by the plaintiff of all that he was required to do to cast upon the defendant the burden of making the conveyance. The fact that plaintiff accepted the defendant's offer while it was in force completed the contract. There then existed an obligation on the part of the defendant to sell and convey by a good and sufficient full covenant warranty deed, and an obligation on the part of the plaintiff to pay the sum of \$2,600. The conversations and agreement as to the way and manner in which these obligations should be performed did not impair, change, or modify the mutual obligations. The plaintiff was entitled to a conveyance in which the defendant's wife should join as grantor, and the arrangement relative to the deposit of the money for the defendant when he should furnish the deed he had agreed to deliver did not relieve defendant from his obligation. The fact that the plaintiff in October, 1911, proposed to settle the controversy by taking advantage of another form of the proposition as contained in the option agreement and pay \$2,200, permitting the defendant to reserve the building on the premises in dispute, which was not acceptable to the defendant, in no way changed the relations of the parties, nor interfered with their rights. The only step taken by the defendant to comply with his obligation being in March, 1911, to request an attorney to prepare a deed, which was never executed, the defendant must be held to be in default, and the plaintiff to be entitled to the relief of having the contract fully performed.

[3] The plaintiff is entitled to a decree that the defendant within 10 days after entry of judgment herein deliver to the cashier of the State Bank of Fillmore a good and sufficient full covenant deed, conveying the premises described in the complaint to the plaintiff. The defendant is 67 years of age, his wife 47. The present value of her inchoate right of dower is \$220.74, and, in the event that the defendant fails to deliver such deed executed by his wife, the sum of \$220.74 must be deducted from the moneys on deposit in said bank, and that amount repaid to the plaintiff by such cashier.

[4] The building upon the premises, owing to natural causes, was in a dilapidated condition in September, 1910. To preserve it from falling the defendant took down a portion of it, piled a part of the lumber upon the premises, and removed a quantity of the value of \$75. The plaintiff is entitled to retain and to be paid out of the moneys deposited this sum of \$75.

[5] The defendant has had the use and occupation of the premises since September 9, 1910, and has received the rents, issues, and profits therefrom. The taxes levied and assessed against said premises up

to the delivery of the conveyance hereinbefore provided for must be paid by the defendant.

[6, 7] The plaintiff has been denied the use and occupation of the premises since September 9, 1910. He also has been denied the use of the purchase moneys deposited in the State Bank of Fillmore for the defendant's benefit. His damage for being deprived of the use and occupation of the premises can best be ascertained by allowing him interest on the purchase price from the time he placed it at the disposal of the defendant. It would be unfair to deprive plaintiff of the use of both the purchased premises and the purchase moneys. It is but just and fair for defendant to reimburse the plaintiff for the damage occasioned by failure to convey as he had agreed. Such damage under the circumstances is the interest on \$2,600 for two years, four months, and twelve days—the sum of \$369.20. Such sum must be deducted from the moneys deposited, and returned to plaintiff.

Let findings in accordance with the foregoing memorandum be prepared. The plaintiff is awarded his costs and disbursements.

CROWE V. LIQUID CARBONIC CO.

(Supreme Court, Appellate Division, Third Department. December 30, 1912.)

1. SALES (§ 481*)—CONDITIONAL SALES—RETAKING AND SALE—LIABILITY OF SELLER.

Under Personal Property Law (Laws 1909, c. 45 [Consol. Laws 1909, c. 41]) § 65, providing that where property is retaken by the seller under a contract of conditional sale, and is not sold by him at public auction within 30 days after the 30 days he is required to retain possession, he is liable for the return of payments made by the buyer, a seller who took control of a soda fountain under a contract of conditional sale, and rented same and appropriated the rent without crediting it on the contract, became liable to repay the installments paid by the buyer, though the contract purported to waive the statutory provision; an executory contract waiving such statutory provision being contrary to public policy, and void.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1449-1455; Dec. Dig. § 481.*]

2. APPEAL AND ERROR (§ 1175*)—REVERSAL—RENDERING FINAL JUDGMENT.

Where, on appeal from a judgment against plaintiff in an action to recover payments made, plaintiff is held entitled to recover the payments, and the findings of fact show, without dispute, the amount of the payments, the judgment will be reversed and final judgment rendered without new trial, under authority of Code Civ. Proc. § 1317, as amended by Laws 1912, c. 380, authorizing rendition of judgment without a new trial when a new trial is unnecessary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.*]

Houghton and Lyon, JJ., dissenting.

Appeal from Trial Term, Broome County.

Action by George J. H. Crowe, as trustee, against the Liquid Carbonic Company. From a judgment dismissing the complaint, plaintiff appeals. Reversed upon the law and facts.

Argued before SMITH, P. J., and KELLOGG, HOUGHTON, BETTS, and LYON, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

H. J. Hennessey, of Binghamton, for appellant.

T. B. & L. M. Merchant, of Binghamton, for respondent.

JOHN M. KELLOGG, J. May 7, 1909, Pappas & Karaliall purchased of the defendant, under a contract of conditional sale, a soda fountain and apparatus for \$1,885, \$400 of which was paid by the delivery of an old fountain, \$225 in cash, and the balance was represented by 36 promissory notes of \$35 each, with interest, dated May 7, 1909, one note payable each month thereafter. On the 21st day of January, 1910, the said firm and its members were declared bankrupts, and thereafter the plaintiff was duly appointed trustee in bankruptcy. The notes which had become due up to that time had been paid. Those subsequently maturing were not paid. The fountain was in the store carried on by said bankrupts. One Beaumann, under a chattel mortgage, acquired title to the goods and fixtures in the store aside from the fountain, and continued the business in the same store. The fountain and apparatus were inventoried by the plaintiff in the schedules in bankruptcy as held under a conditional sale contract, but remained in the store. On February 3, 1910, the defendant leased the fountain in the store to Beaumann, the occupant of the store, for the month of February at \$15, and like monthly leases were made for March, April, and May. The rental was duly paid, but was not indorsed by the defendant upon the contract of sale. In June the defendant removed the fountain and apparatus from the store, and claimed to have retaken it then, and after 30 days caused notice of sale to be given, and the fountain was subsequently sold, apparently according to the provision of the law relating to conditional sales.

There was no note in arrear on the day of the leasing, but one became due a very few days after, and when each subsequent lease was made, there were notes in default.

[1] Section 65 of the Personal Property Law (chapter 45, Laws of 1909 [Consol. Laws 1909, c. 41]) provides that, where property is retaken by the vendor under a contract of conditional sale, it shall be retained by him for 30 days from such retaking in order to enable the vendee to comply with the contract, and, if the default continues, the vendor must within 30 days thereafter sell the articles at public auction, and, "unless such articles are so sold within thirty days after the expiration of such period, the vendee or his successor in interest may recover of the vendor the amount paid on such articles by such vendee or his successor in interest under the contract for the conditional sale thereof." The plaintiff seeks to recover the installments paid upon the contract, but by the judgment appealed from he is denied relief.

The defendant had no right to lease the fountain to Beaumann unless he claimed that right under the contract of conditional sale, and it was proceeding upon the theory that default had been made or was about to be made. After default the plaintiff could not object to the defendant's retaking or renting the property, as it was its right under the contract. That the defendant considered it was leasing the fountain for its own benefit, and not for the benefit of the plaintiff, is

evident by its appropriating the rent, and not crediting it on the contract. It took control of the fountain and retained it for four months, and its attempt thereafter to comply with the statute was too late. It had incurred the liability to repay the installments paid upon retaining the property after thirty days without taking any steps for selling it. The contract purported to waive this provision of the statute as to retaining the property for thirty days after retaking it and selling it for the vendee's benefit, but provided that upon such retaking the vendee's right to comply with the terms of the contract and thereupon receive said property is expressly waived. This statute was passed pursuant to a wise public policy. It was known that property was frequently sold upon conditional sales, and, after the vendee had nearly paid for it, the vendor would seize and resell it, and the vendee would lose the property and the payments as well. The Legislature evidently realized that the persons making this class of contracts were at a disadvantage, and were not entirely in a position to adequately take care of themselves by exacting favorable terms for such a contract, and therefore the law provided what should be the effect of such a contract and in what manner and how the vendor might retake and sell the property. If by an executory contract the provisions of the statute may be waived in advance, it practically nullifies the statute because a waiver will always be found. The authorities indicate that such a waiver by executory agreement in advance of default and at the time of making the contract is against public policy and ineffectual, and we so hold. *Roach v. Curtis*, 115 App. Div. 765, 101 N. Y. Supp. 333; s. c., 191 N. Y. 388, 84 N. E. 283; *Hurley v. Allman Gas Engine & Machine Co.*, 144 App. Div. 300, 129 N. Y. Supp. 14. The defendant did not retake and sell the property in the manner required in the case of a conditional sale, and the attempted waiver of the provisions of the statute in that respect is without effect.

[2] Under section 1317 of the Code of Civil Procedure as amended in 1912 (Laws 1912, c. 380), this court may "render judgment of affirmance, judgment of reversal and final judgment upon the right of any or all of the parties, or judgment of modification thereon, according to law, except where it may be necessary or proper to grant a new trial or hearing, when it may grant a new trial or hearing." The evidence shows that this plaintiff is entitled to recover the payments actually made. The eighth and ninth findings of fact show upon undisputed evidence the payments made. There is therefore no necessity for a new trial. The judgment should therefore be reversed upon the law and the facts. The fourteenth and fifteenth findings of fact are disapproved of as without evidence, and a final judgment directed for the plaintiff for the payments made on said contract as shown by the eighth and ninth findings of fact, with interest thereon from April 12, 1912, with costs to the plaintiff in the court below and upon this appeal.

All concur, except HOUGHTON and LYON, JJ., dissenting.

HOUGHTON, J. (dissenting). I am unwilling to find as a fact in opposition to the finding of the trial court that the defendant actually

repossessed itself of the soda water fountain sold to Pappas & Karahall under conditional contract of sale prior to the 1st day of June, 1910.

The purchasers became bankrupt. A considerable part of their property was subject to a large chattel mortgage. The soda water fountain, however, was not included. The receiver in bankruptcy took possession of all the property of Pappas & Karahall not covered by the chattel mortgage. Such receiver, therefore, took possession so far as the law would permit of the interest of the bankrupts in the fountain which they were under contract to buy. A sale under the chattel mortgage was attempted, and the bankruptcy court issued a restraining order, and the sale was not actually had until February, 1911, more than seven months after June 1, 1910. Although it does not appear that there was any restraining order with respect to the soda water fountain, still there was controversy over the chattel mortgage, over the lease, and the fountain was practically in the custody of the bankruptcy court. Both the receiver and the trustee say that they took possession of the fountain and that they never voluntarily surrendered it, and it was never actually removed until June 1, 1910; and concededly after its removal the defendant complied with all the requirements of the Personal Property Law with respect to holding and sale at public auction.

The sole circumstance against all these facts from which it can be adduced that the defendant did take possession of the fountain prior to the 1st day of June is that the defendant leased the fountain from month to month to the chattel mortgagee who had purchased the perishable stock of the bankrupts and was conducting the store which they formerly occupied.

The letters of instruction of the defendant to its attorneys and their acts I do not think conclusively show that there was any intention of actually taking possession of the fountain by virtue of the right which the defendant had under its contract of conditional sale. It is true the defendant's attorneys kept the money received for the rental; but, if the defendant did not take possession of the fountain, the money belongs to the bankrupts or their trustee, and the fact that the defendant or its attorneys have possession of it does not conclusively establish that the defendant repossessed itself of the fountain by virtue of its contract.

But even if it be assumed that the defendant did retake the fountain as early as February, 1910, and therefore did not comply with the requirements of the Personal Property Law with respect to holding it 30 days and reselling within the succeeding 30 days, still I am of opinion that the purchasers had a right to waive the requirements of the statute, and that their agreement so to do is not against public policy, and therefore ineffectual.

The contract of purchase contained a clear and explicit waiver of the requirements of the statute, and reads as follows:

"And we (purchasers) hereby agree that it shall not be necessary for you (defendant seller) to retain said property for a period of thirty days after retaking, or to sell the same for our benefit; but upon such retaking our

right to comply with the terms of this contract and thereupon to receive said property is expressly waived."

If the requirements of the statute with respect to the retaking of property sold by conditional sale and the retaining of it for 30 days and the selling of it for the benefit of the buyer within the succeeding 30 days can be waived at all, the language quoted would clearly seem to constitute such a waiver. The object of the statute in requiring the retaining of the property for 30 days after retaking is to give the buyer an opportunity to redeem under his contract and complete his purchase, and the requiring a sale at public auction within the next succeeding 30 days is to ascertain if a surplus may not be obtained over the amount due and expenses incurred which can be repaid to the buyer. Of course, a buyer of personal property under a conditional contract of purchase can agree to waive and forego all such privileges unless it is against public policy to permit him so to do. A man with full understanding may deliberately contract to waive, and may waive, rights which the common law or the statute law or even the Constitution itself accords to him, unless for some reason it is against the common good to allow him to do so. The statute was enacted primarily to protect persons of small means who were compelled to purchase household goods and necessities on the installment plan, and to prevent the seller from retaking the property after a large proportion of the installments had been paid without any accounting therefor, and simply because the contract had been broken. This practice tended to impoverish citizens, and to make paupers and public dependents of industrious and striving householders and families. It has long been the law that one having a family to provide for was entitled to certain exemptions against execution. The object of such exemptions was to prevent pauperism and destitution, and it was therefore held by the courts that it was against public policy for a householder prospectively to contract to waive such exemption. *Kneettle v. Newcomb*, 22 N. Y. 249, 78 Am. Dec. 186. The provisions of the Personal Property Law with respect to conditional sales had in view the same salutary purpose as the exemption law, and with respect to all exempt property, and possibly as to all useful and necessary household goods, I am willing to concede that a buyer should not be permitted by contract to waive the provisions of the statute. I can see no reason, however, for extending the prohibition to ordinary articles of commerce and of trade. No considerations of public policy are involved in contracts made by a merchant with respect to his business affairs. A druggist or a candy maker can install a soda water fountain in connection with his business if he chooses, or he can run his establishment without it. If he sees fit, without any advantage being taken of him, to make a bargain to purchase a soda water fountain on the installment plan, I fail to see any consideration of public policy which should prevent him from agreeing that, if he fails to pay all the installments, the seller may retake the property, and claim it as his own without selling it at public auction, and accounting to him for the proceeds. Because the statute may require the intervention of public policy as to the purchase of

some articles, it does not necessarily follow that public policy applies to all articles purchased by conditional contract of sale.

Roach v. Curtis, 191 N. Y. 387, 84 N. E. 283, is not a conclusive authority requiring a holding that the contract under consideration was against public policy. The goods purchased in that case were articles of household furniture, and there was a waiver only of the sale at public auction. While it is strongly intimated that an agreement to waive the requirements of the statute in the conditional purchase of household furniture would be against public policy, and therefore void, it is not so expressly held, the decision turning upon the point that the waiver was not broad enough to include all provisions of the statute but related only to the manner of sale on default.

The same may be said of the decision in *Hurley v. Allman Gas Engine & Machine Co.*, 144 App. Div. 300, 129 N. Y. Supp. 14, which ultimately turned upon the proposition that the agreement of waiver was not broad enough to include a waiver of sale.

In the present case the requirements of retaining the property for a period of 30 days after retaking and of selling for the benefit of the buyer are both expressly waived, as well as the right to retain all installments paid for the use of the property while the vendees had possession.

It seems to me that there is no ground for saying that the agreement which the parties entered into for the purchase of the soda water fountain respecting the waiver of the provisions of the statute was against public policy, and I therefore vote for an affirmance of the judgment.

HOLMSTROM v. WARD et al.

(Supreme Court, Appellate Division, First Department. January 10, 1913.)

1. MASTER AND SERVANT (§ 289*)—INJURIES—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to an iron worker while riding a beam which was being hoisted by the rope breaking, evidence *held* to make it a jury question whether plaintiff was guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

2. MASTER AND SERVANT (§ 288*)—INJURIES—ASSUMED RISK.

Evidence in an action for an iron worker's injuries while riding a beam which was being hoisted by the rope breaking and permitting it to fall *held* to make it a jury question whether plaintiff assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

3. MASTER AND SERVANT (§ 279*)—INJURIES—JURY QUESTION—ACTS OF SUPERINTENDENT.

In an action for an iron worker's injuries while riding a beam which was being hoisted in a building by the rope breaking, evidence *held* to sustain a finding that the foreman's acts in ordering plaintiff to ride the beam were acts of superintendence, so as to make the employer liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973-975, 978-980; Dec. Dig. § 279.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Special Term, New York County.

Action by John Holmstrom against William L. Ward and others. From an order dismissing the complaint and an order denying plaintiff's motion to vacate the dismissal and for a new trial, he appeals. Reversed, and new trial granted.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and MILLER, JJ.

Elmer C. Miller, of New York City (Grant Hoerner and Harold P. Coffin, both of New York City, on the brief), for appellant.

William L. Kiefer, of New York City, for respondents.

LAUGHLIN, J. The complaint was dismissed pursuant to a direction of the court on motion of the defendants at the close of the plaintiff's evidence. The plaintiff was in the employ of the defendants as an iron worker, and on the 22d day of January, 1909, while so employed in the erection of a building at the northeast corner of Thirty-First street and Sixth avenue, borough of Manhattan, New York, he sustained personal injuries, and this action is brought under the Employer's Liability Act to recover damages therefor. We are of opinion that the notice served by the plaintiff was a sufficient compliance with the statute. Pursuant to the notice, the liability is predicated on the negligence of the defendants' foreman, designated as a pusher, while performing acts as a superintendent. The plaintiff and six others constituted a gang of men working under one Jack, from whom they received all their orders, and whose time was almost exclusively occupied in directing the work. Shortly before the accident, Jack ordered the plaintiff and another member of the gang to hook onto a steel beam 18 feet 6 inches in length, and weighing 1,296 pounds, which had been elevated from the street and rested on the girders on the second floor, with a view to lifting it from the girders to enable the insertion of planks for the purpose of making a temporary floor. The plaintiff attached the sling to the middle of the beam, and hooked it onto a derrick which had been installed for use in the construction of the building. According to the evidence, this sling was suitable for lifting or moving the beam a short distance; but there is evidence to the effect that it was not suitable for the purpose of lifting the beam to its place in the permanent structure, and carrying the men who were to connect it with the lugs on the columns at either end. The edges of the beam around which the rope forming the sling passes are sharp, and there is danger that the rope will be cut thereby if the beam is subjected to any very great strain, and, in order to prevent the cutting of the rope, a protection known as "softening" is used between the rope and the edges of the beam, and "lashing" which consists in re-enforcing the sling by winding another rope, also likewise protected by "softening" around the beam and attaching it to the derrick, is also used. The jury would have been justified in finding on the evidence adduced in behalf of plaintiff that, when plaintiff attached the sling to the beam, he understood that the beam was merely to be lifted for the purpose of laying the plank flooring, and that he neither used softening nor re-enforced the sling by lashing

for the reason that he was not aware that the beam was to be hoisted into place and attached to the structure; that, after the sling was so attached, Jack ordered the plaintiff and a fellow workman to connect the beam to the floor above; and that when one of them protested that the sling was not suitable for lifting the beam for connection, and should be protected by softening and lashing, Jack, in effect, directed them to get on the beam and ride up on it, and connect it without waiting to use softening and lashing, and that they did so. The derrick was operated by an engineer who was so located that he was obliged to receive signals, which were given from time to time by Jack to a signalman, who communicated them to the engineer. The evidence presented in behalf of the plaintiff would warrant a finding that Jack, knowing that the sling was not protected by softening or lashing, ordered the beam raised into place, and the plaintiff and his fellow workman to ride upon it, as already stated, for the purpose of connecting it to the lugs at either end on the floor above; that as the beam was brought to the vicinity of the place where it was to be attached the plaintiff was at one end and his fellow workman at the other, and each of them was endeavoring to guide it into place; that the end upon which the plaintiff was riding came nearly into place, but required to be pushed over somewhat from the other end which had come into contact with the upright column, causing friction; that the hoisting was then stopped, and shortly after by direction of Jack was resumed, and while the end of the beam was thus in contact with the upright column it was further elevated several inches, and thereupon Jack determined to get a pinch bar for the purpose of prying the beam away from the upright column, and a few seconds after he started for the pinch bar the sling broke, and the beam and plaintiff were precipitated to the second floor, and he was injured.

[1-3] It cannot be said as matter of law that the plaintiff was guilty of contributory negligence, or that he assumed the risk of injury from this cause. It is quite clear that those questions were for the jury. The evidence, which I have outlined briefly, tends to show negligence on the part of Jack while performing acts of superintendence, which was the nature of his sole or, at least, principal duties; and, if it may not be said as matter of law that the acts were acts of superintendence, at least the jury would have been justified in so finding, and on that theory the defendants under section 1 of the Employer's Liability Act, being chapter 600, Laws 1902, now section 200, Labor Law (Consol. Laws 1909, c. 31), would be liable for the negligence of Jack. *Guilmartin v. Solvay Process Co.*, 189 N. Y. 490, 82 N. E. 725; *Gallagher v. Newman*, 190 N. Y. 444, 83 N. E. 480, 16 L. R. A. (N. S.) 146; *Smith v. Milliken Bros.*, 200 N. Y. 21, 93 N. E. 184; *Buckley v. Beinhauer*, 136 App. Div. 540, 121 N. Y. Supp. 180; affirmed 201 N. Y. 572, 95 N. E. 1124; *Impellizzieri v. Cranford*, 148 App. Div. 758, 133 N. Y. Supp. 336.

It follows, therefore, that the judgment and order should be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

(78 Misc. Rep. 436.)

IN re BOARD OF WATER SUPPLY OF CITY OF NEW YORK
(ASHOKAN RESERVOIR, SECTION NO. 6).

(Supreme Court, Special Term, Albany County. December, 1912.)

1. EMINENT DOMAIN (§ 230*)—PROCEEDINGS TO TAKE PROPERTY—COMPENSATION OF COMMISSIONERS.

Where the compensation of two of three commissioners of appraisal in a proceeding to acquire real estate for water supply of the city of New York was fixed after their death in unequal amounts, because the illness of one prevented him from serving during a portion of the time the other was serving, the surviving commissioner, who served practically the same length of time as the latter, will be given the same compensation for that period, and an additional compensation for services subsequently rendered with the other commissioner.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 584; Dec. Dig. § 230.*]

2. EMINENT DOMAIN (§ 230*)—PROCEEDINGS TO TAKE PROPERTY—COMPENSATION OF COMMISSIONERS.

A claim of commissioners of appraisal in a proceeding to acquire real estate for water supply of the city of New York for the amount expended for services of a stenographer, which the corporation counsel refused to furnish to report the commissioners' proceedings, though required by Laws 1905, c. 724, § 32, to furnish service, must be disallowed; the commission not being authorized to employ a stenographer at the expense of the city.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 584; Dec. Dig. § 230.*]

3. EMINENT DOMAIN (§ 230*)—PROCEEDINGS TO TAKE PROPERTY—COMPENSATION OF COMMISSIONERS.

Where the report of a commission of appraisal in a proceeding to acquire real estate for water supply of the city of New York was not made till two years after organization, and included only six tracts of land valued at an aggregate of \$5,995, a claim of one of the commissioners for 66 days' service and expenses and of another for 65 days' service and expenses is largely unwarranted, and will be reduced accordingly.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 584; Dec. Dig. § 230.*]

Application of the Board of Water Supply of the City of New York to acquire real estate in Ulster County for Ashokan Reservoir, section No. 6, and to tax the fees and expenses of Edward H. Nicoll and another, as commissioners of appraisal. Order entered.

Archibald R. Watson, Corp. Counsel, of New York City, William McM. Speer, and Amasa J. Parker, Jr., of Auburn, for City of New York.

Edward H. Nicoll and Rudolph Diedling, pro se.

CHESTER, J. [1] The commission as first appointed in this matter was comprised of Judge Edgar L. Fursman, Charles B. Cox, and Edward H. Nicoll. Fursman and Cox both died before the conclusion of the work assigned to them. The claim of Commissioner Nicoll on this application is for all his services and expenses from the start to the conclusion of the work. The claim of Commissioner Diedling covers the period since the death of Commissioner Cox, in whose

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

place he was appointed. Commissioner Claudeus Rockefeller, who was appointed in place of Judge Fursman, has not yet presented his claim. After the deaths of Commissioners Fursman and Cox, their compensation and disbursements were taxed in the sum of \$2,045 for the former and \$1,845 for the latter. The difference in these amounts was apparently caused by the fact that the illness of Commissioner Cox prevented him from rendering services during a portion of the time while Commissioner Fursman was serving. Commissioner Nicoll claims services, not only for practically the same amount of time expended by Commissioner Fursman on the matters before them, but for 21 days additional in considering the award, preparing and verifying the report, and signing and filing the same, and for extra executive sessions with the other surviving commissioner, Mr. Cox, at Saugerties and Kingston.

It appears that after the death of Commissioner Fursman Commissioners Nicoll and Cox made a fourth separate report bearing date August 25, 1910, covering five pieces of property. In the third separate report signed by these two commissioners, and by Judge Fursman, it was stated with respect to these five parcels of land that Mr. Buck, the attorney for the several claimants, had expressed some dissatisfaction with various rulings of the commission as to the admissibility of evidence and declined to proceed with the trial of the cases until he could procure a review of the rulings by the Appellate Division. The commissioners state in their report that:

"We had, however, before being informed concerning the proposed action of Mr. Buck, carefully viewed and examined the said parcels as required by law."

The examination or viewing of the lands involved in this report having been completed and the taking of testimony concluded, there was nothing left for the surviving commissioners to do but to agree upon, prepare, sign, and file their report. This might reasonably require two or three executive sessions and the time necessarily spent by Mr. Nicoll in the preparation and filing of the report, but it would not require anything like the 22 days claimed to have been spent. Commissioner Fursman resided in Troy, and Commissioner Nicoll resides in New York, each about an equal distance from Kingston and from the Ashokan reservoir. Their necessary expenses in performing their duties while both were serving must have been substantially the same amount. I will therefore allow Commissioner Nicoll the same amount which the court has heretofore allowed to Commissioner Fursman covering the same period and \$200 for services subsequent thereto and before the organization of the commission with its present membership.

This leaves the claims now presented by Commissioners Nicoll and Diedling for services and disbursements subsequent to the organization of the present commission to be considered. So long as Commissioner Fursman was chairman of the commission, it would appear that the work proceeded with considerable diligence, and there was no unnecessary time spent in performing it. That can hardly be said of the work since, if we are to judge by the character of the claims presented. As near as I can make out from the affidavits before me,

Commissioner Nicoll is claiming for services since December 28, 1910, which was the date when the new commission organized, 1 day for organization, 1 day for consultation, 11 days for travel, 15 days hearing claims, 6 days viewing property, 29 days in executive sessions, and 3 days in preparing and filing a report, or 66 days in all. Commissioner Diedling is claiming for 1 day taking oath, 1 day for organization, 15 days hearing claims, 12 days viewing property and 36 days in executive session, or 65 days in all.

[2] A claim is also made by each of these commissioners for an amount expended or incurred by them for stenographer's fees, the claim being that the corporation counsel refused to furnish a stenographer to report the proceedings of the commission, and that they were obliged to furnish one instead. There has evidently been considerable friction between these commissioners and the corporation counsel's office with respect to many matters before the commission, yet the law makes it the duty of the corporation counsel to furnish the commissioners of appraisal with necessary stenographers (section 32, c. 724, Laws of 1905), and there is no provision authorizing the commission to employ stenographers at the expense of the city. While the services rendered by the stenographer may have been worth the amount the stenographer has charged, yet the minutes before me show that under the direction of the commission the stenographer has copied in the minutes many hundred pages of documentary evidence, and public documents that can serve no purpose whatever, except to enhance the stenographer's charge against those who employed him. Nothing should be allowed on this application for such services.

[3] Commissioner Nicoll claims \$557.77 for expenses since Judge Fursman's death other than the amount incurred for a portion of the stenographer's bill, and Commissioner Diedling claims \$479.92 for expenses besides the amount paid by him for "official stenographer."

To judge how much time was reasonably and necessarily spent by the commissioners in performing their duty we may properly look at the number of claims for damages that were before this commission as now constituted and which have been included in the fifth separate report upon section 6. It appears that there were only six pieces of property in all. Three of these were of very inconsiderable value; the awards of the majority of the commission therefor having been \$250, \$235, and \$200, respectively. One was a burial lot upon a farm in relation to which the parties agreed upon a compensation of \$110 therefor, and there were two other parcels of land for which a majority of the commission awarded \$2,000 and \$3,200, respectively, making the aggregate awards covered by that report the sum of \$5,995.

Commissioner Nicoll, however, who disagreed with the report of his associates, made a report that in his opinion the aggregate awards which should be made for said five parcels, other than the burial lot, should be \$43,100, because of their adaptability and availability for reservoir purposes, and that the aggregate value thereof for farm purposes only was \$10,100. It is urged that differences among the members of the commission as to the proper basis for the awards necessitated the unusual number of executive sessions mentioned in

the claims for services. These differences must have been apparent as soon as the question was first discussed and furnish no justification for the numerous sessions held. On the other hand, it would appear that, when they were found to be unreconcilable, the commissioners should have at once proceeded to the preparation of their majority and minority reports, instead of waiting the many months they did before doing so and continuing during that period to hold executive sessions.

Nor am I able to find anything in the circumstances of the case or in the affidavits that would justify or require the expenditure of anything like the amount of time which these commissioners claim to have devoted to these services, or that would warrant the expenditure of anything like the sums claimed to have been expended for travel, and for expenses incident to the services rendered. The commission as now constituted was organized, as has been stated, on December 28, 1910, yet its report was not made until over two years thereafter. I cannot avoid the conclusion that an unreasonable amount of time has been taken by this commission, and that their claims both for services and expenses are largely unwarranted when we consider the amount of time which could reasonably be required of them to fully perform all their duties with respect to the appraisals of damages in the cases mentioned. I have been quite inclined to send the whole matter to a referee to take testimony and report to the court thereon with respect to the reasonableness and necessity of the services and disbursements claimed to have been rendered and made, but that course would simply devolve an additional expense upon the city which it should not be called upon to bear. It has been held by the Appellate Division in this department in approving an opinion heretofore rendered by me upon another application for the compensation of commissioners with respect to another section that:

"The number and character of the cases before them, the circumstances under which the work was done, the amount of time reasonably required for doing it, the character and quality of the work done by the commissioners and the amounts of their awards may all be considered in fixing their compensation." *Matter of Bensel, Ashokan Reservoir, Section No. 16*, 138 App. Div. 662, 123 N. Y. Supp. 217.

Following this decision and after giving consideration to all the facts stated in the affidavits before me concerning services and disbursements, and their reasonableness and necessity I allow to Commissioner Nicoll the sum of \$750 for his services in addition to those hereinbefore mentioned, and to Commissioner Diedling a like sum for services, and to Commissioner Nicoll for disbursements, in addition to those hereinbefore mentioned, the sum of \$350, and to Commissioner Diedling \$300, the latter living at Saugerties, which is much nearer the place where the services were properly rendered than New York, where Commissioner Nicoll resides.

Ordered accordingly.

ANTHONY v. VAN VALKENBURGH et al.

(Supreme Court, Appellate Division, Third Department. December 30, 1912.)

1. WILLS (§ 614*)—CONSTRUCTION—TRUSTS—DURATION.

Under a will devising land to the executors in trust to rent for 19 years from the date of the will, and pay the net income to testator's wife and daughter for the support of them and the survivor "during said 19 years or during the lives of" them and the survivor, the last clause does not create a life estate in the wife or daughter beyond the 19 years, but limits the trust to 19 years, or to the lives of the wife and daughter if they die sooner.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1393-1416; Dec. Dig. § 614.*]

2. PERPETUITIES (§ 4*)—LIMITATION FOR DEFINITE PERIOD.

A trust estate may be limited for an arbitrary period of time, provided its termination at an earlier time is called for in case of the expiration of two lives in being at the creation of the trust.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-44; Dec. Dig. § 4;* Trusts, Cent. Dig. §§ 3, 4.]

3. WILLS (§ 587*)—RESIDUARY CLAUSE—PROPERTY INCLUDED.

A form devised in trust for 19 years, unless testator's wife and daughter die sooner, the income to be paid to them on expiration of the 19 years, the wife being then alive, falls into the general residuary clause, specifying both real and personal property, all of which is given the wife for life.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1279, 1281-1291; Dec. Dig. § 587.*]

Appeal from Special Term, Rensselaer County.

Action by Amelia V. V. Anthony against Harriet Van Valkenburgh, impleaded with others. From a judgment on a decision of the court without a jury, defendant Van Valkenburgh appeals. Modified and affirmed.

Argued before SMITH, P. J., and KELLOGG, HOUGHTON, BETTS, and LYON, JJ.

Henry D. Merchant, of New York City, for appellant.

Eugene D. Flanigan, of Albany, for respondent Anthony.

William Woollard, of Albany, for respondents Godley.

HOUGHTON, J. John L. Van Valkenburgh died on the 3d day of May, 1884, leaving a last will and testament dated April 3, 1874, whereby he devised his residence and its furnishings to his wife for life and at her death to his daughter Harriet. He was the owner of a farm of considerable value at which he and his family were accustomed to spend the summers, and by the third clause of his will he devised it to his executors in trust to rent the same for the period of 19 years from the date of his will, and pay the net proceeds to his wife and daughter for the support and maintenance of them and the survivor "during said 19 years or during the lives of my said wife and daughter Harriet and the survivor of them." After these provisions of the will, there follows a general residuary clause specifying both real and personal property, all of which is devised and be-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

queathed to his wife during life, and upon her death certain money legacies vesting and payable only when that event transpires are to be paid, and the balance, vesting in like manner, is directed to be divided between his daughter and two sets of grandchildren, share and share alike, per stirpes, with certain restrictions as to events which have not transpired, and which are unimportant in the controversy involved.

The 19-year period expired on the 2d day of April, 1893, and the wife and daughter received the net proceeds of the farm up to that time, and the wife, as conceded on the trial, continued to receive the proceeds until her death, which occurred in November, 1909. Since that time the daughter Harriet has received the proceeds, claiming a right as life tenant under the third clause of the will above quoted so to do. This action is brought to partition the farm by one of the devisees under the residuary clause of the will, and who would be an heir entitled to the same share if the testator had died intestate as to it, which she claims he did on the ground that the trust created was for a definite term of 19 years, and therefore offended against the statute of perpetuities. The appellant claims that the trust created by the testator, notwithstanding the limitation of 19 years, gave the net proceeds of the farm to herself and mother as long as both lived, and after her mother's death to herself as long as she might live.

[1] The trial court held that the daughter Harriet was not given a life estate in the farm, but, neither the wife nor she having died within the 19-year period, the trust was a valid one until it expired of its own limitation, and that on such expiration the testator must be deemed to have died intestate as to that part of his estate, and that it passed to his heirs at law, and that his daughter Harriet having received the avails from it should account therefor to her cotenant from the 2d day of April, 1893. It is from such determination that the daughter Harriet appeals.

We concur in the conclusion of the learned trial court to the effect that the trust was a valid one, and that the trust did not continue for the benefit of Harriet or her mother after the time had expired for which it was limited. For some reason the testator desired the trust which he created with respect to his farm to terminate 19 years from the date of his will. He could not legally create a trust for that specified time, unless he also made its termination dependent upon the ending of two lives in being within such period. Instead of expressly saying that it should terminate at the end of 19 years unless his wife and daughter both should sooner die, he used the expression that it should continue "during said 19 years or during the lives of my said wife and daughter Harriet and the survivor of them." It is quite plain that this last clause does not create a life estate in the wife or daughter beyond the 19 years, but rather that the limitation as to their lives was added for the purpose of saving the trust for the specified period, provided they should live so long, otherwise that it should terminate.

[2] A trust estate may be limited for an arbitrary period of time, provided the termination at an earlier period is called for by the ex-

piration of two lives in being at the creation of the trust. *Schermerhorn v. Cotting*, 131 N. Y. 48, 29 N. E. 980; *McCosker v. Brady*, 1 Barb. Ch. 329.

[3] In considering what became of the farm after the termination of the trust the existence of the residuary clause of the will seems to have been overlooked. On the expiration of the trust, the farm did not pass to the heirs at law of the testator, but it dropped into the residuary clause of his will, and, together with his other property, passed to the wife during her lifetime. She was alive, and the residuary clause was in full operation as to her, and continued to be as long as she should live. If no mention had been made in the will of the farm, confessedly it would have become a part of the residue of the testator's estate. The fact that a 19-year trust had been carved out of it did not prevent its passing to the residuary estate when the trust was terminated. A general residuary clause broadly specifying all real and personal property takes and holds all of the property of the testator which is not legally disposed of through other provisions of the will. *Langley v. Westchester Trust Co.*, 180 N. Y. 326, 73 N. E. 44; *Morton v. Woodbury*, 153 N. Y. 243, 47 N. E. 283. A general residuary clause in a will is created to catch what drops and to pass title to what is not otherwise disposed of, and it is only under the most exceptional circumstances when the contrary intent is manifest that it does not perform its function.

There is nothing in the will under consideration to show that the testator did not intend that his residuary clause should operate to the fullest extent. His greatest solicitude was to provide for his wife and next to make provision for his daughter Harriet, who was of mature age and unmarried at the time of the making of the will, and who had always lived with himself and her mother. Although he possessed considerable personal property, he evidently regarded his farm as of importance. He therefore provided that for a specified time his daughter should share equally with her mother in its net profits, and that, if the mother should die, the daughter should have the whole for such time, notwithstanding the fact that the remainder of his estate might be distributed amongst the objects of his bounty, for he carefully provided that no other legatee or devisee should be entitled to any part of his estate until the death of his wife. If his wife survived the period of the trust, he manifestly intended that she still should continue to receive the proceeds of the farm under the provisions of his residuary clause.

If our construction of the will be correct, it follows that the wife was entitled to the use of the farm as well as the other portions of the estate of the testator during her life, and that it was error to direct the appellant Harriet to account for the rents and profits thereof from the 2d day of April, 1893. Title ripened in herself and the other parties to the action under the residuary clause of the will on the death of the wife of the testator on the 8th day of November, 1909, and she has occupied the farm to the exclusion of her co-owners since that time, and is accountable for the rents from that time, unless she has legally accounted therefor in Surrogate's Court. The parties are all of full age, and all take the same proportional share of the per-

sonal property on distribution of the estate as they take of the real property, and an accounting was had in which all parties were represented by counsel in the Surrogate's Court of Rensselaer county, which accounting ripened into a decree on the 20th day of December, 1911, and which decree was subsequently amended by an order dated the 2d day of February, 1912. There appears to have been some attempt to surcharge the account of appellant Harriet as surviving executrix and trustee for waste to the farm, which under our conclusion would be chargeable against the wife of the testator as life tenant, and not against the executrix of the estate. This surcharge was later withdrawn, and it is impossible from the record, which does not contain the accounts in full, to say whether the rents and profits of the farm from the 8th day of November, 1909, were included in the accounting. While it was improper to include such rents on such accounting, if they were in fact included, there is no occasion for a reference concerning them, and we do not understand the parties have a disposition to attempt to compel them to be twice paid.

In view of the uncertainty appearing in the record, we think the better course is to permit the reference to ascertain the rents and profits from the 8th day of November, 1909, to stand, and, if such rents have been included in the accounting before the surrogate, application can be made for modification of the decree in that respect.

The judgment should be modified by directing an accounting of rents and profits of the farm from the 8th day of November, 1909, instead of from the 2d day of April, 1893, and as so modified affirmed, with one bill of costs to appellant and one bill of costs to the two respondents jointly, each bill payable out of the fund. All concur.

(78 Misc. Rep. 311.)

POEL et al. v. BRUNSWICK-BALKE-COLLENDER CO.

(Supreme Court, Trial Term, New York County. November, 1912.)

1. SALES (§ 23*)—CONTRACT—MEETING OF MINDS.

Plaintiffs' agent, having had a certain conversation with defendant's representative as to the purchase of rubber to be shipped in installments between January and June, 1911, wrote defendant, acknowledging receipt of a telephone offer to purchase 12 tons up-river fine Para rubber, at \$2.42 per pound, to be shipped from Brazil or Liverpool in equal monthly parts January-June, 1911, and agreeing to accept or reject the following Monday. On that day plaintiffs again wrote defendant, inclosing a sold note reciting a sale to defendant, for equal monthly shipments January-June, 1911, from Brazil or Liverpool, about 12 tons fine up-river Para rubber, at \$2.42 per pound, payable in United States gold or its equivalent 20 days from date of delivery. Defendant, on receiving this letter, returned to plaintiffs an executed order blank, requesting plaintiffs to deliver the rubber on the same terms as specified in the sold note, but requesting prompt acceptance. Plaintiffs, believing that the contract was complete, did not reply. *Held*, that such facts showed a sufficient meeting of minds to constitute a valid contract of sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 44-48; Dec. Dig. § 23.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6291-6306; vol. 8, p. 7793.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. FRAUDS, STATUTE OF (§ 125*)—SALE OF GOODS—ORAL CONTRACT.

The statute of frauds does not declare an oral contract for the sale of goods to be invalid, but only requires that, to be valid, there must be a note or memorandum thereof.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 275-277½; Dec. Dig. § 125.*]

3. FRAUDS, STATUTE OF (§ 118*)—SALE OF GOODS—"MEMORANDUM"—REQUIREMENTS.

A note or "memorandum" of a sale of goods, to satisfy the statute of frauds, need not be confined to a single paper, but may rest in letters, telegrams, bills, receipts, or other forms of signed writings which sufficiently evidence the contract of the parties.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 262-265; Dec. Dig. § 118.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4472-4473; vol. 8, p. 7720.]

4. FRAUDS, STATUTE OF (§ 118*)—SALE OF GOODS—MEMORANDUM.

Plaintiffs, having received a telephone from defendant's agent as to the purchase of rubber for future delivery, confirmed the receipt of the offer by letter, setting an early date to accept or reject. On that date plaintiffs inclosed a sold note to defendant, reciting that plaintiffs had sold for shipment, as specified, about 12 tons up-river fine Para rubber at a price stated, and naming terms of payment and delivery. In reply defendant sent plaintiffs a written order for the rubber, made out on one of defendant's order blanks, to which plaintiffs did not reply, and nothing further was done for eight months, when defendant denied liability, on the ground that its agent had no authority to make the contract. *Held*, that the writings constituted a sufficient memorandum of the contract to satisfy the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 262-265; Dec. Dig. § 118.*]

Action by Frans Poel and Charles H. Arnold, copartners, against the Brunswick-Balke-Collender Company. Judgment for plaintiffs on certain preliminary issues.

Pinney, Thayer & Van Slyke, of New York City, for plaintiffs.

Guggenheimer, Untermeyer & Marshall, of New York City, for defendant.

McCALL, J. In this matter the contention of the plaintiffs is that on or about the 4th day of April, 1910, they entered into a contract with the defendant to sell and deliver to it, under conditions and terms specified, "about 12 tons of 2,240 pounds each of up-river fine Para rubber," and that in January, 1911, prior to the expiration of the time agreed upon for delivery of any of the merchandise, the defendant notified the plaintiffs, in writing, that it would not accept or pay for same, or carry out any of the terms of the alleged agreement. After the issue was joined, there being in the judgment of the litigants some issues which upon the hearing or trial thereof might prove decisive of the entire controversy, an application for an order of severance was applied for and resulted in a direction of the court, under which proof was to be taken preliminarily and a decision had thereon to ascertain whether in the disposition of same it would or would not be necessary to enter into a trial of the entire controversy. The proof thereon was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

limited to such a character as would bear on these two primary issues, viz.: First. Did the plaintiffs and defendant make the contract alleged in the complaint; that is, was there a meeting of minds? Second. Is there a written memorandum of such a contract, signed by or on behalf of the defendant, sufficient to satisfy the requirements of the statute of frauds? In disposing of these two questions the court proceeds (upon the assent of both parties) upon the assumption of the fact that Rogers had the authority and capacity to act for and bind the defendant, which assumption is merely taken to permit a disposition of these questions, and is not to be regarded as a decision upon that feature of the litigation, and with the distinct understanding upon the part of all that that is an issue yet undecided and upon which proof is to be taken, if necessity requires it.

[1] The facts established show that on April 2, 1910, which fell on a Saturday, Mr. Kelly, representing the plaintiffs, and Mr. Rogers, representing the defendant, had a telephonic communication one with the other, the subject of which was the sale and purchase of rubber of a quality or grade known as up-river fine Para rubber, and after some inquiries as to market price, etc., by Rogers and the quantity plaintiffs had for sale by Kelly, Rogers asked Kelly what he (Kelly) could do for next year—next year delivery—and Kelly replied that he could get him rubber for January–June equal monthly shipments for up-river fine Para rubber at probably \$2.42 per pound, delivery to be either from Brazil or Europe. Rogers then asked Kelly if he could get him this rubber at once, and Kelly said:

"No; except until I receive my cables on Monday morning."

This conference or talk may now be stated (as explanation showed that the principal markets for this product are London, Brazil, Hamburg, and New York City, and the market prices are determined on cable communications with these different places) to have had reference to market prices. Rogers then said to Kelly:

"I will take 12 tons of up-river fine Para rubber for equal monthly shipments from Brazil or Europe at \$2.42 per pound."

And Kelly was to let him know on Monday morning. On April 2, 1910, the same day Kelly and Rogers had their telephone communication, the plaintiffs wrote the following letter to the defendant:

"New York, April 2, 1910.

"Brunswick-Balke-Collender Co., Long Island City, L. I.—Gentlemen: As per telephonic communication with your Mr. Rogers to-day this is to confirm having your offer of \$2.42 per pound for twelve tons up-river fine Para rubber for shipment either from Brazil or Liverpool in equal monthly parts January–June, 1911, about which we will let you know upon our receipt of our cable reply on Monday morning. Thanking you for the offer, we remain,

"Yours very truly,

Poel & Arnold,
"Per W. J. Kelly."

On April 4th, which was on the Monday referred to in the above letter, it is conceded that the plaintiffs forwarded to, and there was received by, the defendant the following letter:

"New York, April 4, 1910.

"Brunswick-Balke-Collender Co., Long Island City, L. I.—Gentlemen: Enclosed we beg to hand you contract for twelve tons of up-river fine Para rubber as sold you to-day with our thanks for the order.

"Very truly yours,

Poel & Arnold,
"Per W. J. Kelly."

It is further undisputed that there was an inclosure in above letter, but the original could not be produced; the defendant asserting that it had been returned to the plaintiffs, and the plaintiffs claiming that they had never received it, and, the proper foundation being laid, the court took secondary proof in the shape of a copy, and it, as offered and accepted, reads as follows:

"April 4/10.

"Brunswick-Balke-Collender Co., Long Island City, L. I.—Sold to you for equal monthly shipments January–June, 1911, from Brazil and or Liverpool about twelve (12) tons up-river fine Para rubber at two dollars and forty-two cents (\$2.42) per pound payable in U. S. gold or its equivalent cash, twenty (20) days from date of delivery here."

On some orders covering different transactions than the one in dispute, it was shown that the plaintiffs had inserted a clause which read, "this contract contingent upon strikes, accidents or other causes beyond our control," and Rogers, in testifying, said the instrument last above set forth contained this "strike clause," not attempting to further give its phraseology. With this one exception and the addition in red ink of the numerals "Order # 25409," which was defendant's number placed on this copy, it is conceded that this instrument (copy) set forth above is substantially the same as the original instrument, which was contained in the letter of April 4, 1910, addressed by plaintiffs to the defendant. As to terms of credit contained therein, Kelly swore that he arranged that with the defendant. Upon April 7, 1910, the plaintiffs received from the defendant the following, which was sent on a form used by the defendant, part of same being printed matter and part written, that constituting printed matter being in italics:

"Order No. 25409.

"(This number must appear on invoices and cases.)"

"Purchase Dep't the Brunswick-Balke-Collender Co. of New York, Review Ave., Fox and Marsh Sts.

"Long Island City, 4/8 1910.

"M Poel & Arnold, 277 Broadway, N. Y. C.: Please deliver at once the following and send invoices with goods:

"About 12 tons up-river fine Para rubber at 2.42 per pound.

"Equal monthly shipment January–June, 1911.

"Conditions upon which above order is given:

"Goods on this order must be delivered when specified. In case you cannot comply, advise us by return mail stating earliest date of delivery you can make, and await our further orders. The acceptance of this order which in any event you must promptly acknowledge will be considered by us as a guarantee on your part of prompt delivery within the specified time.

"Terms: _____

F. O. B. _____.

"Respectfully yours,

"The Brunswick-Balke-Collender Co. of New York,

"Per C. R. Rogers."

No other communication of any kind, written or oral, so far as I can see, passed between the parties or their representatives until January 7, 1911, upon which day the plaintiffs received from the defendant a letter, dated on that day, reading as follows, and written upon paper bearing the letter head of defendant company:

"Executive Department.

"January 7, 1911.

"Messrs. Poel & Arnold, 277 Broadway—Gentlemen: We beg herewith to advise you that within the past few weeks there has come to our attention through a statement made to us for the first time by Mr. Rogers information as to certain transactions had by him with you in the past and especially as to a transaction in April last relating to 12 tons of crude rubber. Mr. Rogers had no authority to effect any such transaction on our account nor had we any notice or knowledge of his action until he made a voluntary statement of the facts within the past few weeks. In order that you may not be put to any unnecessary inconvenience we feel bound to give you notice at the earliest opportunity after investigating the facts that we shall not recognize this transaction or any other that may have been entered into with Mr. Rogers which was without our knowledge or authority.

"Yours truly,

The Brunswick-Balke-Collender Co.

"Per Thomas P. Mills, Vice Prst."

This letter plays an important role in this litigation for two reasons, as will be seen on the subsequent reference to it. As to first question propounded, I answer "Yes;" the negotiations between the parties were all sufficient, and it is established beyond question, in my judgment, that their minds met in thorough harmony on all the features proposed. There could not be a shade of doubt about this, were it not for the attitude the witness Rogers assumed towards, and the testimony he gave affecting, defendant's Exhibit 3, called the "contract," which was inclosed in plaintiff's Exhibit 2 (letter written April 4, 1910), and which "contract" was concededly received by the defendant. Rogers said that when he sent Exhibit 4 to plaintiffs he inclosed to them Exhibit 3, and he endeavored to establish that he so returned it because he did not approve of it, and that when he forwarded Exhibit 4 with it he meant to convey to plaintiffs that he wanted it substituted in place and instead of Exhibit 3, although he admits he wrote nothing whatsoever to that effect, but merely inclosed the two Exhibits 3 and 4. It is conceded that no reply was made by plaintiffs to Exhibit 4, because, as they assert, it was already a completed transaction, and it required no reply, and that Exhibit 4 was but a mere acknowledgment that the defendant had received the "contract" upon which, as to all its terms, they had previously and absolutely agreed; and they stoutly assert that Exhibit 3 was not inclosed in the envelope that brought them Exhibit 4, and that Exhibit 3 was never, under any circumstances, returned to them. What is there to maintain Rogers' contention? He never makes a solitary inquiry after his alleged attempt to substitute Exhibit 4 for Exhibit 3 of the plaintiffs as to what their attitude would be in the premises, and it is conceded that he never heard from them. Still for a portion of the time the market price of the product was rising. He never informed his superiors, according to his testimony, even of the making of any contract, much less of his endeavor to substitute another for that submitted, which, he says, he did not approve, but from April

until the following December he stands mute as to the entire transaction, and in the latter part of that month he apprises the officers of the company of what evidently his original transaction was, and this at the time the market price of the product had fallen off over 100 per cent. and below that of the figure he had agreed upon as a purchase price. It is impossible to credit his story, either that Exhibit 3 was ever returned, or that it was his intention to make any such substitution as he asserts. If I would want anything further to convince me in the conclusion, I would but refer to defendant's letter of January 7, 1911, wherein it is said, in repudiating Mr. Rogers' transaction of April for the purchase of 12 tons of rubber from the plaintiffs, that "*after investigating the facts we shall not recognize,*" etc. In what way could such an investigation be made excepting by interrogating Rogers, and, if he had sent this Exhibit 3 back or attempted the substitution he says he did, would not that very salient feature have been recited and set forth in the communication of January 7, 1911? Yet it is absolutely silent on that score. Exhibit 4, in my opinion, was just what the plaintiffs' attorney says it was—a hurriedly prepared acknowledgment of the receipt of Exhibit 3, as evidenced by all the earmarks of lack of care. The printed matter calling for delivery *at once* is thoroughly inconsistent with what the understood arrangements were that delivery was to be made January–June 1911, etc., as shown in actual writing on same exhibit. The same reasoning would apply to all these printed requirements appearing upon this Exhibit 4. Rogers just wrote upon this form of defendant his acknowledgment of the receipt of the contract, signed by the plaintiffs, and as to which their minds had fully and completely met; and it was never the intention that this printed matter had any bearing whatsoever upon the transaction. It conveys to plaintiffs defendant's order number and the advice that same should appear on invoices and cases.

[2, 3] Our statute of frauds does not declare an oral contract for the sale of goods to be invalid, but requires merely that, to be valid, there must be a "note or memorandum," etc., of said contract; and it is quite settled, I take it, that the written evidence required by the statute need not be confined to a single paper, but that letters, telegrams, bills, receipts, or other forms of signed writings which sufficiently evidence the contract of the parties are all that is required. Thus Wigmore in his work on Evidence, in pointing out the distinction as between statutes *which require a contract to be in writing* and those requiring a "note or memorandum" in writing, etc., says, in reference to the latter:

"In other words, the writing is not the contract, but is distinct from it, and is merely the parties' admission that such a contract was made. • • • For example, the written admission may be subsequent to the contract. *It may even be an attempt to repudiate the contract.* It may be in a letter to a third person."

And in Browne on Statute of Frauds it is said:

"An oral contract may be taken out of the statute of frauds by letters which admit the making of the contract by the writer, but in terms repudiate his liability." Section 354a.

[4] In this aspect it will be seen, then, the importance of the letter of January 7, 1911, as I referred to *supra*, first, as not being confirmatory of Rogers' attitude as to Exhibit 3, and, second, as to its effect when you consider the above cited authorities, because in that letter they specifically acknowledge the existence of the transaction of April 4th, which is the subject of this litigation. Taking it in all its aspects after reviewing all the writings presented on this trial, the second question must be answered as was the first, "Yes." There is a written memorandum, signed by or on behalf of the defendant, sufficient to satisfy the requirements of the statute of frauds, and direction and procedure may be taken and had accordingly.

Judgment accordingly.

SCHULTZ et al. v. FITZGIBBONS.

(Supreme Court, Appellate Division, First Department. January 10, 1913.)

ACCOUNT STATED (§ 19*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action on an account stated, evidence *held* sufficient to make out a case for plaintiffs in the absence of any opposing proof, and hence a verdict for defendant was unwarranted.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 91-93; Dec. Dig. § 19.*]

Ingraham, P. J., dissenting.

Appeal from Trial Term, New York County.

Action by Martin M. Schultz and others, copartners, doing business under the name of Martin M. Schultz & Co., against Mary J. Fitzgibbons, as administratrix of James B. McMahon, deceased. From a judgment for the defendant and an order denying a new trial, plaintiffs appeal. Reversed, and new trial ordered.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, MILLER, and DOWLING, JJ.

Stephen Van Wyck, of New York City, for appellants.

John H. Durack, of New York City, for respondent.

DOWLING, J. Plaintiffs bring this action to recover the sum of \$8,743, with interest upon an account stated on December 15, 1909, between them and James B. McMahon, now deceased. The answer contains a denial of the statement of any account between the parties, and then, as a separate defense, after repeating the denial, sets up an alleged agreement between McMahon and one Alexander Clark, made on or about December 15, 1909, by which, in consideration of the transfer to him of a certain insurance policy, the latter "would assume the payment of the indebtedness described in the complaint herein and would pay the same," and a further agreement by decedent with plaintiffs (who were advised of the arrangement with Clark) that they "would then and there release the said decedent from any and all obligations under the alleged indebtedness set forth in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

complaint herein, and in place thereof would accept as a debtor of the said indebtedness the said Clark in place of the said McMahon."

The statement of account received in evidence is as follows:

Duplicate.		Statement.		Chicago, Dec. 14th, 1909.	
M Account No. 9		In account with		Martin M. Schultz & Co.	
1909				Dr.	Cr.
June 12	Loss 2000	July Oil.....		1908.00	
July 24	" 500	Sept. "		1167.00	
" 31	" 500	" "		1795.00	
" 31	" 500	" "		1483.00	
Aug. 18	" 1000	" "		2390.00	
Dec. 14 By Balance					8743.00
				8743.00	8743.00
Dec. 15 To Balance				8743.00	
O. K. Chgo. Dec. 15/09					
J. B. M. J. B. M.					

It was established (and not sought to be controverted) that the initials "J. B. M.," twice signed to this paper, were in the handwriting of McMahon. He was a business man, and vice president and general manager of N. K. Fairbanks & Co., with whom he had been associated for 28 years. Moritz O. Korff, a disinterested witness, and who had been acquainted with him for 20 years, testified that he saw McMahon at the hospital in Chicago in December, 1909, every day during his stay in the city; that McMahon told him he had an account with Martin M. Schultz & Co. (the plaintiffs), and was indebted to them, and asked the witness to go to the firm's office at the Board of Trade Building, and see Mr. Schultz that he might instruct the book-keeper to send him his account. This Korff did, telling them as the reason that McMahon was going to New York shortly, and wished "to check matters up." He reported his visit to McMahon, who after several days told him he had not yet heard from the firm, and asked him to call there again and urged the sending of the account, which Korff did. On December 16, 1909, when Korff called at the hospital, McMahon handed him a paper, being a duplicate of the statement above set forth, and said to him that Schultz had visited him the day before; that this was the statement he had received from Schultz of his account; that he had checked it up; that the \$8,743 which appeared thereon was "a nice amount for him to owe," and queried "How am I going to make that up?" The cross-examination of this witness did not vary his testimony in the slightest degree, but, on the contrary, made certain the identity of the paper shown him by McMahon as the duplicate statement of account, and that it referred to account No. 9 and showed a debit balance due thereon of \$8,743. Martin M. Schultz testified without objection that he saw McMahon on December 15, 1909, in his room at the hospital in Chicago, that he had with him a statement of account between McMahon and his firm, and that the paper in evidence was identical therewith. Further he was not allowed to go because of objection raised by defendant. The nurse

in attendance on McMahon at the time testified that Schultz had visited McMahon at the hospital about December 15, 1909. Officials of N. K. Fairbanks & Co., who had long been associated with McMahon, identified the initials on the statement of account as being in his handwriting.

As against this proof, the defendant sought to establish its defense of an assumption of the debt of McMahon by Clark, but utterly failed so to do. The only other testimony was that of defendant's attorney that on a trip which he made to Chicago in the interest of the estate plaintiffs failed to mention or urge their claim.

Upon this record, I am convinced that the verdict for the defendant was against the weight of evidence. McMahon had no business relations with plaintiffs which would have justified or required his certifying to the correctness of the account save as a customer, owing them moneys the amount of which he was desirous of learning and having fixed and determined. He was ill, evidently seriously so, for he died some two months thereafter. His desire for a statement of his account, as repeated to Korff, was natural. He knew nothing of plaintiffs' books or affairs, and therefore there was no pretext under which he could have initialed the account as correct unless it was his own, and unless account No. 9 was his individual account, as Korff testifies and as the circumstances sufficiently demonstrate. While Schultz could not testify to his personal transactions with deceased, his visit to McMahon in the hospital is shown by him and corroborated by the nurse. This followed the requests to Korff by McMahon to obtain the account, and is followed by the production of the account by McMahon to Korff and the confirmation of the balance shown by it, together with the production from plaintiff's possession of the duplicate, with its correctness certified by McMahon himself. There is nothing suspicious or furtive about the transaction in any way. There is nothing improbable in the testimony of the witnesses, nor anything to impugn their veracity or good faith. There was nothing about the statement of account to render its admissibility doubtful as the learned trial justice seems to have thought, and his expressed reluctance to receive or give weight to which must have had its effect upon the jury. In any event, plaintiffs had made out their case, and, in the absence of any opposing proof on behalf of defendant, the verdict for the latter was unwarranted.

The judgment and order appealed from should be reversed, and a new trial ordered, with costs to appellant to abide the event.

McLAUGHLIN, LAUGHLIN, and MILLER, JJ., concur.

INGRAHAM, P. J. I dissent. I think, considering the nature of the transaction and the entire failure of the plaintiffs to prove that the defendant's intestate ever had any transactions with the plaintiffs, that there was a question of fact for the jury, and their verdict should not be disturbed. The action is on an account stated. The account on its face does not show that it was an account against the decedent; and there is no evidence that the decedent ever had any transaction of the kind specified in this account with the plaintiffs. It might well

be that this account was one which involved transactions for which the decedent was not personally liable, but which it was to the interest of the plaintiffs to have him mark correct. To justify a recovery as of an account stated, it must appear, I think, on the face of the account, that by approving it the person against whom there is a balance admitted the correctness of the balance due from him. The mere fact that he wrote "O. K." on this account and signed his name was not, as I view it, an admission that he was the one personally liable for the balance found due, as there was nothing on the face of the account that indicated that fact. The plaintiffs might easily have substantiated this claim by showing that they had transactions with the defendant's intestate, or on his account, which were represented by the balance that on the face of the account was due from somebody so as to connect this account with the decedent's business; but I do not think there was on the face of this account any admission that the decedent was liable to pay the balance due, and that fact was not supplied by other evidence.

I therefore think the judgment should be affirmed.

STANDARD MILLING CO. v. DE PASS et al.

(Supreme Court, Appellate Division, First Department. January 10, 1913.)

1. EVIDENCE (§ 400*)—PAROL EVIDENCE—CONTRACT—SALES.

A broker's bought and sold note, which contained all of the terms of the contract, including the parties, price, and time of shipment, is subject to the rule against varying a written instrument by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1778-1793; Dec. Dig. § 400.*]

2. SALES (§ 272*)—IMPLIED WARRANTY OF QUALITY.

The law would imply a seller's agreement that rice sold was of a merchantable quality.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 747; Dec. Dig. § 272.*]

3. EVIDENCE (§ 441*)—PAROL EVIDENCE—CONTRACT—SALES.

Where a written contract for the sale of rice expressly required merchantable rice, evidence that the sale was by sample and the rice shipped did not correspond to the sample was not admissible, as varying the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.*]

4. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in admitting evidence that a sale of rice was by sample and that shipped did not correspond to the sample, which was the basis of the court's action in directing a verdict for defendants in an action for the purchase price, was prejudicial to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

5. SALES (§ 168½*)—INSPECTION—REJECTION.

Where purchasers of rice reserved the right to examine it before acceptance, and did examine and reject it, title did not pass to them, so that they could not be compelled to accept the rice, and recover, by way

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of counterclaim, damages for its defective quality, but could resist an action for its price on the ground of breach of contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 400-421; Dec. Dig. § 168½.*]

Appeal from Special Term, New York County.

Action by the Standard Milling Company against Eliot A. De Pass and others. From an order setting aside a verdict for defendants and granting a new trial, defendants appeal. Affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, MILLER, and DOWLING, JJ.

Percival H. Gregory, of New York City, for appellants.

George H. Gilman, of New York City, for respondent.

McLAUGHLIN, J. Action to recover a portion of the purchase price of 3,000 pockets of rice sold by plaintiff, a Louisiana corporation, to defendants, who were copartners doing business under the name of A. S. Lascelles & Co. The contract under which the rice was sold was made in New York through the brokerage firm of A. P. Topping & Co., acting on behalf of plaintiff. It was evidenced by a bought and sold note, reading as follows:

New York, April 25, 1908.

Sold for account of Bayou City Rice Mills to Messrs. A. S. Lascelles & Co.

Marks	Barrels.	Pockets.
#157		3000 Rice at 3¢ per lb. f. o. b. Houston, Texas.
		Packed in double pockets.

Immediate shipment, no insurance.

Terms Net Cash, S/D attached to B/L privilege of examination.

A. P. Topping & Co., Brokers.

The name Bayou City Rice Mills was a trade-name used by the plaintiff in its dealings in rice. A few days after the agreement was entered into, the plaintiff, in accordance with instructions from the defendants, shipped the rice in question to Galveston, Tex., and drew drafts upon defendants for the purchase price, with the bills of lading attached. On June 18, 1908, defendants wrote plaintiff a letter, stating that they had examined the rice at Galveston, and were compelled to refuse to accept the same as a delivery under the contract. On being asked for the reason of the rejection, they replied by letter that the rice was not of the same quality as the sample upon which the contract was made. Thereupon plaintiff gave defendants notice of the time and place where the rice would be sold at public auction for their account. The sale took place according to the notice, and the plaintiff, being the highest bidder, purchased the same, paying therefor \$7,650. After deducting the expenses of the sale and transportation, the net proceeds were credited upon the purchase price, and there still remained a balance of \$1,889.35 which the plaintiff claims to be due from the defendants, and to recover which, together with interest, this action was brought. At the conclusion of the trial, the court directed a verdict in favor of the defendants, which it sub-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sequently set aside and granted a new trial, on the ground that error had been made in admitting parol evidence that the sale of the rice was by sample, and also upon the ground that, if the rice shipped did not correspond to the sample, the defendants, nevertheless, were bound to accept it and plead as a counterclaim the damages sustained by reason thereof.

[1] There is no dispute between the parties that the bought and sold note was the contract made between them. It embodied all the terms of the agreement, and is therefore subject to the well-settled rule against varying a written instrument by parol evidence. *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961; *Eighmie v. Taylor*, 98 N. Y. 288; *Williamson v. Seeley*, 22 App. Div. 389, 48 N. Y. Supp. 196.

[2] The agreement called for merchantable rice. This the law implied (*Carleton v. Lombard, Ayres & Co.*, 149 N. Y. 137, 43 N. E. 422; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515), but, as varied by the parol evidence, it would require the delivery of rice which corresponded with the sample (*Henry & Co. v. Talcott*, 175 N. Y. 385, 67 N. E. 617; *Bach v. Levy*, 101 N. Y. 511, 5 N. E. 345).

In *Filkins v. Whyland*, 24 N. Y. 338, the agreement between the parties read as follows:

	Troy, Nov. 19, '52.
	C. B. Filkins Bo't of G. Whyland,
1 Horse.....	\$150.00
	Received payment. G. Whyland.

It was sought by the vendee to prove by parol evidence that at the time of the sale the vendor expressly warranted the horse to be sound. The evidence was excluded, and the plaintiff nonsuited. In affirming the judgment Judge Wright, who delivered the opinion of the court, referring to the agreement, said:

"If it is to be regarded and treated as the contract of the parties for the purchase and sale of the horse, reduced to writing after verbal representations and stipulations, then, as it contains no warranty, it was inadmissible to add to or vary such contract by parol testimony tending to prove a warranty."

The agreement here under consideration is, in some respects, similar to the one passed upon in *Wiener v. Whipple*, 53 Wis. 298, 10 N. W. 433, 40 Am. Rep. 775. There the agreement read:

Bought of Cass Whipple about 300 bushels of barley at 65 cents for 50 pounds, to be delivered by the 15th of September next.	Paid on same \$25.
	A. Whipple.
Waterloo, August 24, 1880.	B. M. Wiener.

At the trial in that action it was shown that the defendant Whipple delivered one load of barley to the plaintiff, which was accepted and paid for, and that he afterwards offered to deliver two loads, which the plaintiff refused to accept, alleging that it was not of the quality which he had bought, that he bought the barley by sample, and that tendered by defendant was not as good a quality as the sample. The trial court permitted plaintiff, against defendant's objection, to give parol evidence tending to show that the sale was in fact by sample

The admission of this evidence was held to be error, which necessitated a new trial; the court saying:

"The written contract being plain and unequivocal, no parol evidence can be given to explain or change its terms. * * * It appearing that the contract was in writing, such written contract failing to show that the sale was by sample, it was clearly error to permit the plaintiff to show that the sale was in fact made by sample."

[3] In the case now before us the agreement between the parties is complete. There is nothing ambiguous about it. Under it plaintiff was obliged to deliver, as indicated, merchantable rice. A better quality than that could not be required. It was therefore error for the court to receive against plaintiff's objection parol evidence that the sale of the rice was by sample and that that shipped did not correspond to it.

[4] This error was a substantial one. It was the basis of the court's action in directing a verdict in favor of the defendants. The verdict was therefore properly set aside and a new trial ordered.

This opinion might well stop here, but, since there must be a new trial, it may not be out of place to call attention to the fact that the court was in error in setting aside the verdict on the other ground named.

[5] If the defendants, with full knowledge of all the facts, had accepted the rice, then, in an action to recover the purchase price, they would have had to counterclaim their damages. But defendants had not accepted the rice. They had expressly reserved the right to examine it before acceptance. They made the examination, and then rejected it. The title to the rice never passed to the defendants, and they could not be compelled to pay for what they never owned or never accepted.

In *Henry v. Talcott*, *supra*, the court said:

"If, upon delivery, the goods fall below the quality of the sample, the buyer may either reject them or may accept and sue for damages upon the warranty. *Zabriskie v. Central Vermont R. R. Co.*, 131 N. Y. 72 [29 N. E. 1006]; *Kent v. Friedman*, 101 N. Y. 616 [3 N. E. 905]; *Day v. Pool*, 52 N. Y. 416 [11 Am. Rep. 719]."

The order appealed from, therefore, is affirmed, with costs to respondent to abide event. All concur.

PEOPLE v. MANETT.

(Supreme Court, Appellate Division, First Department. January 10, 1913.)

1. CRIMINAL LAW (§ 87*)—JURISDICTION—COURT OF SPECIAL SESSIONS.

Bronx County Act April 19, 1912 (Laws 1912, c. 548), which created the county of Bronx, by section 9 provided that the Courts of Special Sessions and the Magistrates' Courts within the county as now constituted by law shall have jurisdiction of such offenses as may be determined by such courts as now constituted under Laws 1897, c. 378, and amendatory acts, the same as if this act had not been passed, and that the said courts

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the county of New York and in the First judicial district shall retain and exercise the same jurisdiction they now have. *Held*, that the Court of Special Sessions of New York City continued to have jurisdiction of the crime of impairing a minor's morals committed after April 19, 1912, within the newly created county of Bronx.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 126; Dec. Dig. § 87.*]

2. CRIMINAL LAW (§ 87*)—JURISDICTION—COURT OF SPECIAL SESSIONS—MISDEMEANORS.

Under Const. art. 6, § 23, giving Courts of Special Sessions such jurisdiction of misdemeanor offenses as may be prescribed by law, any crime graded by law as a misdemeanor, including the offense of impairing a minor's morals, may be prosecuted in that court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 126; Dec. Dig. § 87.*]

Appeal from Court of Special Sessions of City of New York.

Eugene Manett was convicted of impairing the morals of a minor, and he appeals. Affirmed.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and MILLER, JJ.

Henry Waldman, of New York City, for appellant.

Louis Fabricant, of New York City, for the People.

SCOTT, J. [1] The crime for which plaintiff was convicted was committed in the borough of the Bronx on October 24, 1912. The appellant claims that the territory comprised within that borough was erected into a county by chapter 548, Laws 1912, and consequently that the Court of Special Sessions of the city of New York had no jurisdiction of a crime committed after April 19, 1912, when the Bronx County Act was passed. It is not necessary to consider at this time the constitutional objections which have been raised as to the validity of the Bronx County Act. If, for any reason, that act is invalid and void, the Court of Special Sessions has all the jurisdiction it ever had, and the appellant's contention on that point must fail. Assuming, however, that the act is valid, we are still of opinion that the Court of Special Sessions had jurisdiction to try appellant for the crime of which he was accused. The act of April 19, 1912, created the territory comprised within the borough of the Bronx into a county as of the date on which the act was passed, but, since there could not be instantly evolved a complete county government, provision was made for the subsequent organization of such a government, and, until such organization could be effected, the act continued the jurisdiction of the county officers and the City and County Courts which they had theretofore possessed. Section 9 of the act makes special provision for the continuance of the jurisdiction of the Courts of Special Sessions and the Magistrates' Courts in the following language:

"Within the county of Bronx the Courts of Special Sessions and Magistrates' Courts as now constituted by law shall have jurisdiction of such offenses as may be tried and determined by such Courts of Special Sessions and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by such Magistrates' Courts as now constituted under and by virtue of chapter three hundred and seventy-eight of the Laws of eighteen hundred and ninety-seven, and all acts amendatory thereof and supplemental thereto, the same as if this act had not been passed."

There can be no question as to the intention of the Legislature upon this subject, which is confirmed by the closing words of the section as follows:

"The said courts of the county of New York, and in the First judicial district, shall retain and exercise in all civil and criminal proceedings the same jurisdiction they now have."

We entertain no doubt of the jurisdiction of the Court of Special Sessions of the city of New York to try appellant for the crime whereof he was accused.

[2] Appellant further claims that, although the crime charged against him is only a misdemeanor, yet that it is in its nature an infamous crime which could be prosecuted only by presentment or indictment of the grand jury under section 6 of article 1 of the State Constitution. This argument overlooks the provisions of section 23 of article 6 of the Constitution, which provides that:

"Courts of Special Sessions shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law."

It has been repeatedly held that, under this provision, any crime graded by law as a misdemeanor may be prosecuted in the Court of Special Sessions. *People v. Stein*, 80 App. Div. 357, 80 N. Y. Supp. 847; *People ex rel. Comaford v. Dutcher*, 83 N. Y. 240; *People ex rel. Cosgriff v. Craig*, 195 N. Y. 190, 88 N. E. 38.

The conviction is affirmed. All concur.

SCHLOSS et al. v. TROMAN et al.

(Supreme Court, Appellate Division, First Department. January 10, 1913.)

1. MECHANICS' LIENS (§ 254*)—RIGHTS OF SUBCONTRACTOR—AMOUNT PAYABLE UNDER CONTRACT—AGREEMENT WITH PRINCIPAL.

Where the lienor was induced to furnish materials to a building contractor by the agreement of the owner that he would not reduce the amount due the building contractor by claiming liquidated damages for delay in completing the contract, the owner was precluded from claiming such damages as against the claim of the lienor for materials furnished both before and after such agreement, since the furnishing of any materials was a sufficient consideration for the agreement to waive the right to claim such damages as against the whole claim.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 447, 448; Dec. Dig. § 254.*]

2. MECHANICS' LIENS (§ 254*)—DELAY—DAMAGES—RIGHTS OF SUBCONTRACTOR.

An agreement by an owner with a subcontractor that he would not reduce the amount due the principal contractor by claiming liquidated damages for delay in the completion of the contract inured to the benefit

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of a party furnishing materials to the subcontractor, although he did not know of such agreement when he furnished the materials.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 447, 448; Dec. Dig. § 254.*]

3. MECHANICS' LIENS (§ 254*)—DELAY—DAMAGES—RIGHTS OF SUBCONTRACTOR.

Where a subcontractor delayed filing its lien, and thereby lost its right of priority, in reliance on the owner's statement that he would not claim liquidated damages from the principal contractor, and thereby reduce the amount subject to liens, the subcontractor, on the theory of estoppel, was only entitled to such benefits as would have followed the filing of its lien at the time it was induced to refrain from doing so, which necessarily involved a determination of the amount of liquidated damages which the owner was entitled to deduct, but, if there was an agreement by the owner in consideration of such delay in filing that he would not claim such liquidated damages, they could not be claimed as against the subcontractor, whether or not it was prejudiced by the delay.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 447, 448; Dec. Dig. § 254.*]

4. MECHANICS' LIENS (§ 281*)—ENFORCEMENT—SUFFICIENCY OF EVIDENCE.

Where the evidence showed that a subcontractor's manager with the principal contractor called on the owner, spoke to the owner about the provision in the contract relative to liquidated damages, and stated that his company would file a lien unless it was assured of getting its money, that he was told by the owner that it was unnecessary to file a lien, that there was ample money to pay all claims, and that all claims would be paid, and that the subcontractor did delay filing its lien until other liens had been filed, it sufficiently showed an agreement by the owner not to claim the liquidated damages and a delay by the subcontractor in filing its lien in reliance thereon.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 565–572; Dec. Dig. § 281.*]

Appeal from Trial Term, New York County.

Action by Hugo N. Schloss and another against Joseph Troman and others for a determination of the amount due from plaintiffs under a contract with the defendant named. From a judgment foreclosing mechanics' liens in favor of defendants Willson & Adams Company and others, plaintiffs appeal. Affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, MILLER, and DOWLING, JJ.

Benjamin N. Cardozo, of New York City (Herbert R. Limburg, of New York City, on the brief), for appellants.

Edgar J. Phillips, of New York City (Frank M. Avery, of New York City, on the brief), for respondent Willson & Adams Co.

Everett P. Wheeler, of New York City (Henry M. Hewitt, of New York City on the brief), for respondents Marcus Woodworking Co. and Mt. Vernon Builders' Supply Co.

LAUGHLIN, J. On the 11th day of August, 1910, the plaintiffs, who owned the premises situate at the southeasterly corner of 229th street and Bronxwood avenue, borough of the Bronx, New York, contracted in writing with the defendant Joseph Troman for the erection of a two-story factory building thereon, for which they agreed to pay

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

\$17,775, and on the 26th day of the same month they ordered extra work in connection therewith, for which they agreed to pay \$350, making the total contract price of the work \$18,125. The lien filed by the Mt. Vernon Company was for material furnished to Troman and used in the building. Troman sublet the carpenter work to one Staker, who is not a party to the action, and the other two liens filed were for material furnished to Staker and used in the building under his subcontract. The first lien filed was by the Willson & Adams Company November 11, 1910. Thereafter and on the same day the Marcus Company filed its lien; but the Mt. Vernon Company, which had fully performed its contract before the other liens were filed, did not file a lien until December 5, 1910. The lienors having failed to commence an action to foreclose their liens, the plaintiffs, instead of calling upon them to do so, brought this action on February 1, 1911, for a judicial determination with respect to the amount due from them to Troman, and for the distribution of the fund and cancellation of the liens. The action was tried as if it were one brought by a lienor for the foreclosure of his lien, and no question with respect to the form of the action is presented.

Before the liens were filed, plaintiffs paid to Troman on account of the contract price of the work the sum of \$12,000, leaving a balance of \$6,125 unpaid at that time, and when the action was commenced. The contract required Troman to complete the building on or before September 29, 1910, or within seven weeks, and it was therein provided that time was to be of the essence of the contract, and that the contractor was to receive \$50 for each day of completion prior to September 29, 1910, and to pay as liquidated damages \$50 for each day required to complete the contract after September 29, 1910. On the day Troman was required by the contract to have the factory building completed he had not substantially performed, but the plaintiffs took possession to such extent as they could, and installed and operated certain machines for the manufacture of lace. Troman continued the work under the contract, at least, until after the middle of December, 1910, and on January 11, 1911, the architect for plaintiffs employed Staker, the subcontractor for the carpenter work, to complete certain remaining items of work required by the contract. There is a conflict in the evidence both with respect to the work left uncompleted by Troman, and the reasonable cost thereof. The trial court determined that the reasonable cost of completing in accordance with the contract after the last work performed by Troman was \$446.49; and that finding is fairly sustained by the evidence. The cost of completion deducted from the balance of the contract price unpaid leaves a balance of \$5,678.51, which is sufficient to pay all of the liens in full due and owing on the contract, unless the plaintiffs are entitled to appropriate or retain the whole or part of it as liquidated damages. On the conflicting evidence with respect to the time when the contract was substantially performed the court made no finding, and expressed the opinion that such a finding was not material to a decision of the issues. The amount of liquidated damages to which the plaintiffs may be entitled depends upon when the work

was substantially completed, and therefore it was necessary to determine that time unless the amount due to the general contractor is not subject to reduction as against the lienors, or unless the plaintiffs have by estoppel or contract lost their right to insist upon liquidated damages as against the lienors. It is not necessary to discuss or to decide the question as to whether the amount due the general contractor is subject to reduction on account of the liquidated damages because for other reasons the plaintiffs are not in a position to claim liquidated damages as against any of the lienors.

[1, 2] No extended argument is required to sustain the trial court with respect to two of the liens. The evidence warranted a finding that the Marcus Company was induced to furnish materials on the agreement of plaintiffs that they would not claim liquidated damages. The argument that the agreement, at most, only precludes plaintiffs from enforcing the liquidated damages with respect to the materials subsequently furnished is untenable. Furnishing any materials constituted a sufficient consideration for the agreement to waive the right to assert damages, not only as against the claim for materials to be furnished, but also for those theretofore furnished. The Willson & Adams Company does not base its claim upon estoppel or contract made between it and the plaintiffs. It relies upon evidence showing that, before it furnished all of the materials to Staker, the plaintiffs had agreed with him that, if he would fully perform his contract with Troman, the liquidated damage clause would not be enforced, and that, relying thereon, he did perform. When the Willson & Adams Company furnished the remaining materials to Staker, it was not aware of this agreement between him and the plaintiffs. If Staker had had the materials on hand, and had furnished and delivered them pursuant to his contract with Troman, there could be no doubt that in these circumstances that would have constituted a good executed consideration for the agreement on the part of the plaintiffs not to claim liquidated damages which might have so depleted the fund that nothing would remain applicable to payment for the materials thus furnished or for those theretofore furnished. I perceive no valid reason why those who furnished the materials do not stand in Staker's shoes, and therefore I am of opinion that it should be held that the agreement inured to the benefit of the Willson & Adams Co.

[3] The Mt. Vernon Company delivered all of the materials, on account of which it asserts a lien, before the occurrences upon which it bases its right to recover. This lienor claims that, after furnishing and delivering the materials, it was induced by plaintiffs to refrain from filing a lien therefor, and thereby it lost the priority it would have had over the other lienors whose liens had not then been filed. The evidence sustains that contention. On the theory of estoppel, however, the lienor would only be entitled to such benefits as would have followed the filing of its lien at the time it was induced to refrain from so doing. That would necessarily involve a determination with respect to the amount of the liquidated damages, provided the plaintiffs would be entitled to deduct liquidated damages from the amount unpaid on the contract price, for in no other manner could it be ascer-

tained what amount, if any, remained due and owing from the plaintiffs to Troman and applicable to the payment of mechanic's liens. If the evidence showed an agreement on the part of the plaintiffs with this lienor that they would waive, or would not claim, liquidated damages if it refrained for the time being from filing a lien, and it, relying thereon, refrained from filing a lien, which would have preserved its rights as they then existed, that would constitute a sufficient consideration, and it would not be necessary to inquire to what extent, if any, it was prejudiced by deferring the filing of the lien.

[4] The evidence on this point is not entirely satisfactory, but I think that it is sufficient to warrant the inference that this was the intention of the parties. The Mt. Vernon Company evidently contemplated filing a lien unless it received satisfactory assurances that its claim was not in jeopardy. To that end, its manager interviewed Troman and they together called upon the plaintiff Schloss. The testimony with respect to this interview is conflicting; but that upon which the Mt. Vernon Company relies tends to show that its manager spoke to Schloss about the penalty, and stated that his company would file a lien unless it was sure of getting its money, and was assured by Schloss that it was not necessary to file a lien, and that there was ample money to pay all claims against the work, and that, while plaintiffs did not then wish to advance money on the work, in due time the Mt. Vernon Company and all others would be paid. Although this evidence is somewhat meager and indefinite, it is evident therefrom that the plaintiffs were interested in not having a lien filed which would have precipitated the filing of other liens, and it is a reasonable inference that the plaintiffs intended to agree with the Mt. Vernon Company not to enforce the liquidated damage clause of the contract, and that the latter company so understood, and, relying thereon, refrained from filing a lien until long after the other liens had been filed, and the situation had become so changed that the filing of its lien did not prejudice the plaintiffs.

It follows, therefore, that the judgment should be affirmed, with costs. All concur.

(78 Misc. Rep. 419:)

TINCKNELL v. KETCHMAN.

(Supreme Court, Trial Term, Cayuga County. December, 1912.)

NEW TRIAL (§ 35*)—GROUNDS—REFERENCE TO INSURANCE—CROSS-EXAMINATION.

In an action for injuries from a collision with defendant's automobile, where defendant was asked on cross-examination whether he had not told counsel he would have to refer to his insurance company, the purpose being not to show insurance protection, but that, when defendant was charged with causing plaintiff's injuries, he failed to deny the charge, a verdict for plaintiff must be set aside, though the answer was stricken out and the objection to the question sustained.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 51-55; Dec. Dig. § 35.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by May Tincknell against Herman B. Ketchman for damages sustained in a collision with an automobile. Verdict for plaintiff, and defendant moves for a new trial. Granted.

Amasa J. Parker, of New York City, for plaintiff.

H. D. Bailey, of Syracuse, for defendant.

SAWYER, J. This action was to recover damages sustained in a collision with an automobile claimed to have been owned and operated by defendant. The defendant denies having been concerned in the accident, alleges that he was not present at its occurrence, and, if it happened at all, that the automobile in question was owned and operated by some one other than himself. This constituted the only issue aside from that of the extent of plaintiff's injuries.

Upon the trial on the cross-examination of defendant (referring to a certain conversation had between them) the record shows the following:

"Mr. Parker: Q. Didn't you tell me that you would have to refer me to your insurance company?

"Mr. Bailey: I object and ask to have that stricken out as incompetent. [Received. Exception.] A. Yes, sir.

"Mr. Parker: I don't show he was insured. I want to show what he said when he was notified in regard to the accident.

"Mr. Bailey: I except to what counsel said.

"The Court: I think I will not let you ask that question. The objection is sustained, and it may go out and the jury will disregard it.

"Mr. Parker: Exception."

The jury rendered a verdict in favor of plaintiff which defendant now moves to set aside upon the ground that the fact that defendant was insured against any judgment which might be obtained against him was brought to the attention of the jury.

The general rule that it is improper to bring such information to the knowledge of the jury is too well settled to admit of discussion. *Akin v. Lee*, 206 N. Y. 20, 99 N. E. 85; *Cosselmon v. Dunfee*, 172 N. Y. 507, 65 N. E. 494; *Loughlin v. Brassil*, 187 N. Y. 128, 79 N. E. 854; *Hordern v. Salvation Army*, 124 App. Div. 674, 109 N. Y. Supp. 131; *Haigh v. Edelmeyer & Morgan Hod E. Co.*, 123 App. Div. 376, 107 N. Y. Supp. 936; *Manigold v. Black River T. Co.*, 81 App. Div. 381, 80 N. Y. Supp. 861.

It is, however, urged by plaintiff that evidence otherwise competent cannot be excluded because it incidentally infringes upon that rule. In the case at bar the question was asked, not for the purpose of showing insurance protection, but to establish that, when defendant was charged with causing plaintiff's injuries, he failed to deny that charge, thereby tacitly admitting his connection with the accident. It was upon this theory that the question was at first permitted to be answered, but upon reflection the ruling was reversed and the objection sustained. Of the correctness of this latter ruling I am convinced, but there remains the inquiry whether the propounding of the question itself by plaintiff's counsel requires the setting aside of the verdict. As to this, the remark of Mr. Justice McLennan in *Manigold v. Black River T. Co.*, *supra*, that "it is not proper to inform the jury of such fact in any manner" seems to be in point and conclusive.

The question of fact as to whether or not defendant caused the accident under consideration was exceedingly close, and it is impossible to say that the statement that defendant understood he had an insurance behind him embodied in the question did not influence the jury in rendering the verdict which it did. While it is true that the answer was stricken out and the objection to the question sustained, the prohibited matter was by the question brought squarely before the jury and might have had considerable weight in their determination. But for its involving this question of insurance, defendant's failure to deny the charge laid against him would have been competent. It was not, however, conclusive, being simply one of many facts which the jury might consider. It would seem that, where two rules so conflict and offered testimony necessarily involves matter which is specifically prohibited, its otherwise competency must give way. The positive harm flowing to defendant therefrom overbalances the probative advantage to plaintiff of an admission based solely upon failure to deny.

The verdict is therefore set aside, and new trial ordered, Same being upon a question of law only, no costs are allowed.

Ordered accordingly.

SCULLY v. SCULLY.

(Supreme Court, Appellate Division, Third Department. December 30, 1912.)

1. EVIDENCE (§ 236*)—DECEASED PERSONS—CONVERSATIONS—ADMISSIONS.

In an action for conversion of money deposited in a bank, where the question was as to the ownership as between a father and son, who were both dead, evidence of a conversation between the two men relative to such deposit was admissible as declarations or admissions which were binding on their representatives.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 876-882; Dec. Dig. § 236.*]

2. EVIDENCE (§ 121*)—RES GESTÆ—CONVERSATIONS OF DECEASED PERSONS.

In an action for conversion of money deposited in a bank, where the question was as to the ownership as between a father and son, who were both dead, evidence of a conversation between the two men relative to such deposit was admissible as part of the res gestæ, establishing the relations of the parties in reference to the deposit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303, 307-338, 1117, 1119; Dec. Dig. § 121.*]

3. WITNESSES (§ 139*)—CONVERSATIONS WITH DECEASED PERSONS—INTEREST—ADMINISTRATRIX.

Testimony by an administratrix, who was a beneficiary under the will of her husband, in an action by her as such, of a conversation with her father-in-law relative to the ownership of a deposit in a bank as between her husband and the father, where the party alleged to have converted the property claimed that she acted under the direction of the father, was inadmissible under Code Civ. Proc. § 829, relating to communications between persons interested and deceased persons.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 582-597; Dec. Dig. § 139.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, Albany County.

Action by Sarah Scully, administratrix of Thomas J. Scully, deceased, against Margaret P. McGrath, formerly Scully. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before SMITH, P. J., and KELLOGG, HOUGHTON, BETTS, and LYON, JJ.

John J. McCall, of Albany (Nicholas J. Barry, of Albany, of counsel), for appellant.

Countryman, Nellis & Du Bois, of Albany (M. H. Nellis, of Albany, of counsel), for respondent.

SMITH, P. J. Plaintiff has recovered a judgment for the conversion of certain moneys by the defendant, which moneys have been held to have been the moneys of plaintiff's husband, whose estate she is now administering. Thomas Scully, plaintiff's husband, died on the 3d day of October, 1900. In 1893 there was opened an account in his name in the Mechanics' & Farmers' Savings Bank. From that account some moneys were drawn and some deposited therein, until at the time of his death there was in said bank to the credit of Thomas Scully the sum of \$815.75. John Scully was the father of Thomas Scully. As far as appears from the evidence, at all times since the opening of the account the bank book was in the possession of John Scully. Shortly prior to October 13, 1900, Sarah Scully, this plaintiff, was appointed administratrix of her husband's estate. Upon October 13th she went to this bank in company with her father-in-law, John Scully, and this defendant. Thereupon the moneys were withdrawn by her and given to John Scully, who in their presence deposited the moneys, with the exception of about \$50 which he retained in the National Savings Bank in the city of Albany, to the credit of Sarah and Margaret Scully, now Margaret McGrath, this defendant. Upon January 3, 1901, these moneys were withdrawn from the bank by Margaret Scully under the direction of her father, John Scully, and deposited in the Albany Savings Bank to the credit of Delia Scully, a sister of Margaret, and Margaret. Shortly thereafter the deposit was again changed in the same bank to the credit of Bridget Scully, the wife of John Scully, and Margaret. The moneys were afterwards withdrawn upon the 19th day of September, 1904. The claim of the plaintiff is that these moneys were at all times the moneys of her intestate, and that the act of Margaret Scully in withdrawing them from the National Savings Bank and depositing them to the name of herself and Delia Scully, her sister, was an unlawful interference with said funds, and therefore constituted a conversion thereof.

The plaintiff's right must mainly depend upon the force of the presumption that the moneys deposited in the name of Thomas Scully were his moneys. The force of this presumption is largely overcome by the fact that at all times the bank book was held in the possession of John Scully, the father. These moneys could not be withdrawn without the presentation of this bank book. All of this time Thomas Scully and Sarah Scully had an individual account in another savings

bank in Albany, which was in no way connected with this account, and of which they held the bank book. The withdrawal of these deposits in January, 1901, by Margaret Scully became known to Sarah Scully, as she swears, within a year and a half after they were withdrawn. John Scully lived thereafter until February, 1905. His wife, Bridget Scully, lived until September, 1905. The fact that Sarah Scully waited to insist upon this demand until after the death both of John Scully and Bridget Scully, his wife, goes far to corroborate the claim of the defendant that the moneys were the moneys of John Scully. It is not claimed that Margaret Scully ever had any personal benefit from this deposit, and, in fact, the evidence that she did not have any personal benefit was excluded as immaterial, and probably properly excluded. Whether the deposits in the Mechanics' & Farmers' Savings Bank were in fact the property of John Scully or Thomas Scully was a question of fact. Margaret Scully swears that at the time the deposit was withdrawn Sarah Scully handed the moneys over to John Scully, and said, "Here is your money." This is denied by Sarah Scully. Delia Scully further swears that at one time when her father wanted to withdraw some money from this bank he sent for Thomas Scully, and that Thomas Scully asked why he did not withdraw it all. Under these facts, it may well be doubted whether the verdict was a just verdict, or whether it was not against the weight of evidence.

[1-3] The question of the weight of evidence need not be here considered, however, in view of certain rulings by the trial court which seem to me to be fatal to this recovery. While Thomas Scully was living, Delia Scully swears that he and her father, John Scully, had a conversation in reference to this deposit. The defendant offered to prove that conversation, to which an objection was made, which objection was sustained by the trial court. This evidence should have been admitted. It was competent either as a declaration or admission of Thomas Scully, binding upon his representative, or as part of the *res gestæ* establishing the relations of the parties in reference to the deposit and its ownership. That conversation may well have cleared up any doubt that might otherwise exist as to why this deposit was in the name of Thomas Scully, while his father, John Scully, at all times held the pass book. The trial court further allowed Sarah Scully to swear to certain conversations with John Scully, which were material as bearing upon the ownership of the property. This testimony was objected to as incompetent under section 829 of the Code of Civil Procedure. There can be no doubt that Sarah Scully was personally interested in the result of the action. She was administratrix of the estate, and was also one of the beneficiaries thereof. Margaret Scully claims simply to have acted under John Scully, under his authority or direction. These two facts would seem to bring this testimony directly within the prohibition of the section. For these errors, the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

Judgment and order reversed, and new trial granted, with costs to appellant to abide event. All concur; HOUGHTON, J., in opinion and BETTS, J., in result.

HOUGHTON, J. (concurring). I agree in a reversal of this judgment only upon the ground that the court erred in refusing to receive the testimony of Delia Ryan respecting the conversation between her father, John, and Thomas J. Scully, deceased, regarding the money in dispute; and I concur in such holding solely upon the ground that proper objection was not made.

The only objection interposed was that the testimony was incompetent, hearsay, and self-serving. There was no objection that the witness herself was incompetent to testify as against this plaintiff because of the prohibition of section 829 of the Code, nor were facts sufficiently developed to show that she was interested in the estate of John Scully, deceased. The money which it is alleged the defendant converted was deposited in the name of Thomas J. Scully at the time of his death. The defendant attempted to justify her intermeddling with and conversion of such money, not because she herself was the owner, but on the ground that it belonged, not to Thomas J., the deceased, in whose name it was deposited, but to her father, John, and that whatever she did with it was done in pursuance of his direction. The record shows that John Scully was dead, but it does not appear that his daughter Delia would gain anything by adding the \$760 in dispute to his estate if he died still owning it. If he died such owner leaving a will of which she was residuary legatee, or if the fund was specifically bequeathed to her, or if he died intestate and she was one of his next of kin, manifestly she would gain through the success of the defendant in retaining the money for his estate, and hence she would be incompetent to testify against the plaintiff as administratrix to personal transactions had with her testator or intestate, for she would be testifying in her own behalf and for her own benefit. *Matter of Meehan*, 59 App. Div. 156, 69 N. Y. Supp. 9; *Holcomb v. Holcomb*, 95 N. Y. 317, 325; *Brigham v. Gott*, 3 N. Y. Supp. 518.¹

But even if it appeared that she was interested in one of these ways, and would gain or lose by the result of the present action, no objection was made as to her competency as a witness to testify. The evidence sought from her was material and proper, notwithstanding the fact that she may have been incompetent to give it. An objection to be available under section 829 must go to the competency of the witness, and a general objection as to the competency of the evidence itself is not sufficient to invoke its protection. *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579, 63 L. R. A. 163; *Stevens v. Brennan*, 79 N. Y. 254.

I do not agree, however, that it was error for the court to permit the plaintiff, Sarah Scully, the administratrix of Thomas J. Scully, deceased, to testify in her own behalf to conversations which she had with John Scully, deceased. She did not claim title to the fund in controversy through John Scully by assignment or in any manner. She claimed title to it as administratrix of her husband, Thomas J., because the money was on deposit in his name when he died, and thus *prima facie* belonged to him, notwithstanding the fact that she had

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 51 Hun, 636.

been induced by John to withdraw it as administratrix, and redeposit it in the name of herself and the defendant. The defendant is not the administratrix or executrix of John Scully, deceased, but a mere individual who assumed to meddle with the deposit, and who attempts to justify her acts, not because John gave the money to Thomas J., but because it always belonged to John, and was merely being held by Thomas for his benefit. As administratrix the plaintiff made prima facie title to the money by simply showing that it was on deposit in the name of her intestate when he died, and that title could be defeated only by the fact that she turned it over to John in settlement of a bona fide claim made by him against the estate of her intestate; and upon no theory of the action, therefore, can it be said that she claimed title thereto through John Scully a deceased person.

Although Sarah Scully was entitled to share in the estate of her deceased husband, and was therefore interested in the recovery of the deposit which stood in his name, still I think she was competent to testify in her own behalf as administratrix to personal transactions had with John Scully, deceased, tending to show that the claim of the defendant was unfounded. The prohibition of section 829 goes only to testifying against an executor or administrator. An executor or administrator, although sharing in the distribution of the estate, is not prohibited from testifying in favor of himself as executor or administrator to transactions had between his own decedent and the adverse party. *McLaughlin v. Webster*, 141 N. Y. 76, 35 N. E. 1081; *Martin v. Hillen*, 142 N. Y. 140, 144, 36 N. E. 803; *Jones v. Perkins*, 29 App. Div. 37, 51 N. Y. Supp. 380; *Klock v. Brennan*, 82 Hun, 262, 31 N. Y. Supp. 190. Section 829 expressly allows the executor or administrator to testify to such personal transactions; the only penalty being that the door is opened for the opposite party to testify concerning the same transaction or communication. By the provisions of section 828 all persons irrespective of interest are made competent witnesses, unless expressly prohibited from testifying. Sarah Scully, therefore, would have been a competent witness to testify to any personal transaction had between her decedent, Thomas J., and John Scully, deceased. The transactions, however, which she was called upon to testify concerning were had with John Scully after her husband's death, and it is claimed that she was incompetent to testify concerning them because John Scully was a deceased person through whom the defendant claimed title to the fund. By her answer the defendant claimed no title whatever, but simply attempted to justify her acts in withdrawing the deposit which stood in the name of herself and the plaintiff, Sarah, because she was directed so to do by John. The plaintiff did not claim title through John, nor did the defendant, and therefore he was not a deceased person through whom either party claimed title to the fund in controversy. According to the plaintiff's claim, in the course of her administration as administratrix of her husband's estate, his father, upon whom she relied, advised her to withdraw the money which was deposited in her husband's name, and place it on deposit in the name of herself and this defendant, subject to withdrawal by either, not because he himself owned it and wanted it

so deposited, but for convenience only. After the money was so deposited, this defendant withdrew it, and placed it beyond the reach of the plaintiff, and because of such act by the defendant this action in conversion is brought. The defendant justifies on the ground that she obeyed her father in doing what she did. The defendant does not claim that she owns or ever owned the money, or that she obtained title to it through her father or anybody else. Of course, she does incidentally claim that her father had a right to say what should be done with the money because it belonged to him, and not to Thomas. Nevertheless I fail to see how John Scully is a person through whom the defendant claims title in such a sense as to prohibit the plaintiff, who is acting in a fiduciary capacity in the settlement of her husband's estate, from testifying to conversations which she had with John Scully which led her to withdraw the money and deposit it in the name of herself and this defendant. If, however, there was any error in permitting the plaintiff to testify to these conversations, such error was cured in a very large measure, if not entirely, because the defendant without objection was permitted to testify to the same transactions, giving a different version of what occurred from that testified to by the plaintiff. To be sure, the plaintiff was first sworn and the defendant was testifying in denial of what the plaintiff had testified to; but no unfairness resulted because the version of each side was before the jury.

Upon the first ground indicated, however, I concur in a reversal of the judgment and granting a new trial.

IN RE DIRECTORS OF FRONTIER & W. R. CO.

(Supreme Court, Appellate Division, Fourth Department. January 8, 1913.)

1. RAILROADS (§ 47*)—CONSTRUCTION—PROCEEDINGS—PUBLIC SERVICE COMMISSION.

Railroad Law (Consol. Laws 1910, c. 49) § 9, prohibits any railroad corporation from exercising powers conferred by law until the directors have a copy of the certificate of incorporation published and until the commission shall certify that such conditions have been complied with, and that public convenience and necessity require the construction of such railroad "as proposed in said certificate of incorporation." Public Service Commission Law (Consol. Laws 1910, c. 48) § 53, provides that without having first obtained permission of the commission no corporation shall begin the construction of a railroad for which, before this act becomes a law a certificate of public convenience and necessity shall not have been granted by the board of railroad commissioners, nor shall a corporation exercise any franchise without having first obtained permission of the proper commission. Railroad Law, § 16, provides that, before the commencement of construction, it shall file a detailed location of the route, and notify the occupant of each parcel on the route who shall have 15 days to apply for a change of location, and section 24 provides a means to the company for changing the route by filing a certificate thereof without notice to the commission. *Held* that, upon the determination of the convenience and necessity of a proposed route, the commission could consider any routes which do not vary the location contained in the articles of incorporation, irrespective of the route de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

scribed in the petition, and notwithstanding section 89, which merely refers to the manner in which new railroads shall cross streets and highways.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 106–108; Dec. Dig. § 47.*]

2. RAILROADS (§ 53*)—CONSTRUCTION—REGULATION.

A rule by the public service commission requiring the filing of a map identifying the proposed route of any railroad upon an application for certificate of public convenience and necessity has not the effect of a statute, and does not limit the commission's power.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 121, 122; Dec. Dig. § 53.*]

3. RAILROADS (§ 47*)—CONSTRUCTION—CERTIFICATE OF NECESSITY.

In granting a certificate of public convenience and necessity for constructing a railroad pursuant to Public Service Commission Law (Consol. Laws 1910, c. 48) § 53, the public service commission acts solely as guardian of the public interest, and such certificate does not control the precise route of the railroad; such certificate being a mere preliminary requirement.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 106–108; Dec. Dig. § 47.*]

In the matter of the application of the directors of the Frontier & Western Railroad Company for an order directing the Public Service Commission, Second District, to issue certificate of public convenience and necessity. On original motion for an order directing the issuance of the certificate after the application was denied. Determination of the Public Service Commission overruled, and application remitted to the commissioners for their consideration.

Argued before McLENNAN, P. J., and KRUSE, ROBSON, FOOTE, and LAMBERT, JJ.

Edward W. Hatch, of New York City, for the motion.

Edward P. White, of Buffalo, for King Sewing Mach. Co.

Maurice C. Spratt, of Buffalo, for New York C. & H. R. R. Co. et al.

George Clinton, of Buffalo, for Taxpayers and Residents.

Harry D. Sanders, of Buffalo, for City of Buffalo.

John L. Romer, of Buffalo, for Walter H. Schoellkopf et al.

Harry D. Williams, of Buffalo, for Wood & Brooks Co.

Willis H. Tennant, of Buffalo, for Guillaume Reusens, opposed.

LAMBERT, J. By this application it is sought to compel the issuance to the Frontier & Western Railroad Company of a certificate of public convenience and a necessity, as provided by section 9 of the Railroad Law (Consol. Laws 1910, c. 49) and section 53 of the Public Service Commissions Law (Consol. Laws 1910, c. 48). This line of railroad is proposed to commence in the town of Tonawanda, Erie county, at the point where the projected line of the Buffalo Frontier Terminal Railroad approaches nearest to the International Bridge over the Niagara river at Buffalo. Applicant's line is intended to connect such Buffalo Frontier Terminal Railroad with said International Bridge, across which the lines of several railroads gain access to the city of Buffalo from Canada. The benefits to be anticipated from the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

construction of this line are very similar to, and in a measure dependent upon, those sought to be accomplished by the construction of the Buffalo Frontier Terminal Railroad, for which latter road a certificate was recently granted by the commission. It is, in fact, conceded that the two projects are portions of a single general plan. The aim of the two constructions is the betterment of freight traffic conditions in and around the city of Buffalo. The application of the Buffalo Frontier Terminal Railroad, for its certificate, has been before this court, and the conditions there involved and sought to be remedied are fully discussed in the opinions then written. See *Matter of Buffalo Frontier Terminal Railroad*, 131 App. Div. 503, 115 N. Y. Supp. 483. Those same conditions are involved here, with the additional feature of the outlet provided by the proposed connection with the International Bridge. There is no question made in this proceeding as to the regularity of the application to the commission for the certificate here sought; nor was such certificate denied for noncompliance with any statutory requirement.

The applicant's articles of incorporation comply literally with the requirements of section 5 of the Railroad Law. They define the termini of the contemplated railroad, give its length, with reasonable certainty, and specify the county, within which the road is to be built. The petition to the commission also complies with all the requirements of section 9 of the Railroad Law and section 53 of the Public Service Commissions Law, and, in addition thereto, identifies a contemplated route between such termini, which route is described in detail by means of map and profile attached to such petition and made a part thereof. Numerous and lengthy hearings before the commission developed bitter opposition to the location of the route as shown in such map and profile filed. This opposition came almost entirely from certain closely built up sections of the Black Rock district of Buffalo. It was eventually suggested, by the commission, that it might be possible to adopt a different route, thus meeting, to some extent at least, the objections urged. Thereafter two different routes were considered, each varying materially from the one identified in the petition. But eventually the application was denied and the certificate refused. The order of the commission discloses that the certificate was refused, as based upon the route specified in the petition; and distinctly announces that the commission concluded as a matter of law that it had no right to consider any other route. This court has reached a contrary conclusion as to the powers of such commission, but we do not deem it advisable to pass upon the question of public necessity and convenience, although we undoubtedly have the power to do so, until the commission shall have passed upon that question in the exercise of the more plenary powers which we here hold it to possess.

[1] This leaves to be here discussed the single question of the power of the commission to consider other routes than that identified in the petition.

By section 9 of the Railroad Law it is provided:

"No railroad corporation formed after May eighteenth, eighteen hundred and ninety-two, under the laws of this state shall exercise the powers conferred

by law, upon such corporation or begin the construction of its road, until the directors shall cause a copy of the certificate of incorporation to be published in one or more newspapers in each county in which the road is proposed to be located, at least once a week for three successive weeks and shall file satisfactory proof thereof with the public service commission; nor until the commission shall certify that the foregoing conditions have been complied with, and also that public convenience and a necessity require the construction of said railroad, as proposed in said certificate of incorporation. * * *

And section 53 of the Public Service Commissions Law provides:

"Without first having obtained the permission and approval of the proper commission no railroad corporation, street railroad corporation or common carrier shall begin the construction of a railroad or street railroad, or any extension thereof, for which, prior to the time then this act becomes a law, a certificate of public convenience and necessity shall not have been granted by the board of railroad commissioners, or where prior to said time said corporation or common carrier shall not have become entitled by virtue of its compliance with the provisions of the railroad law to begin such construction; nor, except as above provided in this section, shall any such corporation or common carrier exercise any franchise or right under any provision of the railroad law, or of any other law, not heretofore lawfully exercised, without first having obtained the permission and approval of the proper commission. * * *

It is to be noted that the wording of the two sections varies markedly. From this it is argued that the latter section is broader in its scope, and confers upon the commission more extensive powers of inquiry than those conferred by section 9 of the Railroad Law. It is clearly broad enough, so that the powers of the commission and the scope of its inquiry as set forth in section 9 of the Railroad Law are not limited or cut down thereby, and we do not find it advisable to consider its scope further, in view of the admonition of the Court of Appeals in the case of *People ex rel. South Shore Traction Co.*, 196 N. Y. 218, 89 N. E. 460, where in writing upon a kindred subject that court said:

"It is wise, therefore, in each case, which arises under the statute, to take great care to go no further in the expression of judicial opinion than is requisite for the decision of the precise question presented."

Section 9 of the Railroad Law does not specify the particular form of petition to be made for the certificate thereby required. By express terms the line of the railroad, as described in the articles of incorporation, is made the basis for the application. And it is equally clear that the certificate is made to relate only to the line of such road as so described. Nor is there any express statutory requirement that the petition be accompanied by a route more definitely fixed or identified than as required to be stated in the articles of incorporation.

It must be conceded, however, that the investigation by the commission, if intelligently made, necessarily requires inquiry as to the route proposed to be taken. Such choice of route might have a material bearing upon the question of public necessity and convenience. Such inquiry, almost of necessity, requires the use of a map or maps, and hence the provision found in section 9, but not included in the above quotation, requiring the certification of all maps by the commission to this court upon this and similar applications. We cannot, however,

accede to the contention of the contestants that this provision as to the certification of maps is to be given a construction requiring the definite location of a route by the filing of a map thereof with the petition. To so hold requires the reading into the statute of some thing not found therein, and something not essential to the carrying out of the general scheme and plan of the legislation.

Likely it was the fact that an intelligent consideration of the application for a certificate required investigation as to the route of the road that lead to the adoption by the commission of a rule requiring the filing of a map identifying such route. Rule 20.

[2] Such a rule, while expedient as a matter of practice and clearly within the power of the commission to require, does not have the effect of a statutory enactment, nor limit the power of the body which promulgated that rule. In fact, it does not purport to define the grounds upon which the conclusion of the commission shall be based. The question of public necessity and convenience presented upon an application of this character is defined by the statute, and is not dependent upon the form of the petition. The office of the petition is to present the jurisdictional facts, and, when they are presented, the question to be determined as formulated by the statute, and is, invariably, "Does public convenience and a necessity require the construction of the railroad described in the articles of incorporation?"

[3] The requirement of this certificate is a mere preliminary. Its granting does not mean that the road will necessarily be built. In making its determination the function of the commission is exercised solely as guardian of the public weal (*People ex rel. D. & H. Co. v. Stevens*, 197 N. Y. 1, 90 N. E. 60), and it was not intended to make such commission the body to determine the precise location of the road. The control of such precise location is vested elsewhere, as will be hereinafter pointed out. The correctness of the above conclusion is manifested by other provisions of the Railroad Law. By section 16 it is provided that prior to the commencement of the construction or the institution of condemnation for the right of way the railroad shall file in the office of the county clerk a detailed location of its contemplated route and serve notice of such filing upon the occupant of each parcel of land crossed by such route. Such occupants are then allowed 15 days to apply to the court for a change in the location of such route, and provision is made for the appointment of a commission to determine such requested changes. This section, it is clear, has application to a time subsequent to the granting of the certificate here sought, and it makes no provision for consent by or notice to the public service commission of any of the proceedings thereby permitted. And, again, by section 24 of the Railroad Law, a means is provided to the railroad company for effecting a change in its route by filing a certificate thereof, and this, too, without any notice to or consent by the commission. This section also clearly refers to a time subsequent to the granting of the certificate here sought. The general plan of this legislation would seem conclusive that a fixed and definite route is not required to be adopted at the time of the application for the certificate, and that the question of the route is material at that

stage of the proceeding only in so far as investigation of a route or routes becomes essential to the intelligent determination of the public necessity and convenience. Nor do we deem section 89 to be in contravention of the foregoing. That section has reference only to the manner in which new railroads shall cross streets and highways. Its application is clearly subsequent to that of section 9, as no such question arises upon an application under section 9, nor until the road has approached the commencement of construction.

We do not find, nor are we referred to any decisions, directly decisive of the question here presented. *People ex rel. Depew R. Co. v. Commissioners*, 4 App. Div. 259, 38 N. Y. Supp. 528, 861, is claimed by contestants to be controlling here. In that case two rival companies applied for a certificate to construct a road from Depew to Blasdell. The termini of the two proposed roads were identical, and their length the same. Both were standard gauge steam roads, and had the same amount of capital stock. The railroad commission was there put to the choice between the two; it being held that the public necessity and convenience did not require the construction of more than one such road. The opinion in that case, we read, to determine nothing further than that the question of the route, was a proper one for the commission to consider. It is not decisive of the power of the commission to consider more than one route, nor that the route considered determines the route upon which the road must be built with greater definiteness than is provided in the articles of incorporation. Such questions were not there involved.

We are also referred to a class of cases illustrated by *People ex rel. N. Y. C. & H. R. R. Co. v. Commissioners*, 92 App. Div. 126, 87 N. Y. Supp. 334, and *Matter of T. U. T. R. R. Co.*, 116 App. Div. 56, 101 N. Y. Supp. 107, as sustaining the conclusion reached by the commission. Each of those cases is that of a street surface railroad. The description of the route of such a railroad in the articles of incorporation is regulated by a different provision of law. Section 5, subd. 11, of the Railroad Law. Such are required to indicate in their articles of incorporation the particular streets, avenues, and highways in which the road is to be constructed. This is in addition to the provision applicable to a steam road, requiring the statement of the termini, length, and the counties through which the road is to run. The street surface railroad cases only go to the extent of holding that no deviation from the route as described in the certificate of incorporation is allowed. This is the same rule to be applied here, as it is not contended that any deviation from the route indicated in petitioner's certificate of incorporation would be permitted. While the result reached in the street surface railroad cases is the direction of the inquiry and certificate of the commission to a more fixed, definite, and certain route than in the case of a steam railroad, such result is the effect of the difference in the provisions of statute applicable, rather than in the rule to be applied, and such holdings recognize the scope of the inquiry to be, as the public necessity and convenience to be accommodated by the road described in the certificate of incorporation.

It is urged with earnestness that this conclusion would work a great injury to property owners along the line of a route considered, other than that identified in the petition. It is claimed that such owners are not afforded their day in court to be heard upon the question of the granting of the certificate. There is no merit in this contention. The statute does not provide for notice to any property owner other than such as may be said to be given by the publication of the articles of incorporation. Those articles identify the route only in the general manner provided for by section 5 of the Railroad Law, and do not pretend to indicate a precise location. No specific notice is required upon this hearing preliminary in its nature. If, however, the commission should deem such a notice desirable, ample means to its accomplishment, are at its command, by way of order made, to such end. It cannot be seriously claimed that the granting of this certificate is in any sense the taking of property by the corporation or the public, and ample provisions for the protection of the interests of the property owners is afforded by section 16 of the Railroad Law.

It is further urged that our conclusion removes from the commission all control over the selection of the route, and that such is contrary to the spirit of the statute. The answer to this suggestion is afforded by the statute. Railroads, like other corporations, are the creatures of the statute, and the Legislature in creating them had ample power to limit their powers and grant them privileges in such manner as it deemed best. This supervisory power it could lawfully delegate to the commission for the accomplishment of any desired constitutional purpose, but we are not at liberty to enlarge upon those delegated powers or to infer their existence when they are not declared or necessarily implied in reaching the avowed aim of the statute. The aim of this statute is plainly declared and as plainly limited to the consideration of the route as described in the incorporation certificate, and we are not to infer that more specific control over the route was intended to be vested in the commission.

We therefore hold that upon application for a certificate of public convenience and a necessity by a steam railroad corporation the question of such convenience and necessity is to be determined with reference to the railroad as identified in the articles of incorporation of such company, and that, upon such determination, the commission has the right to consider any route or routes, which do not vary the location of the road as identified in the articles of incorporation.

The determination and order of the public service commission should be overruled and the application for a certificate of public convenience and a necessity should be remitted to such commissioners for its determination thereon, under the rules above indicated, without costs of this proceeding to any party. All concur.

MORSE et al. v. CANASWACTA KNITTING CO.

(Supreme Court, Appellate Division, Third Department. December 30, 1912.)

1. APPEAL AND ERROR (§ 1041*)—HARMLESS ERROR—AMENDMENT ON THE TRIAL—PLEADINGS.

An allegation that defendant agreed to accept and pay plaintiffs for making a belt, to pay \$334.80, less 50 per cent. and 10 per cent. "which was the value" and agreed price of same, and defendant promised to pay for cement, etc., fully justified a recovery either upon a contract or upon a quantum meruit, and the allowing of an amendment on the trial stating the value of services rendered, if error, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1041.*]

2. FRAUDS, STATUTE OF (§ 83*)—CONTRACTS FOR WORK AND LABOR—SALES.

The statute of frauds does not apply to a contract for a belt to be manufactured in a special manner, even though a third party is to manufacture the belt, where the vendor has to pay for such manufacture.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 147-153; Dec. Dig. § 83.*]

3. SALES (§ 81*)—DELIVERY—RESCISSION.

Where one put in an order for a belt, saying that he desired it by a certain day, and the other party said he would try to have it ready on that date, but did not have it ready until the day following, the same being within a reasonable time after the order, the right to rescission did not exist.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 217-223; Dec. Dig. § 81.*]

Houghton, J., dissenting.

Appeal from Special Term, Broome County.

Action by Ellis W. Morse and another against the Canaswacta Knitting Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before SMITH, P. J., and KELLOGG, HOUGHTON, BETTS, and LYON, JJ.

Fuller & Truesdell, of Sherburne, for appellant.

McManus & Buckley, of Binghamton, for respondents.

SMITH, P. J. This is an action brought to recover the sum of \$151.47 for work and materials furnished by plaintiffs to defendant in making and cementing a certain waterproof belt according to certain specifications furnished by defendant to plaintiffs. The complaint in paragraph 4 alleged:

"That defendant agreed to accept and pay plaintiffs for said belt. To pay \$334.80, less 50 per cent. and 10 per cent., thirty days from time of invoice, which was the value and agreed price of same, and defendant also promised and agreed to pay for necessary cement used in making a joint in said belt, the value of which is \$1.13, amounting in all to the sum of \$151.47."

[1] Upon the trial there was a question raised as to whether the plaintiffs having specified a definite contract to pay could recover on a quantum meruit. The trial judge allowed an amendment on the trial, stating the value of services rendered. It is complained of upon this

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

appeal that that amendment could not be allowed upon the trial. If we assume for the argument that the amendment was improperly allowed on the trial, I do not see that any harm has come because the amendment was wholly unnecessary, as that part of the complaint above quoted fully justified a recovery either upon a contract or upon a quantum meruit.

[2] It is further contended by the defendant that this contract was void by the statute of frauds. The contract was to manufacture and sell. The contention is that the statute nevertheless applies, because the belt was to be manufactured by another than the plaintiffs, and not by the plaintiffs themselves. This contention is not without support in the authorities. It has been held in the common pleas in the cases cited by Mr. Justice Houghton. Those are based upon a dictum found in *Parsons v. Loucks*, 48 N. Y. 20, 8 Am. Rep. 517. That dictum cites as its authority *Parsons on Contracts*, p. 52. In *Parsons on Contracts*, one of the classes of cases to which the statute is held not to apply, is "to buy hereafter an article to be manufactured by the seller." It is quite apparent, however, that that expression was not used in contradistinction to an article to be manufactured by another than the seller. Similar expressions are found in some other cases, which I believe are made the foundation of the distinction, which was never intended by earlier writers, if the agreement be to manufacture the article according to certain specifications, so that the manufactured article is not one that can be readily held in stock and sold to others. In none of these cases where this rule has been stated has the contract been one to manufacture articles of a peculiar mould. I am unable to see any reason for a distinction when that article is manufactured by an employé in the shop of the seller, or an employé outside his shop. Clearly the seller is bound to pay for the article which is thus manufactured for the vendee. The article which he is thus required to pay for is of little or no value in his hands because made of peculiar moulds for a special purpose. If there be any reason for excluding from the effect of the statute a contract for manufacturing an article by the seller himself, the same reason would seem to apply to a contract for the manufacturing in a special mould where the seller has procured some third party to do the work for him. The rule is well stated in the case of *Edwards v. Grand Trunk Railway Co.*, 48 Me. 380. An extract from the opinion of the court follows:

"The fact that an article contracted for does not exist at the time of the contract, but is to be made or manufactured, will not necessarily take the case out of the statute. It must also appear that the particular person who is to manufacture it, or the mode and manner, or materials enter into and make part of the contract."

It has been further held in *Abbott v. Gilchrist et al.*, 38 Me. 260:

"An agreement to procure and deliver at a time and place fixed a vessel frame, to be hewn and prepared according to certain mould, is binding, without being in writing."

In *Forsyth & Ingram v. Mann*, 68 Vt. 116, 34 Atl. 481, 32 L. R. A. 788, it was held that a contract to manufacture a monument is not within the statute of frauds, although there is no agreement to bestow

personal skill and labor upon it or anything to prevent the contractor from purchasing it elsewhere in whole or in part, instead of manufacturing it from his own quarry and in his own shop. The opinion in part reads:

"But it is said that as the defendants were not bound to bestow their personal skill and labor upon the monument, but were at liberty to get others to make it for them. It is a contract of sale, and not for work and labor. But that makes no difference, as was said in *Bird v. Muhlinbrink*, 1 Rich. 199, 44 Am. Dec. 247. It is not necessary that personal skill and labor should be stipulated for in order to make a contract one for manufacture. It is sufficient if the work and labor requisite to such a contract are to be performed by the contractor, or by his procurement and at his expense. The latter would be work and labor done by him, in the eye of the law, and could be declared for as such. We hold, therefore, that the contract in question is not within the statute."

The judge writing the opinion had theretofore discussed the question of a contract to manufacture an article ordinarily merchantable and an article according to a special pattern, which would be fit only for the party ordering the same. A contract to manufacture the latter article was declared not to be within the statute of frauds, and the part of the opinion quoted followed the discussion upon that question. In *Bird v. Muhlinbrink*, *supra*, certain articles of military uniform had been ordered to be manufactured, but not by the vendor himself, and the question here at issue was thus discussed:

"If the plaintiff had been a maker of such articles, and had made such sashes as these for the defendant, the contract would have been regarded as one for work and labor, as well as for goods to be delivered, as much so as if a tailor had made a new-fangled dress for a peculiar individual, and such as would perhaps suit no one but the person speaking for it. The fact that the sashes were to be made in Germany, by the procurement of plaintiff, instead of being made by the plaintiff himself, can or ought to make no difference in the case."

In 19 Ann. Cas. p. 1298, is an elaborate note upon the distinction attempted in this case. The New York rule is stated as held in the cases cited in the dissenting opinion, that, where the sale is made by an agent of goods to be manufactured by his principal, the statute nevertheless applies. The note continues:

"This rule, however, is limited by the rule that the article manufactured must be such as is vendible in the general market. Although the article may be procured from a third person, yet, if it is not a marketable commodity, the contract should be held to be outside of the operation of the statute."

To this the cases of *Forsyth v. Mann* and *Bird v. Muhlinbrink* are cited. It may be well here to note the fact that these plaintiffs were not acting as agents for these manufacturers. They were independent vendors, and were procuring the belt to be manufactured outside of their shop, instead of by their immediate employés. The distinction between articles to be manufactured by the vendor himself or to be by him procured to be manufactured by another party should only be held upon imperative authority because of the hardship to the vendor, who is himself required to pay for the articles thus manufactured, and to whom, if they are of special manufacture and not articles of general merchandise, they are useless.

[3] Upon December 30th the order was received for the manufacturing of this belt. The order was at once sent to the manufacturers. Upon January 3d the plaintiff received notice from the manufacturers that it was unwise to make an endless belt unless the defendant had some expert who could put it together at the factory where it was to be used. This was communicated to the defendant, who nevertheless desired the belt to be made in this way, and then stated that they desired the belt by January 6th. The plaintiff stated that he would inform the manufacturer to that effect, and, if possible, have the belt delivered by that time. The belt was not finished and shipped until January 7th. Upon that day a letter was received by the plaintiff from the defendant canceling the order. The letter had been written upon January 6th. The court found that the belt was manufactured within a reasonable time after giving of the order, and that the order was not canceled until after the belt was manufactured, and that, therefore, the defendant was required to take the belt and pay for the same. The defendant refused to take the belt from the express company after it reached the defendant's express office, and the belt is now in the express office awaiting the determination of this action. The specifications were not finally delivered until January 3d. The plaintiff was not told that the order would be canceled unless the belt was delivered by January 6th. He was justified in proceeding to procure the same to be manufactured, and, as the belt was practically finished and had been shipped, the defendant was not authorized to rescind the contract. If the defendant wished to rescind the contract, he should at least have notified the plaintiff to that effect on January 3d, when the conversation was held as to the particular kind of belt, whether the belt should be laced or should be made an endless belt and cemented together. I recommend that the judgment be affirmed, with costs.

Judgment affirmed, with costs. All concur, except HOUGHTON, J., dissenting in opinion. LYON, J., not sitting.

HOUGHTON, J. (dissenting). Although the defendant was wholly unjustified in refusing to accept delivery, nevertheless it seems to me the judgment for the plaintiffs cannot be sustained.

The action is brought to recover the market value of belting made especially for the defendant in compliance with its order. Confessedly the belting was not manufactured by the plaintiffs who were not engaged in the business of manufacturing, but by another manufacturing concern not disclosed to defendant, to which they gave orders for the supplying and making of such belting as they might obtain orders and purchasers for. If the plaintiffs themselves had been the manufacturers, the order which the defendant gave for the making of the belt in controversy would have been a simple order for work and labor, because the belt was not in existence, and of necessity had to be made especially to fit the defendant's machinery. Notwithstanding the fact that the belt had to be especially made, the plaintiffs not being the manufacturers, the transaction had between them and the defendant was one of simple bargain and sale of personal property

of more than \$50 in value, and therefore came within the provisions of the statute of frauds requiring a note or memorandum in writing. Personal Property Law (Consol. Laws 1909, c. 41) § 31. Contracts for the delivery of goods to be manufactured are contracts for the sale of goods, wares, and merchandise within the statute of frauds, unless the goods are to be manufactured by the vendors themselves. *Millar v. Fitzgibbons*, 9 Daly, 505; *Joy v. Schloss*, 12 Daly, 533; *Courtright v. Stewart*, 19 Barb. 455; *Juilliard v. Trokie*, 139 App. Div. 530, 124 N. Y. Supp. 121; *Pitkin v. Noyes*, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218; 3 *Parsons on Contracts* (7th Ed.) 60. The principle upon which a contract to sell an article not in existence and which is to be manufactured by the seller is considered not to come within the statute of frauds is that the parties have so blended the contract of sale with one for work and labor that it no longer remains one of sale only to which alone the statute applies. This element of work and labor is lacking where one simply agrees to furnish and sell an article which he procures to be manufactured by whomsoever he chooses and the transaction amounts only to a simple sale.

The plaintiffs cannot recover, therefore, unless the signed letter which the defendant wrote to them on the 29th day of December, 1909, is a sufficient memorandum to satisfy the statute of frauds. So far as material, that letter reads as follows:

"Referring to our order with you for belting, would say you will please make and send to us one belt, distance between centers 39 feet 6 inches. Pulley diameters 28 and 30 inches."

Immediately on receipt of this letter it was observed by the plaintiffs that the width of the belt was not mentioned. In addition to this omission no price is stated.

While the memorandum required by the statute of frauds may be quite informal, and may be composed of several written communications relating to each other, signed by the party to be charged, all the essential parts of the agreement must be contained in the writings, and they cannot be supplied by oral evidence. *Stone v. Browning*, 68 N. Y. 598; *Waxelbaum v. Schloss*, 131 App. Div. 826, 116 N. Y. Supp. 42. The price to be paid or some stipulated means of fixing it is an essential element of such a memorandum. *Lambert v. Hays*, 136 App. Div. 574, 121 N. Y. Supp. 80; *United Press v. New York Press Co.*, 164 N. Y. 406, 58 N. E. 527, 53 L. R. A. 288; *Inman v. Burt Co.*, 124 App. Div. 73, 108 N. Y. Supp. 210.

The defendant claims not to have understood that the plaintiffs were to manufacture the belt, or that it was to be manufactured by any particular concern, or at all, except to be spliced together at the required length. If it was to be manufactured by plaintiffs themselves, the defendant would have been obliged to pay therefor, irrespective of any written agreement, because its order would have been a direction to perform work and labor, and not within the statute. Whatever defendant may have understood as to the manufacture, it appeared in the trial that the transaction was a mere bargain and sale of personal property of over fifty dollars in value, and it then had the right to

insist that there was no binding contract compelling it to accept delivery, even though proper tender was made. It is true that the record shows that no oral agreement as to price was had, and it might seem that there could properly be read into the memorandum an implied agreement to pay the fair value of the belting. But such doctrine was discussed and repudiated by Judge Gray in *United Press v. New York Press Co.*, supra, wherein he points out that such holding in *Hoadley v. M'Laine*, 10 Bingh. 482, was not necessary to the decision because the goods were to be fabricated by the vendor.

The other letters written by the defendant do not aid the memorandum above quoted, and those written by the plaintiffs have no bearing because they are not signed by the defendant, the party to be charged.

For these reasons, I think the judgment should be reversed, and, as there is no possibility of the plaintiffs making a different case upon another trial, the complaint should be dismissed, with costs.

HAWES v. HAWES.

(Supreme Court, Appellate Division, First Department. January 17, 1913.)

EXECUTION (§ 410*)—SUPPLEMENTARY PROCEEDINGS—SALE OF STOCK.

An order directing a sale of certain stock of a judgment debtor should have directed a sale of the debtor's right, title, and interest in the stock.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1180-1182; Dec. Dig. § 410.*]

Appeal from Special Term, New York County.

Action by Elmer E. Hawes, assignee, etc., against Isabella B. Hawes. From an order directing a sale of certain stock of the judgment debtor, defendant appeals. Modified and affirmed.

See, also, 138 N. Y. Supp. 1120.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Charles L. Craig, of New York City, for appellant.

John G. Pheil, of New York City, for respondent.

PER CURIAM. The order should be modified, by directing a sale of the right, title, and interest of the judgment debtor in the stock in question, and, as so modified, affirmed, without costs. Settle order on notice.

MASON v. NEW YORK REVIEW PUB. CO. et al.

(Supreme Court, Appellate Division, First Department. January 10, 1913.)

DISCOVERY (§ 38*)—EXAMINATION BEFORE TRIAL—RIGHT.

In libel against a publishing company and individual defendants, plaintiff was entitled to examine before trial the individual defendants and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the actual publisher of the libel, for the purpose of establishing their connection with the publication, and showing that they knew the article to be false.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 51; *Dec. Dig.* § 38.*]

Appeal from Special Term, New York County.

Action by John Mason against the New York Review Publishing Company. From an order granting a motion to vacate an order for examination of defendants before trial, plaintiff appeals. Order reversed, and order for examination modified.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Gerald B. Rosenheim, of New York City, for appellant.

Max D. Steuer, of New York City, for respondents.

DOWLING, J. This action is brought to recover damages for the publication of a libel concerning plaintiff in the New York Review. The amended complaint sets forth that the defendants, and each of them, caused to be printed and published the article complained of. This is denied by the answer of the respondents herein. An order for their examination has been vacated.

While the order might have permitted a wider scope of examination than was proper, plaintiff was undoubtedly entitled to examine the defendants as to the allegations set forth in the paragraphs of the amended complaint numbered "third" and "fifth"; for he cannot recover against the individual defendants unless he establishes their connection with the publication complained of, and to ascertain this he is entitled to question them, as well as the actual publisher of the libel. He is entitled as well to show, if he can, that defendants knew the article complained of to be false.

The order appealed from will therefore be reversed, with \$10 costs and disbursements to appellant, and the order for the examination of respondents modified, by limiting it to the matters set forth in the paragraphs of the amended complaint numbered "third" and "fifth." All concur.

LOCKPORT CANNING CO. v. PUSATERI.

(Supreme Court, Equity Term, Niagara County. January 31, 1913.)

TRADE-MARKS AND TRADE-NAMES (§ 70*)—IMITATION OF NAME BY COMPETITOR—INJURY—INJUNCTION.

Plaintiff, the "Lockport Canning Company," being first in the field in the city of Lockport, commonly known as Lock City, in the business of canning tomatoes, the use by defendant, engaging there in the same business, in competition with it, of the name "Lock City Canning Company," is calculated to deceive customers, to plaintiff's injury, and will therefore be enjoined.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 81; *Dec. Dig.* § 70.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by the Lockport Canning Company against Rosario Pusateri for injunction. Judgment for plaintiff.

W. A. Gold, of Lockport, for plaintiff.

M. A. Federspiel, of Lockport, for defendant.

POUND, J. The plaintiff, "Lockport Canning Company," a domestic corporation having its factory and principal place of business in the town of Lockport, Niagara county, N. Y., brings this action to restrain the defendant from using the name "Lock City Canning Company" under which the defendant is doing business in the city of Lockport, N. Y. Both concerns are engaged in the business of canning tomatoes, and both sell to jobbers and wholesalers in the same field. Lockport is commonly known as the Lock City, and is surrounded by the town of Lockport.

It is contended by defendant (a) that general terms appropriately descriptive of the business cannot be exclusively appropriated by any one; and (b) that a geographical name cannot be exclusively appropriated against others who can and do use the name with equal truth; and that, therefore, plaintiff is not entitled to preventive relief. There can be no quarrel with the proposition that plaintiff has no exclusive right to the word "Lockport," and, as a separate and distinct proposition, no exclusive right to the word "Canning." It does not follow that plaintiff has no exclusive right to the name "Lockport Canning Company" because other concerns may truthfully describe themselves as Lockport Canning Companies. Such concerns may style themselves Lockport Companies or Canning Companies, with additional distinctive words of description; but it seems too clear for argument that plaintiff has the exclusive right to use the name "Lockport Canning Company" in connection with the business of canning tomatoes.

The substitution of the word "Lock City" for "Lockport" produces a name so nearly resembling the name of plaintiff as to calculate to deceive. Thus it has been held that the name "Columbian Chemical Company" so nearly resembles the name "Columbia Chemical Company" that it is calculated to deceive. *People ex rel. Columbia Chemical Co. v. O'Brien*, 101 App. Div. 296, 91 N. Y. Supp. 649. This circumstance alone does not entitle the plaintiff to injunctive relief. Where there was no competition or rivalry between "Corning Glass Works" and "Corning Cut Glass Company," it was held that, as the only confusion to be apprehended resulted from similarity of names, defendant would not be restrained. *Corning Glass Works v. Corning Cut Glass Co.*, 197 N. Y. 173, 90 N. E. 449. But here, from the use of the name "Lock City Canning Company" by a business rival of the plaintiff, injury may reasonably be anticipated, not from confusion due to mere similarity of name, but from the manner of using the name. Plaintiff is the first in the field, and defendant has no right to establish himself as a direct competitor, catering to the same class of customers, and, by imitation of name, to mislead those dealing with him into buying his canned tomatoes under the impression that

they are buying those of the plaintiff. *Corning Glass Works v. Corning Cut Glass Co.*, supra.

Plaintiff is entitled to judgment restraining defendant from the use of the name "Lock City Canning Company," with costs. Decision accordingly.

PEOPLE v. ATKINS.

(Supreme Court, Appellate Division, Fourth Department. January 8, 1913.)

Appeal from Oneida County Court.

Astley Atkins was convicted of crime, and he appeals. Affirmed. Argued before McLENNAN, P. J., and KRUSE, ROBSON, FOOTE, and LAMBERT, JJ.

Everett E. Risley, of Utica, for appellant.

Bradley Fuller, of Utica, for respondent.

PER CURIAM. Judgment of conviction and order affirmed. All concur, except KRUSE, J., who dissents in a memorandum.

KRUSE, J. I dissent, upon the ground that the evidence is insufficient to show that Atkins, the defendant, had any knowledge of the arrangement under which it is claimed Regnauld obtained the stock from Cushman, or to show that Atkins criminally conspired with Regnauld to misappropriate the stock, or sufficient to connect him with the misappropriation thereof, so as to make him criminally liable. The letters of Atkins, while they show that he was anxious to sell the stock of the Pioneer Company, which he was promoting, do not show the existence of a conspiracy to obtain the stock of Cushman and misappropriate the same. Although Atkins may have known that all the stock which he received from Regnauld in exchange for the Pioneer stock came from Cushman, that does not establish that he had any knowledge that the stock belonged to Cushman, and was simply held by Regnauld as agent to sell the same for Cushman, at not less than a specified price, as Cushman claims.

The conviction rests largely upon the acts and declarations of Regnauld. These were not competent against Atkins, in the absence of a conspiracy to which Atkins was a party, and not then unless they were made in furtherance of the conspiracy. Even if there was such a conspiracy, Regnauld's letter of October 9th was improperly received, since that was after the alleged criminal conspiracy to misappropriate the stock had been consummated, if any such conspiracy ever existed.

I think the evidence is insufficient to sustain the judgment of conviction.

(152 App. Div. 884.)

PEOPLE v. DAVIS.

(Supreme Court, Appellate Division, First Department. July 11, 1912.)

CRIMINAL LAW (§ 1023*)—APPEAL—DECISIONS REVIEWABLE.

Where sentence is suspended, and no judgment is rendered, there can be no appeal from the conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583-2598; Dec. Dig. § 1023.*]

Appeal from Court of Special Sessions, New York County.

Joseph Davis was convicted of crime, and he appeals. On motion to dismiss appeal. Appeal dismissed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, MILLER, and DOWLING, JJ.

Robert C. Taylor, Asst. Dist. Atty., of New York City, for the motion.

Lester W. Eisenberg, of New York City, opposed.

PER CURIAM. In this case sentence was suspended by the court, and no judgment was ever rendered. Thereafter, and on June 24, 1912, a notice of appeal to this court was served. As the sentence was suspended there was no judgment of conviction, and it was held in *People v. Flaherty*, 126 App. Div. 65, 110 N. Y. Supp. 699, and *People v. Markham*, 114 App. Div. 387, 99 N. Y. Supp. 1092, that there could be no appeal from a conviction in the absence of a judgment.

The motion is therefore granted, and the appeal dismissed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PEOPLE v. HAMMERSTEIN et al.

(Court of Special Sessions of First Division of City of New York.
September 7, 1911.)

SUNDAY (§ 29*)—CRIMINAL PROSECUTION—PERSONS INDICTABLE—THEATER MANAGERS AND PERFORMERS.

Penal Law (Consol. Laws 1909, c. 40) § 2152, entitled "Theatrical and Other Performances on Sunday," forbids performances on Sunday, and makes every person aiding in such performance, by advertisement, posting, or otherwise, and every owner or lessee of any building who leases it for such performance, guilty of a misdemeanor. Performers at a theater were informed against, jointly with the managers thereof, for giving a stage exhibition of jugglery on Sunday of a kind forbidden by the Penal Law, and in that the managers, by advertisement and otherwise, aided the performance by permitting the stage to be used therefor, by admitting persons who had paid an admission, and by distributing programs. *Held*, on demurrer, that the information charged more than one offense, the purpose of the statute not being to change the status of actors or others who labor in a theater on Sunday, who should be proceeded against under section 2145, providing for a fine of not more than \$10.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 13, 67-72; Dec. Dig. § 29.*]

O'Keefe, J., dissenting.

William Hammerstein and others were charged with crime. A demurrer to the information sustained. Reversed in 139 N. Y. Supp. 1075.

Argued before O'KEEFE, OLMSTED, and MOSS, JJ.

Lloyd P. Stryker, Deputy Asst. Dist. Atty., of New York City, for the People.

House, Grossman & Vorhaus, of New York City, for defendants.

OLMSTED, J. The defendants are accused on information of the district attorney with the crime of unlawfully giving a theatrical performance on Sunday in violation of the provisions of section 2152 of the Penal Law (Consol. Laws 1909, c. 40). The recitals of the information fix the date of the commission of the offense as of November 27, 1910. The offense is characterized in the language of the opening section of article 192 of the Penal Law relative to "Sabbath breaking." Defendants Hammerstein and Blumenthal are charged with having been "the persons in charge and control and the managers of a theater and place of public amusement called the Manhattan Opera House," in the county of New York; that on the day in question in said theater, before an audience who had paid for admission thereto, defendant Harrigan gave a performance and exercise of jugglery (describing it); that upon the same stage, on the same day, and before the same audience, defendant Bedini, with another not named, gave a performance of jugglery (also described); that before the same audience two other persons, designated on program and cards as "McDevitt & Kelly" gave a performance of "negro and other dancing," and that another person, similarly designated as "Ray Cox" did

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

give "a performance of the stage and of dancing." Defendants Hammerstein and Blumenthal are charged with having caused and permitted said programs and cards to be displayed, distributed, and circulated in said theater.

The information concludes with the following allegations:

"And the said William Hammerstein and George Blumenthal then and there, by advertisement and otherwise, did aid in the said performances of jugglery, of the stage and of dancing, by causing and permitting the said stage to be used therefor and divers of the employes of the said theater to prepare the said stage for such use, and by causing, permitting, counseling, and commanding a person acting as a ticket taker to admit into the said theater the said persons who had theretofore paid the said admission fee, and by counseling, commanding, causing, and permitting divers other persons employed and being in the said theater to direct and permit the said persons so admitted to occupy seats and points of vantage viewing the said stage and the said performances, and by causing, permitting, counseling, and commanding divers employes and persons being in the said theater to display, circulate, and distribute as aforesaid the said cards and printed programs and instruments giving notices of the said dancing as well as of the said jugglery, against the form of the statute in such case made and provided, and against the peace of the people of the state of New York and their dignity."

Each of the defendants demurs to the information herein on the ground of duplicity. It is particularly urged that there is a joinder of several offenses in one count—crimes different in their nature, the punishment which might be inflicted on conviction for some being merely nominal while in the matter of another the extreme penalty for misdemeanor might be imposed.

There is no doubt that the performance given in the Manhattan Opera House on the day in question, as described in the information, is such as is inhibited by the section of the Penal Law which the district attorney invokes in his pleading. "Negro or other dancing" and "any performance or exercises of jugglery" are expressly forbidden thereby.

"And every person aiding in such exhibition, performance or exercises, by advertisement, posting or otherwise, and every owner or lessee of any garden, building or other room, place or structure, who leases or lets the same for the purpose of any such exhibition or performance or exercises, or who assents to the use of the same for any such purpose, if it be so used, is guilty of a misdemeanor." The portion of section 2152 quoted includes all who may be punished for giving such a performance in a theater on Sunday. Whether all of the defendants named come within the statutory classification is at issue. The defendants Harrigan and Bedini and three other performers not arrested are charged in the information with giving the performance, and the defendants Hammerstein and Blumenthal with aiding and abetting them in the manner heretofore described. This portion of the pleading is negatived by the averment that Hammerstein and Blumenthal were the managers of the theater. It is matter of common knowledge that managers are the principals in the matter of theatrical performances, and that the performers are merely laborers for hire. Disregarding the peculiarity of the pleading in this particular and

reversing the alleged relationship of the defendants, we are called on to determine whether defendants Harrigan and Bedini aided and abetted defendants Hammerstein and Blumenthal in giving the Sunday theatrical performance charged. This involves a study of the law regarding so-called Sabbath breaking, its origin and inception.

In 1813 the Legislature of this state, in chapter 24 of the first Revised Laws (2 Rev. Laws 1813, p. 193), collated the common-law and statutory provisions then in force which prohibited the doing of certain acts on Sunday. These were re-enacted in the first Revised Statutes of 1828 (1 Rev. St. [1st Ed.] pt. 1, tit. 8, c. 22, art. 8, §§ 69-72), and were continued in force with few changes as to form until the adoption of the Penal Code in 1881. The Penal Code devoted an entire chapter to the subject, beginning with section 259, and ending with section 277, which latter section, with some trifling amendments which do not affect the issues herein, has been continued as section 2152 of the Penal Law. Before its inclusion in the Penal Code this section was chapter 501 of the Laws of 1860, and its provisions were only applicable in the city and county of New York. Its application was made general by the Code.

Inquiry is now directed to reasons for the enactment of chapter 501 of the Laws of 1860, which has become section 2152 of the Penal Law, and the legislative intent in its enactment.

Prior to 1860 the laws prevented Sabbath breaking in the form of "servile labor or working," which was a necessary part of a theatrical performance both on the part of the attachés of a theater and the performers. The penalty which might be inflicted on a violator of the law, however, was limited to a fine of \$1. An infliction of this penalty upon every attaché of a theater and upon every performer at a Sunday performance would be cheerfully paid by the manager as a sort of license for carrying on a very lucrative business on Sunday. Careful consideration of conditions at the time of this enactment confirms the conclusion that it was not the legislative intent thereby to provide for the imposition of any greater penalty for ordinary labor for hire on Sunday than might theretofore have been imposed under existing laws. It was only sought to provide a more effective way of dealing with a situation which had arisen in this city. The Sabbath-breaking laws were extended in their scope. Laborers and givers of common shows on the street or other public places were to be dealt with as formerly under the old provisions of law, but something more drastic in the way of punishment was to be provided for the theatrical managers who dared give Sunday performances, or the owners or lessees of theaters who permitted such shows to be given on their property. The full penalty provided for a misdemeanor might be imposed on such persons should they be convicted of violating the statute. Added penalties are the forfeiture of the license for the theater and a penalty of \$500 to be recovered in a civil action. Besides provision for the punishment of managers, owners, and lessees of theaters the Legislature made a distinct departure in this statute by declaring the liability to punishment of persons who might be guilty of acts committed on secular days to promote the giving of Sunday

theatrical performances. This intent is to be found in that part of the section which provides that "every person aiding in such exhibition, performance or exercise by advertising, posting or otherwise * * * is guilty of a misdemeanor."

Without advertising the intention to give a Sunday performance, which advertising might be and usually is done on other days of the week than Sunday, there would be little likelihood of the giving of such performance. The reason is obvious.

It is the contention of the people in this case that the defendants Harrigan and Bedini gave the performance in question, and that the defendants Hammerstein and Blumenthal aided them in giving it within the meaning of the statute. As has already been said, this averment is negatived by the allegation that Hammerstein and Blumenthal were the managers of the theater, and I am put to the inquiry as to whether defendants Harrigan and Bedini aided in giving the performance by the acts which are recited in the information as having been committed by them.

Had the two defendants last named performed as jugglers in the streets on Sunday—such performance being given before a noisy crowd and to the accompaniment of a hurdy gurdy and base drum—they could, on conviction as for a first offense, have been fined not exceeding \$10 under the provisions of section 2145 of the Penal Law. The ticket seller, the ticket taker, the program boy, the ushers, and all the stage hands employed in the Manhattan Opera House at this performance might have been joined as defendants in this action on the ground of aiding in giving the performance in question, within the meaning of the statute. It must be conceded, however, that such labor as they performed on this occasion, if performed elsewhere than in a theater on Sunday, would only subject them on conviction under the provisions of section 2143 of the Penal Law to a fine not exceeding \$10.

The juggler, acrobat, or other performer of the stage is a laborer for hire, and, when he works on Sunday in violation of the law, he is subject to the same penalty which may be visited on other laborers. Section 2143, Penal Code. If he appears as a strolling player, giving public shows and passing the hat for the small coin of the crowd, he is to be proceeded against under section 2145 of the Penal Law.

The conclusion is inevitable that the legislative intent in enacting section 2152 of the Penal Law was not to change the status of one who labors in a theater on Sunday and subject him to severer penalties than other laborers, but rather to add to the list of possible Sabbath breakers, a class, the members of which, if prosecuted and punished with severity, would see to it that there is no Sunday labor in any of the theaters on the first day of the week. The early prosecutions under this statute were, on this theory, maintained against the managers of theaters only, and no attempt was made to join performers as defendants. *Lindenmuller v. People*, 33 Barb. 548.

The doctrine of *ejusdem generis* should always be invoked as an aid to the interpretation of a statute, and the idea of giving to the statute full force and effect rather than to limit it. It is with this in mind that it is here applied. Do the words "and otherwise," where used in the section of law under consideration, include the ticket seller, the

ticket taker, the program distributor, the ushers, the stage hands, and performers at the Manhattan Opera House on the occasion mentioned in the information, as well as the owners and lessees of the building itself, the managers of the theater and all those who by bill posting or other advertising gave advance notice of the performance? The suggestion in the information that the distribution of programs and placing of such cards in the theater during the performance was such an advertising as is contemplated by the statute is not worthy of serious consideration.

Study of the law and the purpose of its enactment leads me to the belief that there was not legislative intent to make it exclusive in its application to Sunday labor in theaters, or by it to amend either section 2143 or 2145 of the Penal Law; that the provisions of section 2143 control in the matter of Sunday labor, whether such labor be performed in a theater or elsewhere; that the sole purpose of the Legislature in this enactment was to provide for the punishment of a new class of Sabbath breakers; that in that class the theatrical manager and the owner or lessee of the theater were to be treated as principals; and that others who advertised the Sunday show, no matter how or on what day they did so, so long as they did it with knowledge, might be prosecuted for "aiding." The words "and otherwise" can be given no broader meaning than to include those who by advertising, posting, or similarly lend their aid to giving the show. These are they who may be punished as Sabbath breakers for doing acts on secular days which relate to Sunday performances.

Having reached this conclusion, it is apparent that the recitals in the information charge more than one crime in one count. Harrigan's act of labor was his own, for which he might be convicted and fined \$10. Bedini labored on his own account, and on conviction might have had similar judgment imposed. These two defendants are also charged with being principals in giving the show, although it is apparent from the statement of facts that they are not. The other defendants are charged with a crime punishable by an entirely different penalty.

This court in May, 1909, held a similar information (*People v. Sur-ratt et al.*, not reported) void for duplicity, and can find no reason for departing from the rule it made in that case.

Demurrer allowed. MOSS, J., concurring. O'KEEFE, J., dissents. without opinion.

PEOPLE v. KINGSTON.

(City Magistrate's Court of New York City. April 19, 1912.)

1. SUNDAY (§ 29*)—THEATRICAL PERFORMANCES—STATUTES—EVIDENCE.

In a prosecution for violation of Penal Law (Consol. Laws 1909, c. 40) § 2152, making it unlawful to exhibit certain performances on Sunday, evidence *held* to sustain a conviction.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 13, 67-72; Dec. Dig. § 29.*]

2. SUNDAY (§ 29*)—THEATRICALS—MANAGER—EVIDENCE.

In a prosecution under Penal Law (Consol. Laws 1909, c. 40) § 2152, prohibiting certain Sunday theatrical performances, evidence *held* to show that defendant was manager of a prohibited performance.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 13, 67-72; Dec. Dig. § 29.*]

3. CRIMINAL LAW (§ 217*)—SUFFICIENCY OF COMPLAINT.

Any statement under oath that brings to a magistrate notice that a crime has been committed, however crude or imperfectly drawn, is sufficient to justify the issuing of a warrant for the arrest of the party charged with the offense alleged to have been committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 439; Dec. Dig. § 217.*]

4. SUNDAY (§ 29*)—CRIMINAL PROSECUTION—PERSONS INDICTABLE—THEATER MANAGERS AND PERFORMERS.

The purpose of Penal Law (Consol. Laws 1909, c. 40) § 2152, entitled "Theatrical and Other Performances on Sunday," forbidding certain performances on Sunday, and making every person aiding in such performance, and every owner or lessee of any building who leases it for such performance guilty of a misdemeanor, was to prohibit theatrical performances on Sunday, and, if given, the performers and any persons assisting the performance were all principals committing the same crime by violating the provision of the same statute.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 13, 67-72; Dec. Dig. § 29.*]

Samuel Kingston was charged with crime. Motion to discharge defendant denied.

Joseph F. Darling, of New York City, for the People.

Rogers & Rogers, of New York City (Gustavus A. Rogers, of New York City, of counsel), for defendant.

BUTTS, City Magistrate. In an affidavit verified January 17, 1912, the defendant Samuel Kingston is charged with violating section 2152 of the Penal Law (Consol. Laws 1909, c. 40), in that on Sunday evening, December 17, 1911, being then and there the manager of a theater known as the Academy of Music, situate at the corner of Fourteenth street and Irving Place, in the city of New York, that he, said defendant Samuel Kingston, willfully and knowingly aided in exhibiting dramatic performances, tragedies, dances, comedies, and negro minstrelsy in public, which were performed at said theater on the night

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in question, and that the said defendant also on that evening assisted in taking the tickets of persons seeking admission to the theater.

[1] The evidence produced by the people before me establishes conclusively that at the time and place above stated there was a theatrical performance open to the public produced at said theater. In the auditorium thereof were assembled several hundred people. There was a stage set with scenery appropriate for the different exhibited acts. There was an orchestra to accompany the singing performers, a curtain rose and fell between the several acts, and, in fact, all the accessories and accompaniments of a dramatic performance were proved to have been in operation on the night in question at said theater. Several of the acts or performances were described in detail by the complainant. It will be unnecessary to set forth herein more than one of such performances, because it is typical of all the rest. The witness referred to testified as to such act substantially as follows: Two cards were placed on the stage announcing "Bookman and Gross." Two women dressed as men and having their faces blacked sung several comic songs, talked with each other in negro dialect, distorted their faces, producing great laughter in the audience, and one of the performers described to the other a new fashion of embroidering the names of women on their stockings, until one woman had her name embroidered so high up that the police stopped it. The evidence as to this act and the other acts there performed by the several actors, there being in all 10 numbers exhibited, establishes beyond any doubt that at the time and place in question dramatic performances, consisting in part of said negro minstrel act aforesaid, were exhibited to the public in violation of said section 2152 of the Penal Law. No attempt has been made on the part of the defendant to disprove the violation of the section of the Penal Law in question on the evening of Sunday, December 17, 1911, at the Academy of Music.

[2] The testimony taken upon the examination largely dealt with the alleged connection of the defendant Kingston with the management of Sunday evening performances at said Academy of Music. Indeed, it is strongly urged by his counsel that the evidence fails to show that the defendant was at the time the manager of said theater. But the evidence is not denied that on the night in question he assisted in taking tickets at the entrance of said theater from those who had purchased tickets entitling them to admission to the performance then and there given. Without referring specially to all the evidence taken upon the alleged management of the Sunday evening performances at the Academy of Music, it is sufficient to say that the evidence in my opinion establishes sufficiently that the defendant Samuel Kingston was the manager of the Sunday evening performances given at the Academy of Music for some period of time prior to Sunday evening, December 17, 1911. The witnesses Nolan and McNamee were employes under him. They took orders from him as manager. He occupied a room within the theater building upon the door of which was printed the word "Manager." The witness Nolan had charge of the stage hands who were employed at the Sunday evening performances, and always made up the pay roll for salaries, including his own, and

submitted them to the defendant. No articles needed for any performance and known as "properties" could be purchased without consulting the defendant, and specific instances were detailed by the witness Nolan and also the witness McNamee as to transactions of that nature between them and the defendant. At Sunday evening performances Nolan would not ring up the curtain for the beginning of the same until he had reported to defendant Kingston, and in rush hours of Sunday evenings the defendant would aid the ticket takers at the door.

This state of affairs existed up to November 25, 1911, when, owing to some trouble, the witnesses McNamee and Nolan and others quit the employ of the management of the Academy of Music, and it is urged by defendant's counsel that, even conceding the defendant to have been the manager up to November 25, 1911, there is no proof that he was such manager on December 17, 1911, when the said Sunday evening performance was given. But the evidence satisfies me that the defendant Kingston was the manager of the Sunday evening performances given at the Academy of Music up to November 25, 1911, and it appearing that on the following December 17, 1911, he was still at the said theater taking tickets as it had been theretofore his custom to do during the rush hours, it is a fair presumption, in the absence of a denial by the defendant, that the defendant's relationship to said theater as manager still continued, and I hold that the evidence justifies such presumption.

From this view of the case it follows that section 2152 of the Penal Law was violated on the night of Sunday, December 17, 1911, at the Academy of Music. The defendant must therefore be held for trial, unless the court should determine in his favor the motions made by his counsel at the close of the people's case: First, that the complaint herein is defective as it fails to sufficiently charge the defendant with a crime; and, second, that on all the evidence the defendant cannot be held for having violated said section 2152 of the Penal Law.

[3] The first motion of the defendant must be denied. The complaint herein sufficiently informed the magistrate that a crime had been committed, and that the defendant was charged with having committed that crime. Any statement under oath that brings to the magistrate notice that a crime has been committed, however crudely or imperfectly drawn, is sufficient to justify the issuing of a warrant for the apprehension of the party charged with the offense alleged to have been committed.

[4] The second ground urged upon the court why the complaint herein should be dismissed and the defendant discharged is more serious, and involves the construction of section 2152 of the Penal Law and the decisions of the Court of Special Sessions of the City of New York upon the meaning and scope of such section. It is clear that, if the decisions referred to declare the law, the defendant must be discharged. In support of his contention defendant's counsel has cited the case of *Eden Musee v. Bingham*, 58 Misc. Rep. 644, 108 N. Y. Supp. 200, decided by Judge Greenbaum, and the case of *Keith & Proctor Co. v. Bingham* (Sup.) 108 N. Y. Supp. 205. But neither of said cases involved a Sunday theatrical performance. The former

referred to an exhibition within doors, and the latter to a moving picture show, and both were decided upon the ground that such shows did not tend to disturb the peace and order of Sunday. The case of *People v. Hemleb*, 127 App. Div. 356, 111 N. Y. Supp. 690, was decided on similar grounds. Whether these cases correctly decide the law of the state must some time be settled by the Court of Appeals. It must be observed, however, that as to Sunday theatrical performances Judge Greenbaum in the case above cited uses this strong and unequivocal language:

"Hence we find that certain theatrical and other entertainments are absolutely prohibited on that day, irrespective of the fact that a given performance, which comes within the description of the forbidden acts, may be so quietly done that no serious interruption of the peace of the community thereby ensues. In such a case the naked proof of the exhibited performance doubtless would constitute the crime, unless the power of the Legislature to make such a law was questioned."

Before proceeding to construe section 2152 of the Penal Law in the light of the decisions of the Court of Special Sessions above referred to, it may be well to remember section 2140 of the Penal Law, which as the opening section of article 192 of said law relating to the Sabbath, declares as follows:

"The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community."

Theatrical performances are included in such prohibited acts.

In construing the Sunday Law there should be no suggestion or even suspicion that such construction was moulded by any religious sentiment, for such a construction could not be tolerated, and indeed would thwart the high purpose of the Legislature in enacting said law. But it is justifiable that such construction should be declared in the light of the established policy of the state, set forth in the Constitution and laws of the state and its highest courts, as to the observance of the Sunday Law, not in the interest of any class or creed, but rather in the interest of the whole people, whose Legislature enacted that the Sabbath should be set apart for rest and religious uses. And if to-day that law is openly violated, under one pretext or another, and if one of the venerated institutions of the state is crumbling away, overthrown, and partially demolished by those who assail it, apparently unrebuked, let it be understood that the highest courts of one state have declared its high purpose and settled forever its constitutionality. The responsibility for its violation is to be charged to those whose office casts upon them the public duty to see that all the laws of the state are observed by all the people of the state, and that all who violate such laws should be brought to justice. Let no court or judge in examining and deciding a case like the one at bar fail to realize that the question involves the integrity of the Christian Sabbath and all that it implies, fortified by views and decisions of great jurists who have investigated and decided questions of this nature so vital to the people of the state.

In the case of *Lindenmuller v. People*, 33 Barb. 548, the court considered and decided an alleged violation of the Sunday Law by the defendant and appellant in the city of New York, in that he exhibited a certain theatrical performance publicly on Sunday. Henry L. Clinton and James T. Brady represented the defendant, and John Anthon and Nelson J. Waterbury (district attorney) represented the people. Among other things the court, by Allen, J., decided:

"It is not disputed that Christianity is part of the common law of England. In *Rex v. Woolston*, Str. 83-4, the Court of King's Bench would not suffer it to be debated whether to write against Christianity in general was not an offense punishable in the temporal courts at common law. The common law, as it was in force April 20, 1777, subject to such alterations as have been made from time to time by the legislature, and except such parts as are subsequent to the Constitution, is, and ever has been, a part of the law of this state. Const. of 1846, art. 1, § 17; Const. of 1821, art. 7, § 13; Const. of 1777, § 25. * * * But it is urged that it is the right of the citizen to regard the Sabbath as a day of recreation and amusement, rather than a day of rest and religious worship, and that he has a right to act upon this belief and engage in innocent amusements and recreations. This position it is not necessary to gainsay. But who is to judge and decide what amusements and pastimes are innocent, as having no direct or indirect baneful influence upon the community, and as not in any way disturbing the peace and quiet of the public, and as not unnecessarily interfering with the equally sacred rights of the conscience of others? But whatever the reason may have been it was a matter within the legislative discretion and power, and their will must stand as the reason for the law. We could not, if we would review their discretion, and sit in judgment upon the expediency of their acts. We cannot declare that innocent which they have adjudged baneful and have prohibited as such. Their act in substance declares a Sunday theater a nuisance, and deals with it as such."

The doctrine laid down in this case was expressly approved in the case of *Neuendorff v. Duryea*, 69 N. Y. 557, 25 Am. Rep. 235, where the court (*per curiam*) says:

"Here, again, it is enough to refer to the decision in *Lindenmuller v. People*, *supra*, which having never been appealed from, or in any other manner questioned, will be held as declaring the law of this state. It is there held that the Christian Sunday may be protected from desecration by such laws as the Legislature in its wisdom may deem necessary, and that it is the sole judge of the acts proper to be prohibited with a view to the public peace. The subject is exhausted in the *Lindenmuller Case*, *supra*, and the true grounds of judgment there occupied, and all the arguments on this branch of the case in the present state of civil society in this country, are advanced and elaborated. It is needless to repeat them."

In the *People v. Moses*, 140 N. Y. 214, 35 N. E. 499, the court, by Judge Earl, says:

"The Christian Sabbath is one of the civil institutions of the state, and that the Legislature for the purpose of promoting the moral and physical well-being of the people and the peace, quiet, and good order of society has authority to regulate its observance and prevent its desecration by any appropriate legislation is unquestioned. *Lindenmuller v. People*, 33 Barb. 548; *Neuendorff v. Duryea*, 69 N. Y. 557 [25 Am. Rep. 235]."

See, also, the very able opinion of O'Gorman, J., in *Re Hammerstein*, 57 Misc. Rep. 52, 108 N. Y. Supp. 197; *People v. Havnor*, 149 N. Y. 195, 43 N. E. 541, 31 L. R. A. 689, 52 Am. St. Rep. 707.

Is it not apparent that all courts in construing the Sunday laws of

the state should have in view the purpose of the Legislature in their enactment? Among the various enactments of the Sunday Law is section 2152 of the Penal Law, which provides as follows:

"The performance of any tragedy, comedy, opera, ballet, farce, negro minstrelsy, negro or other dancing, wrestling, boxing with or without gloves, sparring contests, trial of strength, or any part or parts therein, or any circus, equestrian or dramatic performance or exercise, or any performance or exercise of jugglers, acrobats, club performances or rope dancers on the first day of the week is forbidden; and every person aiding in such exhibition, performance or exercise by advertisement, posting or otherwise, and every owner or lessee of any garden, building or other room, place or structure, who leases or lets the same for the purpose of any such exhibition, performance or exercise, or who assents to the use of the same for any such purpose, if it be so used, is guilty of a misdemeanor.

"In addition to the punishment therefor provided by statute, every person violating this section is subject to a penalty of five hundred dollars, which penalty 'The Society for the Reformation of Juvenile Delinquents' in the city of New York, for the use of that society and the overseers of the poor in any other city or town, for the use of the poor, are authorized, in the name of the people of this state, to recover.

"Besides this penalty, every such exhibition, performance or exercise, of itself, annuls any license which may have been previously obtained by the manager, superintendent, agent, owner, or lessee, using or letting such building, garden, room, place or other structure, or consenting to such exhibition, performance or exercise."

The position of the defendant's counsel as taken in his points submitted herein is stated as follows:

"In the *People v. Hammerstein et al.*, 139 N. Y. Supp. 644, and to which reference is hereinafter made, the decision sustained a demurrer to a complaint which is more complete and more direct than the one sworn to by Hannon in the case at bar, and in declaring the law Judge Olmstead, writing for the Court of Special Sessions, followed the decision which had been previously rendered by that court in May, 1909, in the case of *People v. Surratt*, in which it was held that even the actor himself or herself is not liable under section 2152, and that, if the words 'or otherwise' following the word 'posting' is given any other meaning except the limited one employed in the *People v. Hammerstein*, the actor or actress would certainly be liable under section 2152 (which the Court of Special Sessions has held is not the case), for no one more directly aids in an exhibition or performance than the actor or the actress."

In the opinion of the Court of Special Sessions referred to above the court, by Olmstead, J., says:

"The sole purpose of the Legislature in this enactment (i. e., section 2152 of the Penal Law) was to provide for a new class of Sabbath breakers; that in that class the theatrical manager and the owner or lessee of the theater were to be treated as principals, and the others who advertised the Sunday show, no matter how or on what day they did so, so long as they did it with knowledge, might be prosecuted for aiding."

By virtue of section 2152 of the Penal Law there are two groups of persons who may violate its provisions: First. Those who are concerned in the exhibition of a dramatic performance on Sunday. Second. Those who aid such performance by advertising, posting or otherwise. By this decision (*People v. Hammerstein*) the Court of Special Sessions, it would appear, decided that only theatrical managers and the owners and lessees of theaters, and those who aid any theatrical

performance by advertising, posting, or otherwise, can be found guilty of violating section 2152 of the Penal Law relating to theatrical performances on Sunday. Indeed, in that case before the court and also in a former case (*People v. Surratt*) certain actors charged with having actually performed their parts on the stage on Sunday were discharged. Can it be possible that these decisions correctly construe the section of the Penal Law under consideration?

In apt words and without equivocation that section (2152 of the Penal Law) declares that:

"The performance of any tragedy, comedy * * * negro minstrelsy * * * on the first day of the week is forbidden."

Therefore it follows that, if any such tragedy or comedy is performed, such performance must be by actors who take part in a performance forbidden by law. It follows also that, if actors perform, there are persons who hire them or procure them to act in such performance. Such persons are those usually interested pecuniarily or otherwise, as owner or manager, in giving the performance forbidden by law. There must also be persons who aid in the theatrical performance in various capacities. If on any Sunday in this state a public theatrical performance is produced upon a stage, all who are engaged in aiding or furthering such performance, forbidden by law, and all engaged therein, whether as owner of the business that produced the play, the manager of the concern, the actors who take part therein, the ticket seller, the ticket taker, the ushers, all in fact who are present, aiding and abetting the forbidden performance, are violators of the law. "A person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission, and whether present or absent, or who directly or indirectly counsels, commands, or induces or procures another to commit a crime, is a principal." Section 2, Penal Law.

This court is urged to follow the decision of the Court of Special Sessions in the cases above referred to on the ground that the doctrine of *ejusdem generis* (of the same kind, class or nature) limits the application of section 2152 of the Penal Law only to owners, etc., who produce theatrical performances, and those who aid such performance by advertising, posting or otherwise, as provided in such section. I am constrained to hold that the doctrine of *ejusdem generis* has no application whatever to the construction of said section. Indeed, it seems perfectly clear to me just why that portion of the section relating to advertising, etc., was added to the Sunday Law, and why it still remains a part of said section. Although Sunday theatrical performances were forbidden, it was found that such performances were advertised and posted. Persons engaged in advertising or posting such Sunday theatrical performances could not be held as violators of the law as principals, as being present aiding or abetting in any performance on Sunday, because they were not present when such crime was committed—i. e., when the Sunday theatrical performance was given—within the definition of and principles of the criminal law before the Penal Code or after its enactment. It was for that reason that the Legislature added a new class of persons who might be amenable to

the criminal law; i. e., those advertising or posting notices as to such Sunday performances. And thus section 2152 of the Penal Law forbids theatrical performances on Sunday, and makes liable all who directly or indirectly are responsible for such forbidden production, and also those who further the same by advertising, posting or otherwise.

For the Court of Special Sessions of the city of New York and its judges I have the highest respect. With regret I respectfully dissent from its decisions in the two cases above referred to. In my opinion said decisions are in conflict with the law enacted in section 2152 of the Penal Law, and not in accord with the spirit of the Sunday Law as declared by the higher courts of the state. It is to be regretted that there is no direct authoritative decision by the Court of Appeals upon the important question now at bar. All laws should be impartially enforced, and nothing tends to bring the administration of justice into contempt as the unequal enforcement of laws. Who is responsible for the condition that the storekeeper who sells his wares on Sunday, or performs labor on that day not actually necessary, is arrested and punished for violating the Sunday Law, and yet in every part of our city theaters exhibit theatrical performances to the public on Sunday forbidden by law, and apparently under the sanction of law? If such theatrical performances on Sunday are lawful, and shall be so declared, all will acquiesce, but, if they are unlawful, all persons must obey the law, or, violating it, be tried, and, if found guilty, punished according to law.

The motion of the defendant to discharge the defendant is denied.

SANTILLI v. ILLINOIS SURETY CO. et al.

(Supreme Court, Appellate Term, First Department. March 7, 1913.)

1. JUDGMENT (§ 677*)—PARTIES CONCLUDED—REPRESENTATIVE ACTION.

A final judgment in an action by one claimant for himself and all others in like situation, in which all claimants were required to prove claims, is binding, not only upon those who appear, but upon those who neglect to come in and be made parties, where it determines that no others than those appearing are entitled to recover.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062, 1193; Dec. Dig. § 677.*]

2. REFERENCE (§ 99*)—CONCLUSIVENESS OF FINDING—NECESSITY OF FINAL JUDGMENT.

In a suit on a surety bond required by law from private bankers conditioned for their faithful holding and transmission of money, the referee found as a conclusion of law that no person except plaintiffs and the claimants who had appeared were entitled to recover thereon, but the judgment entered merely determined that the plaintiffs and the claimants could recover, without passing in any way on the rights of other claimants, not parties. *Held*, in a subsequent action on the bond, that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaintiffs' right to sue was not *res judicata*, since the finding of the referee was only an order for judgment, and not the judgment of the court.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 148-158; Dec. Dig. § 99.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Giuseppe Santilli against the Illinois Surety Company and another. From a judgment of the Municipal Court of the City of New York rendered in favor of plaintiff, defendant Illinois Surety Company appeals. Affirmed.

Argued February term, 1913, before SEABURY, GERARD, and BIJUR, JJ.

Nelson L. Keach, of New York City (L. L. Kellogg, of New York City, of counsel), for appellant.

Gino C. Speranza, of New York City (Michael Schneiderman, of New York City, of counsel), for respondent.

SEABURY, J. This action is upon a bond of the Illinois Surety Company given pursuant to chapter 185 of the Laws of 1907, as amended by chapter 479 of the Laws of 1908. The condition of the bond was that one Cianchetta, a private banker, should faithfully hold and transmit moneys deposited with him for transmission to persons in foreign countries. The liability of the appellant under the bond was stipulated not to exceed \$15,000. On August 3, 1908, plaintiff deposited with Cianchetta \$100, and subsequently withdrew \$50 of this amount. The balance left with Cianchetta was to be transmitted to a person residing in Italy. Cianchetta, instead of transmitting the money, absconded. The present action is to recover the amount left on deposit with Cianchetta, and was commenced on October 1, 1912. Upon the trial the defendant offered in evidence the judgment roll in an action commenced October 14, 1911, in the Supreme Court of this state by one Terragni and one Di Tizio, who sued on behalf of themselves and all other creditors of said Cianchetta who may be similarly situated and who may come in and become parties and contribute to the expenses of said action. The action was brought against this appellant upon the same bond as that upon which the plaintiff now sues. Notice of the pendency of that action being given by publication, the action was referred to a referee to hear and determine, and, pursuant to an order therein entered, notice was published requiring all those having claims under said bond to appear before the referee and make proof of their claims. Six claimants, including the plaintiffs, appeared and made proof of claims aggregating \$2,617.24. The referee submitted findings of fact and conclusions of law. The findings of fact recite that the six claimants appearing before the referee have claims against the appellant on the bond, and that their claims are just and legal obligations of the appellant. There is no finding of fact that only those who appeared in that action have claims against the appellant upon the bond. Notwithstanding the absence of any finding of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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fact that no one other than the claimants appearing in the action are entitled to recover upon the bond, the referee found as a conclusion of law that no person other than the plaintiffs and the claimants who appeared "have established claims against the said bond, *or are entitled to recover upon said bond.*"

[1, 2] The judgment entered upon the findings merely determines that the plaintiffs and the claimants appearing in that action have just and valid claims against the appellant herein, and that the six claimants named recover the respective sums due them. The judgment itself does not provide that no person other than those named "are entitled to recover upon said bond." Upon appeal, the appellant contends that the judgment rendered in the Supreme Court action is *res adjudicata* in the present action. The appellant makes this claim although its liability under the bond might equal \$15,000, and notwithstanding the fact that it has only paid claims aggregating \$2,617.24. In support of this contention the appellant invokes the rule that a final judgment entered in such a representative action is binding not only upon those who become parties and prove their claims, but upon those who neglect to come in and be made parties. *Kerr v. Blodgett*, 48 N. Y. 66; *Brinckerhoff v. Bostwick*, 99 N. Y. 194, 1 N. E. 663; *Hirshfeld v. Fitzgerald*, 157 N. Y. 180, 51 N. E. 997, 46 L. R. A. 839; *Davids v. Bauer* (Sup.) 140 N. Y. Supp. 55.

The rule invoked, however, is not decisive of the present appeal. Where the final judgment in such an action determines that no others than those who appeared in the action are entitled to recover, that judgment is doubtless, under the authorities cited, conclusive as a bar against all those who have neglected to come in and be made parties to that action. The judgment which the appellant claims to be a bar in this case contains no such provision. It determines merely that the plaintiffs and those appearing as claimants in that action are entitled to recover the amount of their respective claims. It does not adjudge that there are no others who have claims against the bond, nor does it contain any injunctive clause restraining those who were not parties to that action from the prosecution of their claims. It is true that the conclusion of law made in the findings of the referee states that no persons other than the plaintiffs and the claimants appearing "are entitled to recover upon said bond," but that finding was not included in the judgment, and is not, therefore, to be deemed *res adjudicata* upon the claim of this plaintiff. A question does not become *res adjudicata* until it is settled by a final judgment. A mere finding by a referee has no such binding effect; "nothing but final determinations upon the merits are exalted to that pre-eminent distinction." The finding of a court or referee is nothing more than an order for judgment, and is not in itself a judgment of the court. *Andrews v. Welch*, 47 Wis. 132, 134, 2 N. W. 98.

In *Webb v. Buckelew*, 82 N. Y. 555, 559, Judge Finch, after pointing out that a judgment is a bar, said:

"But without such actual determination on the merits, evidenced by a record which cannot be contradicted, the reason of the rule does not apply,

and the evidence ceases to be effective. Thus, where the litigation has ended in a discontinuance, or a nonsuit, so that an actual decision on the merits has not been reached; or where a verdict of a jury, or the finding of a judge or referee, has not passed into a judgment, and so become absolutely fixed and final—the proceedings have no conclusive character and cannot operate as a bar. *Carlisle v. McCall*, 1 Hilt. 399; *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216; *Leonard v. Barker*, 5 Denio, 220. It is therefore only a final judgment upon the merits, which prevents further contest upon the same issue, and becomes evidence in another action between the same parties or their privies. Until final judgment is reached, the proceedings are subject to change and modification; are imperfect, and inchoate, and can avail nothing as a bar, or as evidence, until the judgment, with its verity as a record, settles finally and conclusively the questions at issue. An interlocutory order is not such a judgment. It is not a judgment at all."

In *Auld v. Smith*, 23 Kan. 65, 69, the court said:

"Final judgments are, of course, adjudications; and findings of courts are verdicts of juries, and reports of commissioners or referees may also sometimes be considered as adjudications, but they can be considered such only in cases where they themselves are final, or in cases where a final judgment has afterward been rendered upon them sustaining and confirming them, and even when confirmed by a final judgment they are adjudications only so far as they are necessarily included in and become a part of such judgment. A finding or verdict partially sustained by a judgment and partially not is an adjudication or evidence in a subsequent suit, only so far as it is sustained by the judgment. A thing contained in the finding or verdict, but not included in or confirmed by the judgment, cannot be considered as an adjudication, or used as evidence unless some other ground can be found for its use than merely that it is contained in such finding or verdict. We would refer to the following as among the authorities which we think tend to sustain the foregoing propositions: *Donaldson v. Jude*, 2 Bibb (Ky.) 57; *McReady v. Rogers*, 1 Neb. 124 [93 Am. Dec. 333]; *Hawks v. Truesdell*, 99 Mass. 557; *Nash v. Hunt*, 116 Mass. 237; *Fisk v. Parker*, 14 La. Ann. 496; *Whitaker v. Bramson*, 2 Palme, 209 [Fed. Cas. No. 17,526]; *U. S. v. Addison*, 73 U. S. [6 Wall.] 292 [18 L. Ed. 919]; *Ridgely v. Spenser*, 2 Bin. (Pa.) 70; *Collins v. Freas*, 77 Pa. 493, 497."

In *Freeman on Judgments* (4th Ed.), § 251, the rule is declared as follows:

"No question becomes *res adjudicata* until it is settled by a final judgment. For this reason, the verdict of a jury, the finding of a court, or the report of a referee or master is not admissible as evidence to create an estoppel, before it has received the sanction of the court, by passing into a judgment."

In 23 Cyc. 1227, it is said:

"Findings of fact made by the court, or decisions on contested issues, when made the basis of a judgment or decree, are conclusive on the parties in subsequent litigation; but unless followed by a judgment, or incorporated in or covered by a judgment, findings by the court, special proceedings of a jury, reports of referees and masters, and the like, are not conclusive adjudications"—citing *Cauhape v. Parke, Davis & Co.*, 121 N. Y. 152, 24 N. E. 185; *Leonard v. Barker*, 5 Denio, 220.

The judgment offered in evidence made no determination adverse to this plaintiff. It merely determined that those who appeared in that action established their claims. It did not adjudicate upon the rights of any other person, and contained no injunction restraining others than those who appeared in that action from bringing an action against the appellant upon its bond. It seems that the appellant sought to have

that judgment amended so as to contain an injunction against all other claimants, but this amendment the court refused to make, and upon appeal to the Appellate Division the judgment was affirmed.

The record upon which the appellant relies is not a bar to the plaintiff's claim, and the judgment was therefore properly rendered in favor of the plaintiff.

Judgment affirmed, with costs. All concur.

(78 Misc. Rep. 428.)

WHITE v. MILLER.

(Supreme Court, Trial Term, Onondaga County. December, 1912.)

1. MINES AND MINERALS (§ 55*)—RESERVATION IN CONVEYANCE—CONSTRUCTION.

Where a conveyance of land excepts and reserves to the grantor all mines and minerals, it works a severance between the ownership of the surface, including the limestone thereon, and the minerals, including the gypsum, beneath.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 153-165; Dec. Dig. § 55.*]

2. PARTIES (§ 80*)—OBJECTIONS—MODE OF RAISING OBJECTIONS.

Where plaintiff's failure to join parties is not taken advantage of by demurrer or answer, while the fact of their nonjoinder may be proved to prevent the plaintiff from recovering more than his proportional share or interest, it cannot be urged as a ground for defeating the action.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 123-131, 170; Dec. Dig. § 80.*]

3. MINES AND MINERALS (§ 52*)—GROUNDS FOR DENYING RELIEF—LACHES.

No period of inaction will bar the right to injunction against the removal from land of minerals belonging to plaintiff, unless continued for such time as will authorize the presumption of a grant.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 142-146; Dec. Dig. § 52.*]

4. MINES AND MINERALS (§ 49*)—ADVERSE POSSESSION—NATURE AND ELEMENTS—MINES AND MINERALS.

Where there has been a severance between the surface of the soil and the minerals underneath, the owner of the surface, by carrying on mining operations, has no adverse possession of the minerals remaining in the land.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 135; Dec. Dig. § 49.*]

5. MINES AND MINERALS (§ 49*)—PRESCRIPTION—NATURE OF RIGHT.

Where the title to the surface of lands is severed from that to the mines and minerals underlying the surface, the owner of the surface does not, by carrying on mining operations, acquire rights by prescription, as distinguished from adverse possession, to the minerals which have not been removed.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 135; Dec. Dig. § 49.*]

6. CHAMPERTY AND MAINTENANCE (§ 7*)—CONVEYANCE OF PROPERTY HELD ADVERSELY.

Where the title to the surface of land has been severed from that to the mines and minerals underlying it, a conveyance of the mines and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

minerals while the owner of the surface is carrying on mining operations is not champertous.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. §§ 54-110; Dec. Dig. § 7.*]

7. MINES AND MINERALS (§§ 51, 52*)—TRESPASS—INJUNCTION.

Where the title to the surface was severed from that to the mines and minerals in a tract of 174 acres, and plaintiff became the owner of $\frac{6}{7}$ of all mines and minerals on the whole tract, he is entitled to an injunction against the owner of 12 acres of the surface who has quarried gypsum on a portion thereof, and to damages for the removal of gypsum during the six years next preceding the commencement of the action.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 137-141, 142-146; Dec. Dig. §§ 51, 52.*]

Action by Ernest I. White against Clifford L. Miller for injunction and damages. Judgment for plaintiff.

See, also, 134 App. Div. 908, 118 N. Y. Supp. 1150.

White & Barber, of Syracuse (Jerome L. Cheney, of Syracuse, of counsel), for plaintiff.

King, Waters & Page, of Syracuse, for defendant.

ANDREWS, J. One George D. Wickham was originally the owner of lot 73 in the town of Manlius, in Onondaga county, containing 600 acres of land. On July 10, 1807, he conveyed 174 acres of such land by warranty deed to one Asel Wilcox, "excepting and reserving out of the premises hereby intended to be conveyed all mines and minerals." By various mesne conveyances the title to some 12 acres of this 174 had, at the time of the commencement of this action, become vested in the defendant.

George D. Wickham died in 1845, leaving a last will and testament by which he devised the rest and residue of his real estate of every kind and description. Thereafter by conveyances from his devisees and their successors in title the plaintiff became the owner of five-sevenths of all mines and minerals on said lot 73; the title to the remaining two-sevenths still remaining in certain of Wickham's devisees. For a number of years the defendant has quarried gypsum upon a portion of the 12 acres deeded to him. To obtain this material, he has removed the surface of the soil and the overlying stratum of water limestone. He is still engaged in such work, and threatens and intends to continue the same.

The plaintiff claims that he is the owner of an undivided five-sevenths of such gypsum; that as to him the removal thereof is unlawful, and he brings this action for the purpose of enjoining its continuance and of recovering damages for the gypsum already removed.

The defendant claims (1) that the gypsum passed under the original deed from Wickham to Wilcox and thence to him; (2) that because he has quarried such gypsum openly under a claim of right for a period exceeding 20 years he has obtained title thereto by adverse possession; (3) that, if he has not obtained title thereto by adverse possession, he has obtained the right to quarry and remove such gypsum under the theory of prescription; (4) that the deeds under which the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaintiff claims are void as being champertous; (5) that the plaintiff cannot maintain this action because of laches; and (6) that the plaintiff cannot maintain this action because, being a tenant in common of the gypsum, his cotenants have not been brought in as parties.

[1] In my opinion the Court of Appeals in *White v. Miller*, 200 N. Y. 29, 92 N. E. 1065, 140 Am. St. Rep. 618, where the effect of a Wickham deed containing a similar exception or reservation is discussed, is conclusive upon the question of the interpretation of the Wilcox deed. I must hold that by this deed from Wickham to Wilcox there was wrought a severance between the ownership of the surface of the soil, including the limestone thereon, and the minerals, including the gypsum beneath; that the former passed to Wilcox and his grantees; that the latter was retained by Wickham; and that an undivided five-sevenths thereof passed from his devisees to White.

[2] The defendant has not taken advantage of the failure to join the Wickham devisees as parties either by demurrer or answer. That being so, while the fact of their nonjoinder may be proved at the trial for the purpose of preventing the plaintiff from recovering more than this proportional share or interest, it cannot be urged as a ground for defeating the action. *Hill v. Gibbs*, 5 Hill, 56 and note; 38 Cyc. 118.

[3] As to the defense of laches, there is a distinction between an action for an equitable remedy in aid of or to enforce a legal right not barred by the statute of limitations and the case where an exclusively equitable remedy is sought to enforce a purely equitable right. In cases of the latter class long delay or acquiescence, although short of the statutory period for the limitation of equitable actions, may be a ground for refusing relief. But, where an injunction is sought to prevent repeated trespasses, the relief is allowed as much upon the ground of public policy as upon any other. The public as well as the plaintiff is interested in preventing a multiplicity of suits. To refuse an injunction while the legal remedy was still in force would serve no good purpose. In this state no period of inaction merely has been held sufficient to justify a nuisance or trespass, unless it has continued for such a length of time as will authorize the presumption of a grant. So long as the legal right exists the owner is entitled to maintain his action in equity to restrain violations of this right. *Calhoun v. Millard*, 121 N. Y. 69, 24 N. E. 27, 8 L. R. A. 248; *Galway v. Metropolitan El. R. R. Co.*, 128 N. Y. 132, 28 N. E. 479, 13 L. R. A. 788; *Mendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526; *Matter of Baker*, L. R. (20 Ch. Div.) 230. In short, laches is no defense in an action of this nature. There must be a case of estoppel before an injunction can be refused. And here no evidence of facts sufficient to justify a finding of estoppel has been given.

[4] In the case of *French v. Lansing*, 73 Misc. Rep. 80, 132 N. Y. Supp. 523, the question as to when and how, where a severance between the surface of the soil and the minerals underneath has been effected, title to the latter can be obtained by adverse possession, was discussed by this court. Here, as there, the acts under which this claim was made consisted generally in the removal of gypsum from time to time from quarries on the 12 acres in question and from other portions

of the original 600 acres which belonged to Wickham. And here, as there, the question arises as to what effect such acts, assuming that they have continued for over 20 years, have upon the title of the owner of the minerals beneath the surface.

In the Lansing Case it was held that the mere opening and working of a quarry with or without a written claim of title did not constitute adverse possession as against Wickham and his heirs to the gypsum situated beyond the face of the quarry. I see no reason, under the circumstances in this case, of changing the views there expressed.

It is true that in the case at bar somewhat fuller evidence is given of the use made of the surface which is said to be entirely useless for agricultural purposes. Such evidence tends to show that the lands in question had been surveyed and the boundaries thereof marked in 1867, 1884, 1887, 1890, and 1905; that a stone wall had been long in existence between part of the plaintiff's property, who owns a farm adjoining the land in question, and the defendant's property; that there is also a natural ledge of rock extending 40 feet along the north side of the defendant's property and separating it from plaintiff's; that the gypsum cannot be mined on the lands in question, and that no galleries can be driven around the minerals because of the nature of the soil; that two houses and a barn were built in 1864 by defendant's predecessors at the quarry, and that the men working the quarry lived in the houses; that a wire fence was put up between the plaintiff's premises and the premises in question by the defendant in 1908.

All these acts, however, were acts which the defendant as owner of the surface of the premises in question had a right to perform, and were not in any sense adverse or hostile to the rights of the plaintiff as the owner of the minerals beneath the soil.

I have examined the cases cited by the defendant, and they do not seem to touch the point in dispute. The Wisconsin cases all hold the undoubted proposition that, where there has been no severance between the title to the surface and that to the minerals beneath, one entering upon the surface and conducting mining operations thereon is in adverse possession both of such surface and of the minerals. *Stephenson v. Wilson*, 50 Wis. 95, 6 N. W. 240; *Wilson v. Henry*, 40 Wis. 594; *Stephenson v. Wilson*, 37 Wis. 482; *Wilson v. Henry*, 35 Wis. 241; *Sydnor v. Palmer*, 29 Wis. 226. To the same effect is the Iowa case, *Colvin v. McCune*, 39 Iowa 502, and the North Carolina case, *Moore v. Thompson*, 69 N. C. 120, and also *Jackson v. Oltz*, 8 Wend. 440. In *Desloge v. Pearce*, 38 Mo. 588, it is assumed, as has been assumed in many cases, that the right to enter and dig for ores may be acquired by adverse enjoyment; but it was held that the circumstances disclosed were insufficient for that purpose. The same thing is true of *Armstrong v. Caldwell*, 53 Pa. 284; *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Dec. 436; *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. 293, 22 Atl. 1035, 13 L. R. A. 627, 24 Am. St. Rep. 544; *Finnegan v. Stineman*, 5 Pa. Super. Ct. 124.

The California cases do not seem to be in point. As I understand the rules that there prevail, a person may mark out upon public lands a mining claim of a certain size upon the surface of the ground, and

thereupon obtain the right of mining within the boundaries so defined, and of using the surface for such objects. Such action puts him in possession of the mining claim. No acts are necessary to evidence such possession other than those usually exercised by the owners of such claims. And such acts sufficiently long continued give title to the claim to the person exercising them. *English v. Johnson*, 17 Cal. 107, 76 Am. Dec. 574; *Hicks v. Bell*, 3 Cal. 219; *Hess v. Winder*, 30 Cal. 349; *Nessler v. Bigelow*, 60 Cal. 98; *McTarnahan v. Pike*, 91 Cal. 540, 27 Pac. 784. To the same effect is *Harris v. Equator Mining & S. Co.* (C. C.) 8 Fed. 863.

The English cases also have no bearing upon the question as to how and when title may be acquired to the minerals beneath the land by adverse possession as distinguished from the title to the surface. They are cases where it is left to the jury to determine whether a grant, release, or other document necessary to perfect a title shall be presumed. They illustrate simply a rule of evidence. The title to land is not in itself a fact, but a legal conclusion drawn from a number of facts. One such fact is the due transmission of title to the present owner. This is ordinarily proved by the production of the appropriate deeds of records. If they are lost, secondary evidence may be given of their existence and contents; but assume that because of lapse of time, or other reason, the evidence of persons who actually saw or knew of these deeds cannot be obtained. Circumstances may be shown from which the execution and delivery of the missing deeds may be inferred with more or less certainty. The question as to their former existence is a fact, and, as in all cases, this may be proved by direct or circumstantial evidence. It is not material that the possession should have lasted 20 years. The result in each case depends upon the circumstances disclosed, and they may be so strong that, independently of any question as to the length of possession, the inference of a deed may be justified. As is said by Lord Mansfield in *Mayor of Kingston v. Horner*, Cowp. 102:

"All evidence is according to the subject-matter to which it is applied. There is a great difference between length of time which operates as a bar to a claim, and that which is only used by way of evidence. A jury is concluded * * * in the one case. But * * * in the other evidence may be left to the consideration of the jury to be credited or not, and to draw their inference one way or the other, according to circumstances."

In *Curtis v. Daniel*, 10 East, 273, the question arose as to whether the title to certain minerals lying under former waste lands was in the tenants or in the lord of the manor, and it was held that, though the general presumption of law was that the soil of the waste was in the lord of the manor, yet it might be shown by evidence of acts of ownership to be in the tenants. The same circumstances appear in *Rowe v. Grenfel*, 21 Eng. C. L. 396, and in *Barnes v. Mawson*, 1 Maule & Sel. 77. I shall therefore hold that the defendant has not obtained title by adverse possession to the gypsum underlying the 12 acres in question.

[5] Even though the defendant may not have acquired the title, it is still claimed that he has gained certain property or rights under the

theory of prescription. It is obvious that under no such theory could he obtain title to the minerals themselves. The ownership of these minerals would be a corporeal hereditament, and as such the doctrine of prescription does not apply to it. *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Dec. 436; 2 Wash. Real Prop. (6th Ed.) § 1318. But the right to work a mine or extract minerals from the land of another is a profit a prendre, and as such may be created by a grant or a prescription. *Pierce v. Keator*, 70 N. Y. 419, 26 Am. Rep. 612; *Taylor v. Millard*, 118 N. Y. 244, 23 N. E. 376, 6 L. R. A. 667; Wash. Real Prop., *supra*.

Undoubtedly the plaintiff, as the owner of all the minerals including gypsum beneath the soil, could have granted to the defendant the right to quarry and remove the gypsum in question in such a manner that the title thereto still remained in the grantor; and, if such a right may be granted, it may be obtained by prescription. *Arnold v. Stevens*, 24 Pick. (Mass.) 106, 35 Am. Dec. 305; *Gloninger v. Franklin Coal Co.*, 55 Pa. 9, 93 Am. Dec. 720.

But the extent of the right acquired by prescription is measured by the extent of the use and enjoyment thereof during the prescriptive period; and, as in the case of adverse possession, it is difficult to see how there has been any use or enjoyment of the gypsum beyond the face of the quarry operated by the defendant and still lying undisturbed in its bed. The same argument used in *French v. Lansing* with regard to the doctrine of adverse possession applies to the doctrine of prescription.

[6] The result as to adverse possession disposes of the claim that the deeds to the plaintiff were champertous. If there was no possession adverse to the plaintiff or his predecessors in title, there was no champerty.

[7] Holding these views, I must find, not only that the plaintiff is the owner in fee of five-sevenths of the gypsum on the land in question, but also that the acts of the defendant in removing gypsum therefrom have been wrongful, and that the plaintiff is entitled to recover such damages as he has suffered by reason thereof during the six years prior to the commencement of this action. The evidence shows that during those years the defendant has quarried and removed 35,528.65 tons.

I shall further hold that the damages caused thereby amount to 10 cents a ton, making a total of \$3,552.86. Five-sevenths thereof would be \$2,537.75.

Proper findings may be prepared in accordance with these views. If not agreed upon, they will be settled upon notice.

Judgment accordingly.

SARGENT v. McLEOD et al.

(Supreme Court, Appellate Division, Fourth Department. January 8, 1913.)

ATTORNEY AND CLIENT (§ 150*)—RIGHT TO FEE—SETTLEMENT AFTER ATTORNEY'S DEATH.

Where an attorney employed for a contingent fee to recover damages from a railroad company for injuries to an employé died after serving the requisite notice, instituting suit, and performing all services proper and necessary, but before the case was brought to trial, and where his client settled with the railroad company for \$5,000, though the best offer before the attorney was employed was \$600, and the settlement secured was not less in amount than he would have been willing to accept had the attorney been living, the attorney's estate was entitled to the contingent fee agreed upon.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 354-357; Dec. Dig. § 150.*]

Appeal from Equity Term, Onondaga County.

Action by Mary L. Sargent, as administratrix, etc., against Donald McLeod and another. From judgment for plaintiff, defendants appeal. Affirmed.

Defendant McLeod, while acting as a locomotive fireman in the employ of the defendant Railroad Company, was seriously injured in the Railroad Company's yards at East Syracuse, N. Y., while in the discharge of his duties, under circumstances which he claimed gave rise to a cause of action in his favor against the Railroad Company. While in the hospital under treatment for his injuries, he had negotiations with a claim agent of the Railroad Company for settlement. The best offer made to him was \$600, which he declined to accept. On June 16th he wrote a letter from the hospital at Lyons, N. Y., to the late Frank C. Sargent, an attorney at law at Syracuse, N. Y., requesting Sargent to call on him with reference to managing a settlement with the Railroad Company. Sargent thereupon sent a clerk in his office to interview McLeod. This was followed by several letters between Sargent and McLeod, and interviews between McLeod and Sargent's clerk, and resulted on August 6, 1910, in the execution by McLeod and Sargent of a written contract prepared by Sargent, as follows: "Lyons, N. Y., August 8, 1910. I, the undersigned, hereby employ Frank C. Sargent as my attorney to commence an action against the New York Central & Hudson River Railroad Company to recover damages sustained by me by reason of its negligence. In consideration of the agreement on the part of my said attorney to make me no charge for services unless successful in realizing on this claim, I agree to pay my said attorney Frank C. Sargent, one-third of the amount received in case this claim is settled without trial and fifty per cent. of the amount received in case of trial whether the same be compromised thereafter or not. It is mutually agreed that this contract contains the entire agreement between the parties hereto. Donald McLeod. [L. S.] Frank C. Sargent. [L. S.]"

Sargent thereupon made an investigation into the circumstances of the accident, prepared and procured McLeod to sign a notice under the Employer's Liability Act (Consol. Laws 1909, c. 31, §§ 200-204), which, with a summons and a complaint in an action by McLeod against the Railroad Company, verified by McLeod, were served on the company on August 15, 1910. Issue was joined by the service of the answer of the Railroad Company, and the case was duly noticed for trial at the October Trial Term in Onondaga county and a note of issue filed, and Sargent caused notice to be filed with the clerk to place the case on the day calendar. On October 14th, before the case had been reached in its order, or placed upon the day calendar, Sargent died. Plaintiff, his widow, was duly appointed administratrix of his estate, and requested McLeod to consent to the substitution of a firm of attorneys in said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

action in Sargent's place to continue the same, and while negotiations were pending for such substitution, and before they had been concluded or any substitution made, the Railroad Company, through its claim agents, negotiated a settlement directly with McLeod, which was consummated on the 10th day of November, 1910, by the payment of \$5,000 by the Railroad Company to McLeod, and the execution by McLeod to the Railroad Company of a general release of all claims, demands, and causes of action on account of his injuries or otherwise. Before this settlement was made, the claim agents who negotiated it had knowledge of the terms of the contract between Sargent and McLeod. They represented to McLeod that the death of Sargent terminated this contract, and ended all liability of McLeod to Sargent's estate. McLeod expressed the opinion that Sargent's estate might have a valid claim, and the claim agents agreed orally for the Railroad Company to protect McLeod against such claim, if one were made.

Argued before McLENNAN, P. J., and KRUSE, ROBSON, FOOTE, and LAMBERT, JJ.

A. H. Cowie, of Syracuse, for appellant New York C. & H. R. R. Co.

Clyde W. Knapp, of Lyons, for appellant McLeod.

Stewart F. Hancock, of Syracuse, for respondent.

FOOTE, J. It has been adjudged in this case that plaintiff's intestate, Frank C. Sargent, acquired an attorney's lien upon the cause of action of defendant McLeod against the defendant Railroad Company, which lien did not cease ipso facto upon Sargent's death, but attached to the \$5,000 paid by the Railroad Company in settlement of the cause of action to the extent of one-third thereof, and judgment has been awarded foreclosing such lien against both defendants to the amount of \$1,666.66, with interest, execution to issue first against the defendant McLeod, and, upon return thereof unsatisfied, then against the defendant Railroad Company. The findings of fact upon which these legal conclusions were reached are that Sargent in his lifetime performed all the services proper and necessary to protect and promote the interests of McLeod, and that such services were the cause of the offer of the Railroad Company to pay \$5,000 in settlement, and were the cause of such settlement, and that defendant McLeod is insolvent.

We think these findings of fact are sufficiently supported by the evidence. It did not appear that McLeod incurred any expense whatever after Sargent's death in reference to his case against the Railroad Company. He did not employ another attorney, nor did he, so far as the evidence discloses, accept in settlement any less sum than he would have been willing to accept had Sargent been living.

We think the judgment awarded is sustained by the weight of authority. In *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189, the estate of an engineer, who had been employed under contract to erect certain docks in California and who for his services was to receive certain compensation monthly, and, upon the completion of the work, one-third of the profits realized by the principal contractor by whom he was employed, and who died before the completion of the contract, was held entitled to recover such proportion of one-third of the whole profits as the amount and cost of the work done at the time of his

death bore to the entire cost of the work when completed. In the course of the opinion in that case it is said:

"By applying the rule to this case, that the servant, when prevented by sickness or death from fully performing a contract for his personal services, may recover compensation for the services performed at the rate specified in the contract, subject to the right of the employer to reduce the same, by proof of the damages, if any, sustained by him in consequence of the servant not being able to complete the stipulated term of service, justice would be done to both parties, and the plaintiff would recover one-third of the profits earned, at the time of the testator's death, on the contracts the defendant and his associates had with the government of the United States, not only for constructing the dry dock and the lease of it, but also the basin and railway, after deducting the damages, if any, the defendant sustained in consequence of the sickness and death of the testator, prior to the completion of the work."

It was also held in that case that it was not a valid objection to the application of the rule that at the time the testator died the profits earned upon the contracts could not have been ascertained.

In *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388, recovery by the executor was permitted for service performed by his testator under contract for personal services for the term of one year, where part of the compensation was not to be paid until the full performance of the contract at the end of the year. In this case, Judge Allen, after reviewing many English and American authorities, deduces from them conclusions which, in principle, support the judgment in the present case. He says:

"There is good reason for the distinction which seems to obtain in all cases between the case of a willful or negligent violation of a contract and that where one is prevented by the act of God. In the one case the application of the rule operates as a punishment to the person wantonly guilty of the breach, and tends to preserve the contract inviolable; while in the other its exception is calculated to protect the rights of the unfortunate and honest man who is providentially and without fault on his part prevented from a full performance."

And from Story on Bailments is quoted the following:

"That, where the contract is for personal services which none but the promisor can perform, there inevitable accident or the act of God will excuse the nonperformance, and enable the party to recover upon a quantum meruit. But, where the thing to be done or work to be performed may be done by another person, then all accidents are at the risk of the promisor."

The conclusion reached by this learned judge is stated by him as follows:

"The conclusion, then, is, that, where the performance of work and labor is a condition precedent to entitle the party to recover, a fulfillment must be shown; yet that, where performance is prevented or rendered impossible by sickness or death of the party, a recovery may be had for the labor actually done. This is not out of harmony with principle or adjudged cases, and is certainly in harmony with the rules of common honesty and strict justice. * * * The contract was in fact discharged by the act of God, and its chief consequence was to measure the amount of the plaintiff's damages, or to regulate the compensation to which the plaintiff was entitled, though this remedy was as upon a quantum meruit."

The same rule was applied in *Coe v. Smith*, 4 Ind. 79, 58 Am. Dec. 618, where the estate of a deceased attorney, who had contracted to

defend his client's suit for the gross sum of \$500 but who died before completing the defense, was allowed to recover as upon a quantum meruit for the value of the service performed prior to his death. That an attorney's lien survives his death under contract for a contingent fee is held in *Dodge v. Schell*, 10 Abb. N. C. 465, 12 Fed. 515. In that case Judge Wallace in the United States Circuit Court, on the authority of *Wolfe v. Howes*, *supra*, and other cases, held:

"That the executrix of Douglas (the deceased attorney) has a valid claim against the plaintiffs for the value of his services up to the time of his death; the entire performance of the contract, on his part, being prevented by his death."

We think that *Badger v. Celler*, 41 App. Div. 599, 58 N. Y. Supp. 653, is not in conflict with the authorities above referred to. In that case the controversy was submitted to the court without action as to the right of the executor of a deceased attorney to recover for his services rendered to the defendant in his lifetime under a contract for a contingent fee, where the action in which the services were rendered had not then been determined, and where it was impossible to say whether the action would ultimately be successful. It was very properly held in that case that there could be no recovery, because the defendant had recovered nothing upon the claim or demand which the attorney had been engaged in prosecuting upon the basis of a contingent fee. In the course of the opinion in that case, Mr. Justice Ingraham, for the court, says:

"We are not now concerned with a determination of the question whether an attorney employed under such a contract as the one in question, who has rendered valuable services which result in his client's obtaining a substantial recovery upon the claim which he was employed to enforce, although such recovery should happen after the death of the attorney, would be entitled to some compensation for the services which he had rendered."

We conclude that plaintiff has been properly allowed a recovery to the extent of the one-third contracted by McLeod to be paid to Sargent for his services in bringing about a settlement before trial, inasmuch as the services rendered by Sargent are found by the court to have been the procuring cause of the settlement actually made. We think the defendants cannot complain, inasmuch as Sargent would have been entitled to that amount, if living, though he did not himself negotiate the settlement, and since McLeod has suffered no loss and incurred no expense in reference to the settlement since Sargent's death. We base our decision upon the findings made by the court, without approving all of the reasons assigned by the learned trial justice in his opinion for the judgment he gave.

We think the judgment appealed from should be affirmed with costs. All concur.

PATTERSON et al. v. YOUNGS et al.

(Supreme Court, Appellate Division, First Department. January 10, 1913.)

1. PARTNERSHIP (§ 361*)—SPECIAL PARTNERSHIPS—FORMATION.

Partnership Law (Consol. Laws 1909, c. 39) § 30, provides that two or more persons may form a limited partnership consisting of general partners and of special partners, the latter to contribute in actual cash a specified sum as capital, and that it shall be created by signing, acknowledging, and recording a certificate in the county clerk's office. A certificate of a special partnership specified the full partners and referred to a firm composed of three brothers as the special partner. After the expiration of the time of the partnership a new certificate for "continuance" was filed which named the individual members of the firm as special partners and specified the amount of capital contributed by each as being one-third of the amount alleged to have been contributed by the firm. *Held* that, as a partnership is not a distinct entity apart from the members composing it, the firm could not be a special partner, for want of proper execution of the first certificate; but, as the statute is remedial and a substantial compliance is sufficient, the second certificate, though one of continuance, should be treated as a valid agreement establishing a special partnership if the amount of capital contributed by the firm as a special partner remained intact.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 838; Dec. Dig. § 361.*]

2. PARTNERSHIP (§ 375*)—SPECIAL PARTNERSHIPS—ACTIONS—CAPITAL.

In an action against defendants as special partners, where the first certificate of special partnership was defective, but one for continuance was good as a certificate of formation of special partnership, plaintiffs have the burden of proving that the capital contributed by the special partners was not intact at the time of the filing of the second certificate.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 852-861; Dec. Dig. § 375.*]

Appeal from Appellate Term, First Department.

Action by Mary Patterson and another, as administrators of Thomas G. Patterson, deceased, against Charles A. Youngs and others. From a judgment of the Appellate Term affirming a judgment for plaintiffs, defendants appeal. Reversed and remanded.

See, also, 150 App. Div. 904, 135 N. Y. Supp. 1131.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, MILLER, and DOWLING, JJ.

John Ewen, of New York City, for appellants.

Pierre M. Brown, of New York City, for respondents.

MILLER, J. The plaintiff recovered a judgment in an action against William E. Marsh and Herbert F. McClennan, who were concededly general partners of the firm of Marsh & McClennan, and thereafter brought this action against the appellants on the same cause of action, perforce of section 1946 of the Code of Civil Procedure, which authorizes an action to be brought against partners not named in a former suit against other partners. The question is whether the appellants were special or general partners.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

On January 4, 1900, a limited partnership certificate was filed, pursuant to section 30, art. 3, of the Partnership Law (chapter 420, Laws of 1897, now chapter 39, Consol. Laws 1909), which recited, among other things, that the general partners were William Marsh and Herbert F. McClennan, and that the special partner was "W. B. Youngs & Bros., * * * said firm or copartnership being composed of W. P. Youngs, residing at No. 153 Rodney street, in the borough of Brooklyn; Charles A. Youngs, residing at No. 603 Bedford avenue in the borough of Brooklyn; and David L. Youngs, residing at No. 158 Keap street, in the borough of Brooklyn, in the city of New York." The certificate was signed: "W. E. Marsh, H. F. McClennan, W. P. Youngs & Bros., by Chas. A. Youngs." It stated that the contribution of the special partner was \$25,000. It is undisputed that that sum was contributed. On the 31st day of December, 1900, a new certificate, severally signed and acknowledged by each of the said admitted general partners and by each of the defendants, was filed. That certificate differed from the first only in that it stated that the subscribers were desirous of "continuing" instead of "forming" a limited partnership, and in that it stated the special partners to be William P. Youngs, Charles A. Youngs, and David L. Youngs, the appellants, and the amount of capital contributed by each to be \$8,333.33. No claim is made but that all of the requirements of the statute for continuing a limited partnership were complied with. It is conceded, however, that no new capital was contributed. There is no proof whether the original capital was intact when the second certificate was filed.

The appellants have been held liable on the theory that, upon the filing of the second certificate, a new partnership was formed, and that no capital was contributed upon forming the new firm, although the certificate stated that each of the special partners had contributed the sum of \$8,333.33.

[1, 2] Section 30 of the Partnership Law provides:

"Two or more persons may form a limited partnership, which shall consist of one or more persons of full age, called general partners, and also of one or more partners of full age, who contribute in actual cash payments, a specified sum as capital, to the common stock, called special partners, for the transaction within this state of any lawful business except banking and insurance, by making, severally signing and acknowledging, and causing to be filed and recorded in the clerk's office of the county where the principal place of business of such partnership is located, a certificate. * * *"

A partnership, unlike a corporation, is not a distinct entity apart from the members composing it. It is not a person. Had the first certificate been severally signed and acknowledged by the individuals composing the firm of W. P. Youngs & Bros., they as individuals would doubtless have become special partners. That certificate, however, was not severally signed and acknowledged by them, and it was therefore ineffective to create a limited partnership under the statute, as a substantial requirement was not complied with. However, the second certificate was thus signed and acknowledged, and the first question is whether it was ineffective for stating that the purpose was

to continue, instead of to form, a limited partnership. Section 33 of the Partnership Law prescribes how a partnership may be renewed or continued, namely, "in the manner required for its original formation." In other words, the same certificate and affidavit are to be filed and same notice is to be published on a renewal as upon the original formation of a limited partnership.

The statute is remedial, and substantial compliance with its essential requirements is sufficient. *White v. Eiseman*, 134 N. Y. 101, 31 N. E. 276; *Fifth Ave. Bank v. Colgate*, 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712. The purpose of requiring the filing of the certificate and the publication of the notice was to give notice to the public so that persons dealing with a limited partnership would know upon what to rely, i. e., upon the unlimited liability of the general partners and upon the capital actually contributed by the special partners, and the latter were made liable as general partners only in case of a failure to comply with the statute or in case a false statement in the certificate or affidavit should be made. *Id.* § 34. The second certificate in this case stated who the special partners were and how much had been contributed by them. No one could be harmed, by the fact that the purpose was stated to be to continue an existing partnership.

Treating the second certificate as the formation of an original partnership, as it has been treated below, the question is whether the statement that each of the special partners had contributed \$8,333.33 was false. Plainly, it was for the plaintiff to prove that fact. It is of no consequence whether each of the special partners separately contributed the sum stated or all together a lump sum of \$25,000. Persons dealing with the partnership were entitled to rely upon its having that amount of capital contributed by the special partners. If therefore the sum originally contributed was intact when the second certificate was filed, the statement as to the amount contributed was not false. As the proof fails to disclose what the fact was in that respect, a new trial must be ordered.

The determination of the Appellate Term and the judgment of the City Court are reversed, and a new trial ordered, with costs to the appellants to abide event. All concur.

FIELD v. FIELD.

(Supreme Court, Special Term, Kings County. January 13, 1913.)

DIVORCE (§ 37*)—GROUNDS—DESERTION.

Where a husband without sufficient means to support his destitute mother otherwise than at his own home provides a place for her there, but the mother interferes with the wife's control, or by improper conduct makes the home distressing to her, she is justified in leaving her husband and requiring support from him elsewhere; and the husband is not entitled to a decree of separation merely because the wife left him, but offered to return under proper conditions.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 107-132; Dec. Dig. § 37.*]

Action by Gardner L. Field against Adelaide F. Field for separation. Complaint dismissed.

Toivo H. Neckton, of Brooklyn, for plaintiff.

L. Victor Fleckles, of Brooklyn, for defendant.

CRANE, J. Is a wife compelled to live with her mother-in-law? This is the question which confronts me in this case, and which by reason of the attitude of the parties I am compelled to decide. The plaintiff, a man of moderate means, has brought his mother, a widow, into his home to provide for her. Some differences having arisen between the mother and wife, the latter has left, and expresses her intention and desire not again to return so long as the husband's mother is in the house, unless compelled to do so by the law of this state. She is very desirous of living with her husband, and has offered to return when his mother leaves.

The husband insists upon his right to provide a home with him for his mother, but the wife insists upon her right to live with her husband without his mother; and in spite of all that counsel and court has been able to do in an attempt to adjust these strained relations the parties insist upon having their legal rights determined. There is an insistence which does not augur well for future happiness if persisted in. With much reluctance I am forced to touch upon those delicate situations which should, if possible, be adjusted in private.

No friendly relationships can ever be maintained upon a strictly legal basis. When husband and wife begin to discuss their respective rights, discord and disagreement begin. Fortunately self-rights are never thought of in that desire for mutual helpfulness which pervades most homes. This would be a strange world if people were no better than the law allows. By sections 914, 915, and 920 of the Code of Criminal Procedure, a son is only required to support his mother when she is so infirm as to be unable to work for a living; the law permits parents to disinherit their children and give their property to strangers; but how often do people act in accordance with these laws?

Society and the home is preserved, not by law, but by an instinctive as well as educated regard for the moral rights of others. But, while the law does not compel the son to support his mother in his

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

home, yet it recognizes his privilege so to do if circumstances make it necessary. The plaintiff in this case has not sufficient income to maintain two homes, and the mother has not the means or ability to support herself. Under these conditions he is justified in providing a place for her in his own home, provided she recognizes that place and keeps it. Thus she can have no say whatever regarding the management and control of the home; this belongs to the wife, and if the husband's mother makes discord where there should be harmony, interferes with the wife's control and management, even at the request of her son, or by her own improper conduct and thoughtless language makes the home unpleasant and distressing to the defendant, then the wife would be justified in leaving her husband and requiring support from him elsewhere. The following cases support this conclusion: *Mossa v. Mossa*, 123 App. Div. 400, 107 N. Y. Supp. 1044; *Hall v. Hall*, 69 W. Va. 175, 71 S. E. 103, 34 L. R. A. (N. S.) 758; *Brewer v. Brewer*, 79 Neb. 726, 113 N. W. 161, 13 L. R. A. (N. S.) 222; *Powell v. Powell*, 29 Vt. 149; *Shinn v. Shinn*, 51 N. J. Eq. 78, 24 Atl. 1022; *Maben v. Maben*, 72 Iowa, 658, 34 N. W. 462.

The plaintiff is not entitled to a decree of separation, as the defendant did not leave him with the intention to permanently abandon him (*Williams v. Williams*, 130 N. Y. 193, 29 N. E. 98, 14 L. R. A. 220, 27 Am. St. Rep. 517) and she has offered to return under proper conditions, and I have above stated what will be the proper conditions. The complaint is therefore dismissed, without costs.

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(78 Misc. Rep. 303.)

MORRISS v. HOME INS. CO.

(City Court of New York, Trial Term. November, 1912.)

1. INSURANCE (§ 96*)—BROKERS—REPRESENTATION.

A broker, who is employed to secure insurance, is the agent of the insured, and not of the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 126; Dec. Dig. § 96.*]

2. INSURANCE (§ 103*)—BROKERS—AUTHORITY TO DEAL WITH POLICY—NOTICES.

Possession of a policy is the test of an insurance broker's authority as to what he may do therewith, and as to what notices may be held binding on the insured, when sent to the broker before delivery of the policy to insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 130; Dec. Dig. § 103.*]

3. INSURANCE (§ 102*)—BROKERS—AUTHORITY—DELIVERY OF POLICY.

After delivery of a policy by a broker to insured, his authority to deal with the insurance ceases.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 102.*]

4. INSURANCE (§ 136*)—FIRE POLICY—DELIVERY—VALIDITY.

Plaintiff applied to a broker to effect certain insurance for him; the broker agreeing to do so on the understanding that it was to be a cash transaction. The binder for the insurance was issued, but never physically delivered to plaintiff. The broker demanded his premium, and, not having received it, returned the policy as "not wanted," and it was can-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

celed, nor had plaintiff paid the premium when the property was thereafter burned. *Held*, that the broker's possession of the policy was not a delivery to plaintiff, as against the insurer, and, the broker having authority to return the policy, on which he had a lien for his premium, plaintiff cannot recover thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 219-230; Dec. Dig. § 136.*]

Action by Isidor M. Morriss against the Home Insurance Company. On motion to set aside an order dismissing the complaint after trial. Denied.

Herman B. Goodstein, of New York City, for plaintiff.

Richards & Richards, of New York City (Frank Sowers, of New York City, of counsel), for defendant.

GREEN, J. This is a motion to set aside an order dismissing the complaint after the trial of the action. The action is brought to recover upon a fire insurance policy issued by the defendant, but as claimed by defendant, never delivered to the plaintiff.

[1-3] Plaintiff authorized one Dannenberg, an insurance broker, to procure certain fire insurance for him. It was their first transaction. Dannenberg testified that he told the plaintiff it was to be a cash transaction—"C. O. D.," as he expressed it—and that he wanted the premium paid before he delivered the policy. The policy of insurance was obtained from the defendant company by the agent, Dannenberg, and was never physically delivered at any time to the plaintiff. The broker, Dannenberg, demanded his money or premium, and, not having received it, about a month thereafter, he returned the policy to the company as "not wanted" and for cancellation. A fire occurred in plaintiff's premises some months later, and plaintiff now claims that the delivery of the policy by the company to Dannenberg was a delivery, and that the agent had no right or authority to cancel the same. It is well settled in this state that a broker, who is employed to secure insurance, is the agent for the insured, and not for the company (Northrup v. Piza, 43 App. Div. 284, 60 N. Y. Supp. 363, affirmed 167 N. Y. 578, 60 N. E. 1117), and the possession of the policy seems to be the test of authority on the part of the agent as to what he may do therewith, and as to what notices may be held binding on the insured, sent to the agent *before* delivery of the policy to the insured (Stone v. Franklin Fire Ins. Co., 105 N. Y. 543, 12 N. E. 45; Karsen v. Sun Fire Office of London, 122 N. Y. 545, 25 N. E. 921; Ikeller v. Hartford Fire Ins. Co., 24 Misc. Rep. 136, 53 N. Y. Supp. 323; Walrath v. Hanover Fire Ins. Co., 139 App. Div. 407).¹ However, *after* delivery of the policy of insurance to the assured, the broker's authority cannot be held to continue in reference thereto. Hermann v. Niagara Fire Ins. Co., 100 N. Y. 411, 3 N. E. 341, 53 Am. St. Rep. 197; Healy v. Insurance Co. of Penn., 50 App. Div. 327, 63 N. Y. Supp. 1055; Ikeller v. Hartford Fire Ins. Co., 24 Misc. Rep. 138, 53 N. Y. Supp. 323.

[4] In the case at bar the testimony is uncontradicted; in fact, it is

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

¹ 124 N. Y. Supp. 54.

conceded that the plaintiff never paid the premium to the agent, never saw the policy of insurance, and that he never had it physically delivered to him. His contention is, however, that, the agent having a credit with the defendant company, and the policy having been issued by the company and delivery made to the agent, such delivery to the agent constituted a delivery to the plaintiff as against the defendant, irrespective of any agreements between the agent and the assured, and that consequently the agent had no right or authority to return the policy for cancellation because the premium had not been paid. The "binder" for the insurance was issued November 2, 1911, the policy was returned or canceled December 4, 1911, and the fire took place on April 24, 1912. During all this period the premium had been unpaid and never was paid, although the agent demanded the premium and stated to plaintiff that unless it was paid he would return the policy to the company. During all this time the broker was assuredly the agent for the plaintiff. The policy had not been delivered to him by the agent; the agent had a lien on the policy for his premium. He stated that it was a cash transaction. He certainly had control over the policy, and it would be manifestly unjust to the defendant, in view of the return of the policy by plaintiff's agent, to hold upon such a state of facts that the agent was without authority to return the policy for cancellation. Legal delivery of the policy is an essential element to its existence as an enforceable contract (*Walrath v. Hanover Fire Ins. Co.*, 139 App. Div. 407, 124 N. Y. Supp. 54), and I am of the opinion in this case that there was no delivery of the policy in question sufficient in law to bind the defendant, and for that reason I conclude that the dismissal of the complaint at the trial was proper.

The motion to set aside the dismissal of the complaint and for a new trial is therefore denied.

Motion denied.

(78 Misc. Rep. 417.)

DUERINGER et al. v. KLOCKE et al.

(Erle County Court. December 9, 1912.)

PARTITION (§ 55*)—COMPLAINT—APPOINTMENT OF REPRESENTATIVE.

Where A. D., less than three years after the death of her stepmother, sought to partition an estate left by her father, one-third to her stepmother and the remainder to his eight children, four of whom, including A. D., were children of a former wife, and where her complaint in which she was joined by two half-sisters as plaintiffs, failed to state whether any executor or administrator had been appointed for her stepmother's estate, such complaint was fatally defective under Code Civ. Proc. § 1538, requiring such an allegation; it being immaterial that A. D. took no portion of her estate from her stepmother or that she need not have joined her step-sisters as plaintiff, since they were necessary parties either as plaintiff or defendant, and, if defendants, the omitted allegation would have been just as necessary under the express provisions of section 1538.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 148-159, 182; Dec. Dig. § 55.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by Augusta Dueringer and others against Henry Klocke and others. Plaintiffs' motion for judgment denied, and defendants' motion for judgment on pleadings granted conditionally.

Benjamin N. Shaffer (Emil Rubenstein, of Buffalo, of counsel), for plaintiffs.

Frank Harding, of Buffalo, for defendant Charles A. Klocke.

TAYLOR, J. This is a partition action. It appears that one Henry Klocke, father of the defendant Henry Klocke, above named, died more than three years ago, leaving him surviving his wife Caroline, four children of himself and said wife, and four children of himself and a former wife, one of the latter of whom is the plaintiff Augusta Dueringer, above named. The said ancestor, Henry Klocke, by a will left one-third of his property to his wife Caroline, and two-thirds thereof to all his children, share and share alike. His wife Caroline died less than three years prior to the time of the commencement of this action.

The defendant Charles A. Klocke demurs to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. In support of his contention he cites a portion of section 1538 of the Code of Civil Procedure, which reads as follows:

"Whenever an action for the partition of real property shall be brought before the expiration of three years from the time when letters of administration or letters testamentary, as the case may be, shall have been issued upon the estate of the decedent from whom the plaintiff's title is derived, the executors or administrators as the case may be, if any, of the estate of said decedent, shall be made parties defendant. In case no executor or administrator of such decedent shall have been appointed at the time said action is begun, that fact shall be alleged in the complaint."

The complaint contains no allegation on the subject as to whether or not an executor or administrator of the estate of Caroline Klocke has been appointed, and the demurring defendant contends that this is a fatal defect.

The plaintiffs argue that, under section 1532 of the Code of Civil Procedure, the plaintiff Augusta Dueringer, who takes no portion of her estate in common from said Caroline Klocke, might have brought this action alone as plaintiff, instead of joining with her as plaintiffs Lissete J. Green and Clara J. Hanover; furthermore, that, inasmuch as the objection made does not lie against the plaintiff Augusta Dueringer, the complaint is sufficient at least as to her, and that, therefore, the demurrer should be overruled. I cannot agree with the plaintiffs' contention. If counsel had chosen to make Augusta Dueringer alone plaintiff, the said plaintiffs Lissete J. Green and Clara J. Hanover would then have been necessary parties defendant, and under the portion of said section 1538 immediately following that portion above quoted an allegation would have been necessary in that case as to executors or administrators, if any, of Caroline Klocke. So in either case, whether said persons are made parties plaintiff or defendant, the allegation with reference to an executor or administrator is requisite to a complete statement of a cause of action, and the fact that said

persons are added as plaintiffs, instead of being made defendants, does not excuse the absence of the allegation mentioned.

Instead of this matter being moved for trial on the demurrer, it is brought in on a motion for judgment by plaintiff and argued as if a motion were made by said defendant for judgment on the pleadings under section 547 of the Code of Civil Procedure. Therefore I hold that the plaintiffs' motion for judgment must at present be denied, and that the motion for judgment on the pleadings will be granted unless the plaintiffs make an appropriate amendment pursuant hereto, and pay said demurring defendant \$10 motion costs on or before December 30, 1912. In case said costs are paid before said date, the plaintiffs may within said time amend their complaint.

(78 Misc. Rep. 415.)

PEOPLE v. DINEHART.

(Onondaga County Court. December, 1912.)

1. CRIMINAL LAW (§ 1023*)—SENTENCE—APPEAL.

The imposition of a sentence by a Court of Special Sessions presents neither an erroneous decision or determination of law or fact, within Code Cr. Proc. § 750, allowing an appeal in such case, and the County Court cannot modify the sentence on the ground that it is excessive, though section 764 gives the right to render the judgment which the court below should have rendered, or to affirm or reverse in whole or in part.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583-2598; Dec. Dig. § 1023.*]

2. CRIMINAL LAW (§ 1023*)—EXCESSIVE SENTENCE.

A claim that a sentence imposed by a justice of Special Sessions is excessive does not present the question whether the verdict is against the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583-2598; Dec. Dig. § 1023.*]

Appeal from Court of Special Sessions.

Peter Dinehart was convicted of disorderly conduct, and appeals. Affirmed.

On September 16, 1912, the defendant was convicted of the crime of disorderly conduct upon a trial had before Harry E. Reed, justice of the peace of the town of Salina, Onondaga county, N. Y., sitting as Court of Special Sessions, and a jury, and it was thereupon adjudged by said Court of Special Sessions that the said Peter Dinehart should be imprisoned in the Onondaga County Penitentiary for a period of six months. From such conviction and commitment this appeal was taken.

The justice of the peace in the return in this case has incorporated a number of affidavits taken after the appeal was perfected, which affidavits tend to show that the sentence was not too severe. And he also has annexed a petition of a number of people to the same effect. These matters are not properly part of the return, not being a history of what occurred at the trial, and the question involved here is not the severity of the sentence, but whether this court has power to review it.

Barnum & Wells, of Syracuse, for appellant.

George W. Standen, First Asst. Dist. Atty., of Syracuse, for the People.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ROSS, J. The only assignment of error claimed by the appellant is that the said sentence of six months is excessive.

[1] The learned district attorney's position is that the claim of the defendant that his sentence is excessive does not present reversible error, and I do so hold, not in the exercise of discretion, but upon the ground that I have no authority to modify a sentence imposed by a Court of Special Sessions or by a committing magistrate upon the sole ground that the sentence imposed is excessive. The authority for allowing an appeal from a Court of Special Sessions is to be found in section 750 of the Code of Criminal Procedure, "an appeal may be allowed for an erroneous decision or determination of law or fact upon the trial," and I hold in this case that the imposition of a sentence by the committing magistrate within the statutory limitations presents neither. It is true that section 764 of the Code of Criminal Procedure gives this court the right to "render the judgment which the court below should have rendered, or may, according to the justice of the case, affirm or reverse the judgment, in whole or in part." But this assumes that an erroneous determination or decision of law or fact has been made by the trial court, which gives the court jurisdiction. In other words, section 764 is not jurisdictional.

[2] Bear in mind that a claim of a sentence imposed by a justice of Special Sessions is excessive does not present the question whether the verdict is against the weight of evidence. This is a matter that relates to the finding of the guilt or innocence of the defendant and not to the extent of sentence imposed. The latter is a matter resting entirely in the discretion of the committing magistrate.

This court has for years assumed to exercise such power of modifying sentences, usually upon the recommendation either of the trial justice or of the district attorney, or both, and such action has been based upon conditions which seemed to this court at the time to render such action proper and in furtherance of justice and in the best interests of the people, and such power has been exercised by the County Court in other counties. See *People v. Mulkins*, 25 Misc. Rep. 599, 54 N. Y. Supp. 414; *People v. Loomis*, 65 Misc. Rep. 156, 121 N. Y. Supp. 91.

In the press of business of the Court of Special Sessions all the facts may not be brought to the attention of that court, or conditions may arise after commitment which would strongly impel a judge to modify a sentence if such authority existed, especially as executive clemency is rarely exercised in cases of misdemeanors. But, until the authority of the County Court to act in this class of cases is given by legislation, it is powerless.

Judgment affirmed upon the ground of want of authority to act, and the appellant may make an application to be admitted to bail pending an appeal to the Appellate Division.

Judgment affirmed.

(78 Misc. Rep. 306.)

PEOPLE v. LOOKSTEIN.

(Court of General Sessions of the Peace, New York County. November, 1912.)

1. MUNICIPAL CORPORATIONS (§ 630*)—ORDINANCES—VIOLATION—MISDEMEANOR.

Under Greater New York Charter (Laws 1901, c. 486), a violation of an ordinance of the city is not a misdemeanor, unless expressly so declared.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1385; Dec. Dig. § 630.*]

2. MUNICIPAL CORPORATIONS (§ 631*)—ORDINANCES—EFFECT—VIOLATION.

New York City Ordinances, § 408, provides that no person shall cast in or upon any of the streets, avenues, or public places any bills, circulars, cards, or other advertising material. *Held*, that such section does not impose a penalty on the person who furnishes to another circulars for distribution.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1386-1388; Dec. Dig. § 631.*]

3. MUNICIPAL CORPORATIONS (§ 630*)—CITY ORDINANCES—VIOLATION—MISDEMEANOR—AIDING AND ABETTING.

A violation of New York City Ordinances, § 408, prohibiting the distribution of advertising matter on any of the streets or public places of the city, is not a misdemeanor, and hence one cannot be lawfully convicted of aiding and abetting a violation thereof.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1385; Dec. Dig. § 630.*]

Appeal from City Magistrate's Court, Borough of Manhattan.

Max F. Lookstein was convicted of aiding and abetting the distribution of circulars on the streets of the city of New York in violation of an ordinance prohibiting the same, and he appeals. Reversed and dismissed.

Max Brown, of New York City, for appellant.

Robert C. Taylor, Asst. Dist. Atty., of New York City, for the People.

ROSALSKY, J. The defendant appeals from a judgment of conviction in the City Magistrates' Court, First Division, borough of Manhattan, upon a charge of aiding and abetting two boys in the distribution of circulars upon the streets of this city. The record of the proceedings before the magistrate shows that two boys were furnished by the defendant with circulars for the purpose of distribution upon the highways of the city, and that at the time they were engaged in throwing, casting and distributing the circulars the defendant was not present. The learned magistrate adjudged the defendant guilty of a violation of section 408 of the Code of Ordinances of the city of New York, and sentenced him to pay a fine of \$10, which the defendant paid under protest.

Section 408, *supra*, provides as follows:

"No person shall throw, cast or distribute in or upon any of the streets, avenues or public places, or in front yards or stoops, any handbills, circulars, cards or other advertising matter whatsoever."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It will be observed that this ordinance does not impose a penalty upon a person who furnishes to another circulars for the purpose of distribution upon the streets. In other words, this ordinance relates only to the actual distribution, casting and throwing away of circulars upon the streets. If the board of aldermen had intended to impose a penalty upon the person who furnishes the circulars, it could have so enacted in express terms. The ordinance being silent on this subject, the learned magistrate seeks to sustain his conclusion as to the defendant's guilt upon the theory of aiding and abetting another in the commission of a crime. The question, therefore, to be determined upon this appeal is whether there is such an offense as aiding and abetting a person to commit a violation of a city ordinance.

Section 2 of the Penal Law (Consol. Laws 1909, c. 40), among other things, divides crimes into two divisions: Felonies and misdemeanors. This section defines a principal as "a person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime." The provision in this section as to aiding and abetting another in the commission of an offense relates only to acts or omissions punishable as felonies or misdemeanors, under the provisions of the Penal Law, and to the violation of statutes which declare acts or omissions to be either felonies or misdemeanors. If the violation of the ordinance of which the defendant was convicted is a misdemeanor, then the conviction must stand; but, if it is not a misdemeanor, the conviction must be reversed.

Prior to the enactment of the Greater New York Charter (Laws 1901, c. 466), by section 85 of the Consolidation Act (Laws 1882, c. 410) as amended by chapter 233 of the Laws of 1895, all persons offending against any ordinance passed by the common council were deemed guilty of misdemeanor, and on conviction were punishable by a fine, or, in default of payment of such fine, by imprisonment not exceeding 10 days. Under sections 85 and 86 of the Consolidation Act, the acts forbidden by section 408 of the present Code of Ordinances of the city of New York constituted a misdemeanor. Upon the adoption of the Greater New York Charter the provision in the Consolidation Act (section 85), that violations of city ordinances should be misdemeanors was not incorporated, and section 44 of the charter provides that the ordinances should be enforced "by such fines, penalties, forfeitures and imprisonment as may by ordinance or by law be prescribed." Pursuant to section 44 of the charter, the board of aldermen in 1906 adopted a Code of Ordinances, and in part 16 of said Code declared as follows:

"Wherever in the foregoing ordinances no specific penalty is provided for the violation of any such ordinance, the penalty for the violation thereof shall be the sum of ten dollars."

[1] The question frequently arises whether every violation of an ordinance is a misdemeanor. After a careful examination of this sub-

ject, I have reached the conclusion that not every violation of a city ordinance is a misdemeanor unless its violation is expressly declared to be such. Under the present charter, it is specially provided that violations of certain ordinances and regulations shall be misdemeanors. The sections and their sources in the Consolidation Act are as follows: Park Ordinances Charter, § 610, Consolidation Act, § 676; Fire Regulations Charter, § 773, Consolidation Act, § 465 (in part); Dock Regulations Charter, § 827, Consolidation Act, § 717; Sanitary Code, § 1172, Consolidation Act, § 575; Sanitary Code, § 1222, Consolidation Act, § 543.

By section 95 of the Inferior Courts Act (Laws of 1910, chap. 659), a person found guilty of a violation of the Sanitary Code, or any sanitary regulation, ordinance, or order of said Code, shall be punished in the same manner as is provided for the punishment of a person found guilty of misdemeanor. With respect to park ordinances the charter (section 610) expressly makes the violation a misdemeanor, whereas under the Consolidation Act it was not a misdemeanor. Thus it will be observed that the charter is precise in making certain violations misdemeanors.

[2, 3] In view of the fact that the present ordinance does not declare its violation a misdemeanor, and of the further significant fact that whenever a violation of the law is declared a misdemeanor in the charter, it is expressly mentioned as a misdemeanor, the conclusion follows that a violation of section 408 of the ordinances of the city is not a misdemeanor, and therefore the conviction of the defendant as aiding and abetting in the violation of the said section is without authority in law.

The decision of this appeal is in accord with the views expressed in the brief of the learned assistant district attorney, to whom I am indebted for making a careful and exhaustive research of the law affecting this case.

The judgment of conviction should be reversed, and, as the defendant cannot be successfully prosecuted, the charge against him is dismissed.

Judgment reversed, and charge dismissed.



(78 Misc. Rep. 325.)

In re LINCOLN TRUST CO.

(Surrogate's Court, New York County. November, 1912.)

WILLS (§ 634*)—CONSTRUCTION—VESTED OR CONTINGENT INTERESTS.

Where a will directed executors to invest one-seventh of the remainder of an estate, together with an amount mentioned in a particular item, and to pay the income semiannually to testator's son during life, and on his death, leaving lawful issue, to pay the principal and any interest not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

paid over to such issue as they should come of age, and in default of such issue to divide it equally among the testator's surviving children and the children of any who should have died, a surviving child of testator's son, who died before coming of age, took a vested remainder in one-fourth of the property held in trust for the life of her father, and the decree settling the accounts of the trustee should direct the payment thereof to the child's administrator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

Judicial settlement of the account of the Lincoln Trust Company, as trustee under the last will of George F. Codington. Decree entered.

Bowers & Sands, of New York City, for trustee.

Anson J. Fowler, of Newburg, in pro. per.

Timothy Murray, special guardian, for Martha Codington, infant.

Joseph P. Morrissey, special guardian, for William Codington, infant.

COHALAN, S. The substituted trustee under the will of George F. Codington has filed its account, and asks for a construction of paragraph sixth, so as to enable it to make a proper distribution of the property held by it as such trustee. The paragraph referred to reads as follows:

"Sixth. I order and direct my said executors to retain and hold in their hands the remaining equal seventh part or portion of the remainder of my estate, together with the said sum of one thousand dollars lately mentioned in the fourth item of this will, and invest the same securely, and pay the interest or income of the whole thereof in semiannual payments to my son Charles H. Codington for and during his natural life, and upon his decease, if my said son Charles shall leave lawful issue him surviving, I direct my said executors to pay the whole of the principal thereof and interest which shall not have been for any cause then paid over to the lawful issue of my said son Charles H. Codington, share and share alike, as they shall arrive at the age of twenty-one years; and in default of such issue of my said son Charles, I direct my executors upon his death to pay the said sums of money directed to be retained in their hands and divide the same equally among my surviving children and the children of any of my children who shall then have become deceased, provided, however, that the children of any deceased child shall only take the share the parent would have taken if alive."

Charles H. Codington died in 1903. He was survived by four children, Mary, Marjorie, William, and Martha. Mary Codington became of age on the 1st of June, 1904, and her share was then paid to her. Marjorie died on the 15th of March, 1912, before arriving at the age of 21. The question to be determined is whether Marjorie took a vested remainder in one-fourth of the one-seventh held in trust for the life of her father, or whether her right to the possession of the property was contingent upon her arriving at the age of 21.

If the testator intended that the trust estate should continue until the issue of his son Charles reached the age of 21, the gift would be invalid as a suspension of the absolute ownership of property for more than two lives in being. *Manice v. Manice*, 43 N. Y. 303; *Matter*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of Wilcox, 194 N. Y. 288, 87 N. E. 497. The language of the testator, however, would seem to indicate that he intended that the property held in trust during the life of his son Charles should vest immediately upon his death in his lawful issue then surviving, but that the payment of the money or the actual transfer of the possession of the property should be deferred until such issue arrived at the age of 21. In other words, futurity did not apply to the vesting of the gift, but merely to the time of payment. The direction in the will is that the trustee should upon the death of Charles pay the whole of the principal to his lawful issue then surviving. This direction to pay is not limited or qualified by a direction that the payment should not be made unless the issue of Charles H. Codington arrived at the age of 21. If the testator had intended that the property after the death of his son Charles should not go directly to the issue of Charles then surviving, but that it should go only to such of his issue as reached the age of 21, it is reasonable to suppose that he would have provided by appropriate phraseology that in the event of such issue not reaching the age of 21 the property should be paid to the survivors or to other beneficiaries.

His failure to make such an alternative provision for the distribution of the property, coupled with the extremely significant fact that he did provide for its disposition in the event of his death without leaving issue surviving him, is convincing evidence of his intent that it should belong to such of the issue of his son Charles as survived him, but that actual payment should be deferred until the legatees respectively arrived at the age of 21. After the death of Charles the right of his issue then surviving to their respective shares of the property held in trust during the life of their father became absolute, and the title of the trustee was merely a power in trust to manage the property until the children arrived at the age of 21 respectively, and then to pay over to each of them his or her respective share. *Steinway v. Steinway*, 163 N. Y. 184, 57 N. E. 312. The deferring of payment through the creation of this power is not a suspension of the power of alienation. *Bliven v. Seymour*, 88 N. Y. 469; *Steinway v. Steinway*, *supra*. The legacy to the surviving issue of Charles being absolute, and the time of payment only postponed, such issue took a vested remainder in the property; and, upon the death of any such issue intestate before arriving at the age of 21, her legal representative became entitled to the share which vested indefeasibly in her upon the death of her father. *Quade v. Bertsch*, 65 App. Div. 600, 72 N. Y. Supp. 916, affirmed 173 N. Y. 615, 66 N. E. 1115; *Matter of Dippel*, 71 App. Div. 598, 76 N. Y. Supp. 201; *Smith v. Edwards*, 88 N. Y. 105; *Goebel v. Wolf*, 113 N. Y. 405, 21 N. E. 388, 10 Am. St. Rep. 464; *Vanderpoel v. Loew*, 112 N. Y. 185, 186, 19 N. E. 481.

A decree directing payment of one-fourth of the property held in trust for the life of Charles H. Codington to the administrator of Marjorie Codington will be signed.

Decreed accordingly.

In re LAMB'S ESTATE.

(Surrogate's Court, New York County. December 30, 1912.)

1. GUARDIAN AND WARD (§ 30*)—CONTROL OF CHILD—RELIGIOUS FAITH.

On an application for letters of guardianship of an infant's person and estate by maternal aunts who had, at their own cost, taken care of the infant since the mother's death several years before, the father was entitled to have his request, made in apparent good faith, that the child be brought up in his religious faith, complied with, though he had neglected the child and forfeited his right to any other consideration in the matter of the application.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 116-135; Dec. Dig. § 30.*]

2. GUARDIAN AND WARD (§ 8*)—APPOINTMENT OF GUARDIAN—JURISDICTION.

A surrogate's power to appoint guardians of infants is not incidental to a court of probate, but is derived from statute originally Laws 1802, c. 110 (3 Webster, p. 158; 1 Rev. Laws 1813, p. 454, § 30), and since often re-enacted.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 9, 13-18; Dec. Dig. § 8.*]

3. GUARDIAN AND WARD (§ 8*)—APPOINTMENT OF GUARDIAN—JURISDICTION.

The power conferred upon the surrogate by Rev. St. 1830 (2 Rev. St [1st Ed.] pt. 2, c. 8, tit. 3, § 6 [now Code Civ. Proc. § 2821]), providing that the surrogate shall have the same power to appoint guardians as the chancellors possessed, ought not to be taken away by mere implications of an inconsiderate or partial character.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 9, 13-18; Dec. Dig. § 8.*]

4. GUARDIAN AND WARD (§ 29*)—APPOINTMENT OF GUARDIAN—RIGHT TO APPOINT.

Where, on an application by an infant's maternal aunts for letters of guardianship of the person and of an estate coming from the maternal side, it appeared that the infant had been abandoned by the father to their care several years before, upon the death of the mother, the aunts were entitled to the letters prayed for, subject to a provision which respected the father's wishes that the child be brought up in his religious faith.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 109-115; Dec. Dig. § 29.*]

5. GUARDIAN AND WARD (§ 10*)—APPOINTMENT OF GUARDIAN—RIGHT TO APPOINTMENT.

While the surrogate may appoint a guardian other than the parent, it should do so only on a showing that such appointment is for the child's best interest.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 23-33; Dec. Dig. § 10.*]

6. COMMON LAW (§ 8*)—DETERMINATION.

Decision as to the common law by the courts of England since American independence have no weight or authority in determining the present common law in New York.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. § 8; Dec. Dig. § 8.*]

Application by maternal aunt for letters of guardianship of the person and estate of Mildred Lamb, minor, opposed by the father. Father not appointed, but his religious faith respected, and application granted, with qualifications.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Isaac W. Goodhue, of New York City, for the maternal aunt of the infant.

Charles C. Marrin, of New York City, for the father, opposed.

FOWLER, S. This is an application by the maternal aunt of the infant for letters of guardianship of the person and estate of an infant under 14 years of age. The facts are not much disputed. Since the death of the infant's mother many years since, the infant, who is a confirmed invalid suffering from an aggravated epilepsy, has lived and been supported solely by the hard earnings of the maternal aunts. The aunts have devoted to it a care and affection very admirable and unusual. Now the child has come into some little estate, and the father, who has never contributed to the support of his child, opposes the aunt's application, and asks to have one of his own nomination appointed guardian of the infant's estate, and that he himself be appointed the guardian of the person of his child. The father is very wisely advised not to seek to be made the guardian of the child's estate, for that would be impossible under the circumstances disclosed to me.

To appoint the father the guardian of the person of the infant and to remove the child from the long accustomed and tender care of its self-sacrificing and devoted maternal aunts would, I am satisfied, be most prejudicial to the delicate and sickly child, and most unfortunate for its physical well-being, happiness, and comfort. The child has never known any care or affection except that of its maternal aunts. To separate a feeble child from such affectionate care would be cruel in the extreme, and should be avoided if possible. To appoint the father guardian of the person would be to give him the control of its person and the expenditure of its little income, either directly or indirectly. This would not be in the child's interest. Nor would it be proper, for it appears that the father has been a most wayward and mistaken young man, dissipating his own patrimony in a very brief time. It also appears that the father's affairs are, or recently have been, greatly disordered, and that his prospects are even now doubtful or unsettled. It was owing to such facts, and others not noticed, but established, that the brief life of the child's mother, as I am informed, was most unhappy and sad. I am of the opinion that, if I have any choice, the father should not be named a guardian of the person of the infant in this matter.

[1] The difficulty with this application and one which distresses me is this: The mother of the infant and her sisters, the infant's aunts, are in religion orthodox Baptists, while the father was born a Catholic, and is, no doubt, now seriously anxious that his only child should be of the faith of his fathers. Yet the father himself consented to be married by a Baptist minister, and was so married. This was not a Catholic observance on his part. It also appears that at some moment, unknown to the maternal aunts, the father had the child baptized in the church of his own youthful faith and upbringing, and thus the child is in name and faith made a Catholic. To me this does not seem so unnatural as it does to the aunts. The mere impulses of

a person who, like the father, belongs by submission, at least, to a great, historic, and disciplined faith, coming down all the ages of our era, are not now the impulses of those of us who are outside of that church. I am bound to conclude that the father is most sincere in his contention that the whole future well-being of his child depends solely on its conformity with the Catholic faith. Certainly this is a natural conviction in his case, as his own mother, his family, and all the traditions of his life and race are Catholic. We, none of us, even if not religiously inclined, can cast aside such sacred associations. That the father was sincere in his action in having his child baptized in the Catholic communion is, I think, shown by the fact that at the time he had the child baptized a Catholic it had no prospect of an estate. But if it were otherwise, and if the father simply states to me, as he does, that he has religious scruples, I am bound to assume that he states truly and to give them respect. He is the father, with all the rights the law confers on a father. The court cannot traverse a statement of this kind by a father. There are some statements which admit of no denial in a court of justice, and the father's statement of his religious convictions is one. If a father of any faith, Jew or Gentile, Protestant or Catholic, states in this court that he has religious scruples, there can be no traverse of that statement here. This is a land where all forms of religion are both free and protected, and where the rights of fathers, within the law, are still recognized and enforced in proper cases.

The question before the surrogate is not what form of religion would be most advantageous for the child, but what are the rights of the parties to care for her estate and temporal custody. The surrogate is the servant of the law, and he can have no right to obtrude his individual opinion on matters of faith on the parties who resort to this court for assistance in cases they are pleased to submit to the surrogate.

[2] The express jurisdiction of the surrogate to appoint guardians of infants is in this state over a century old. His authority to appoint guardians, though undoubtedly claimed by the Prerogative Courts of New York and its surrogates before that time, is not, I think, a jurisdiction incidental to a court of probate, but one devolving on the present surrogates by a particular statute (Laws of 1802, c. 110, 3 Webster, 158; 1 R. L. 454, § 30), often re-enacted and acquiesced in by the public authority of the state of New York. I have indicated the source of this particular jurisdiction of the surrogate in my prior opinion in the Matter of the Infant Wagner, 75 Misc. Rep. 419, 425, 135 N. Y. Supp. 678, and also what I conceive to be the true limitations imposed on the exercise of the jurisdiction itself. In the jurisprudence of the common law, imposed by organic action on the present state, in strict conformity with the prior law in New York, we find after the year 1696 a new kind of guardianship, known as a "chancery guardian." This species of guardianship owed its rise to the modifications made necessary in the common law after the abolition of feudal tenures and the disappearance of certain kinds of common-law guardianship. Matter of Scoville, 72 Misc. Rep. 310, 313, 131 N. Y. Supp. 205. The cessation of the feudal relations in the common-law

courts disorganized all prior forms of guardianship. After the institution of the new kind of "chancery guardian" in 1696, the mode of selecting such guardians and the rules regulating their appointment in disputed cases became extremely complete in courts of chancery prior to our Revised Statutes of 1830. The chancery reports are full of adjudications in point.

[3] It was for this reason and because of prior acts of this state to like effect, and in order to set at rest other debatable questions, that the Revised Statutes of 1830 prescribed that the surrogate should have the same power to allow and appoint guardians which the chancellors of this state possessed. 2 R. S. 151, § 6, now section 2821, Code of Civil Procedure.

That the statute of this state conferring power on the surrogate to designate and appoint guardians of the person and estate of infants meant precisely what it said I have no doubt; nor had that distinguished surrogate of this county, Mr. Rollins. *Derickson v. Derickson*, 4 Dem. Sur. 295. The canon of equity in respect of the designation or selection and appointment of guardians was very complete in the year 1830, when the Revised Statutes took effect, and it was intended that the surrogate, in the selection and appointment of guardians, should be bound by that canon. It is sometimes the fashion to depreciate the jurisdiction of the courts of the surrogates, without, I think, taking proper note of the fact that never in the history of the common law has another court of probate been invested with such an extensive, historic, and splendid jurisdiction. The court of the surrogate is, in the first place, an original court for all contentious probates. In contentious probates the Appellate Division is, however, by law the ordinary, and the surrogate, as his title implies, is in reality only the delegate in conformity with very old practice in probate courts. *Matter of Will of Irving*, 138 N. Y. Supp. 784, App. Div. 1st Department, Decisions, 1912. The surrogate also has jurisdiction to settle and distribute estates of the dead in the manner formerly cognizable only in the courts Christian and the Court of Chancery combined. It now may sit, when duly invoked, also as an original court of construction of wills and devises, and then its jurisdiction is nearly as complete as the quondam chancellor's. In addition to all this, it is the chief, or one of the chief, assessors of the state. It also appoints guardians in the same manner as did the chancellor. Those who underestimate such an extended and complex jurisdiction are apt to have little acquaintance with the history of jurisdictions at common law. The trouble in this court is not with the jurisdiction of the surrogates, but to be equal to the jurisdiction imposed and to apply and exhaust it in conformity with the great body of law governing it. This law is as binding on the courts of appeal as on the surrogates. There is no authority in any appellate court to apply a different kind of law excogitated out of different sources of law. The established law which governs the surrogate must be applied in every other court of the state whenever the surrogate's judgments and jurisdiction are open to review. As matter of course, and as has always been the case with courts of this character, if a surrogate usurp jurisdiction, he should be and is rebuked and checked. But the power clearly conferred on the surro-

gate ought not to be taken away by mere implications of an inconsiderate or partial character. The interests of the public are greatly dependent on the jurisdiction in question, and that is the paramount consideration.

The statute regulating guardians reads that the surrogate has the like power and authority to appoint a general guardian of the person or the property, or both, of an infant which the chancellor had when his great office was abolished in the year 1846. Section 2821, Code Civ. Proc. I take it so plain a statement is not open to equivocation, and that the surrogate is to be controlled by the equitable canon which controlled the chancellor under like circumstances. *Matter of Wagner*, 75 Misc. Rep. 426, 135 N. Y. Supp. 678.

[4] That the surrogate may in a proper case appoint other than the parent the guardian of the person or estate of an infant is no longer open to contention. *Woerner*, *American Law of Guardianship*, 90; *Matter of Wagner*, 75 Misc. Rep. 427, 135 N. Y. Supp. 678, and cases there cited. While courts of law have no power to take the custody of an infant away from the father, it is different with the surrogate under the statute cited. Besides, this infant is not in the father's custody. He long since abandoned its custody to its aunt. It is already in the custody of the aunt by consent of the father.

[5] Having distinct reference to the power of the chancellor, the surrogate may in any event, in a proper case, appoint a guardian of the person or property of the infant other than the father. Sections 1341, 1342, *Story*, *Eq. Jurisp.* and cases there cited; *Derickson v. Derickson*, 4 Dem. Sur. 295. While this is true, the power to appoint other than a parent the guardian of the person of a child should be very sparingly exercised (*Morehouse v. Cook*, *Hopk. Ch.* 226; *Ledwith v. Ledwith*, 1 Dem. Sur. 154), and then only on a proper showing in the best interests of the child itself (*Matter of Wagner*, 75 Misc. Rep. 426, 135 N. Y. Supp. 678, and cases there cited).

By the law of this state, it is the father, and not the aunts, who has the right to determine the religious belief of an infant under 14 years of age. *Matter of McConnon Infants*, 60 Misc. Rep. 22, 112 N. Y. Supp. 590; *Matter of Crickard*, 52 Misc. Rep. 63, 102 N. Y. Supp. 440; *Matter of Jacquet*, 40 Misc. Rep. 578, 82 N. Y. Supp. 986, citing *Matter of De Marcellin*, 4 Redf. Sur. 299, affirmed 24 Hun, 207. The same conclusion is now reached in England, even where there is a settled state religion. *In re Scanlan Infants*, L. R. 40 Ch. Div. 200, 213; *Eversley's Law of Domestic Relations* (2d Ed.) 523. The modern English law even goes so far as to hold that the father cannot alienate this right, and, even if he contract by an antenuptial agreement to bring the children of the marriage up in the mother's faith, the modern English law enables him to revoke the consent. I am free to say that the conclusion of the modern English courts on this point does not appeal to me. Of course, such a rule could not be the law of this state. It is the ancient decisions of England, rendered on the primitive common law of England, while in political control of New York, that form an integral part of our common law.

[6] Since our independence, decisions of English courts have no

weight or authority here. It is a juridical assumption, also, that we are our own sole interpreters of the ancient common law once applicable here. These are tremendous differences, and thus it is that the common law of the people of this state and that of the people of modern England are often very far apart in principle and in application. As the Romans looked upon themselves, and not modern Greece, as the true successors of ancient Greek thought, so our courts are obliged to assume that they, and not the English courts, are the true interpreters of the great principles of the nonstatute law once common to all English-speaking peoples, some few dependencies excepted. This assumption is a necessary corollary of sovereignty.

The father even yet, in contemplation of our common law, is priest and king in his own household. 1 Bla. Com. 453. Even if he is an unworthy father, he is not ipso facto dethroned, and he retains a right to regulate the religious welfare of his own infant. Matter of Crickard, 52 Misc. Rep. 66, 102 N. Y. Supp. 440. I am, I think, obliged by law to defer to the expression of the father's wish for the religious training of his infant child.

As the estate of the infant was derived wholly from its mother's side, I shall in this instance defer to that very old maxim of our common law, "materna maternis, paterna paternis," as it is still discernible in the statutes regulating descents and successions ab intestato in this state. I nominate and appoint the infant's maternal aunt, this petitioner, Florence R. Cooper, the sole guardian of the estate of the infant. The estate came from the mother's side, and in this instance there it should stay for the present. I nominate and appoint the aunt also a joint guardian of the person of the infant, together with Mrs. Clara Stone Marshall, of No. 3120 Broadway, New York City, a lady in religion of the Catholic faith. This lady is of my own selection. So kindly and gentle a person will be sure to represent the father's faith in a proper way without detriment to the child's health. If the guardians of the person cannot agree, and I feel assured that two such excellent women can agree even in so delicate a matter, either may have liberty to apply to the surrogate from time to time on notice to the other during their joint guardianship, and he will then direct them further in the premises.

Decree accordingly.

(78 Misc. Rep. 319.)

In re HENRY'S ESTATE.

(Surrogate's Court, Onelda County. November, 1912.)

EXECUTORS AND ADMINISTRATORS (§ 509*)—ACCOUNTING—JUDICIAL SETTLEMENT—DECREE—MODIFICATION—"OTHER SUFFICIENT CAUSE."

Where a decree settling an estate declared that vouchers had been filed showing payment of all debts by the heir, and it was ordered that her bond to pay the debts to prevent the sale of real property be canceled, and the sureties discharged, subsequent proof that one of the debts against the estate had not been paid or considered in the settlement was "other sufficient cause" for modification of the decree, under Code Civ. Proc. § 2481, subd. 6, authorizing the surrogate to modify or vacate a former decree for fraud, newly discovered evidence, clerical

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

error, or other sufficient cause, whether the omission was intentional or otherwise.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2199-2219, 2233, 2234; Dec. Dig. § 509.*

For other definitions, see Words and Phrases, vol. 6, p. 5101.]

Judicial settlement of the estate of James Henry, deceased. Application for an order modifying a decree discharging the heir and her sureties from liability on her bond to pay debts. Granted.

James T. Cross, of Rome, for petitioner Rome Daily Sentinel Co.
M. H. Powers, of Rome, for Ida McCale.

SEXTON, S. Maud Henry, the administratrix of this estate, on October 27, 1911, petitioned this court for leave to sell real estate for the payment of debts and funeral expenses of the deceased, which proceedings were abated by the giving of a bond by Ida McCale, an heir at law, which provided for the payment of all the debts, legacies, and expenses of administration, which bond was filed December 19, 1911. On February 19, 1912, the administratrix duly filed her account and took proceedings resulting in a decree of judicial settlement filed March 23, 1912, which provided:

"That said Ida McCale within 10 days from the service upon her of a certified copy of this decree, with notice of entry thereof, pay to the following named persons the several amounts hereinafter stated which are hereby allowed and fixed as legal claims against the estate of said James Henry as set forth in the account of said administratrix filed herein."

Among the claims referred to is the following:

"Rome Daily Sentinel Co., \$13.25."

Said decree also contained this provision:

"It is further ordered, adjudged, and decreed that, upon filing with the surrogate of Onelida county vouchers showing the payment of said amounts to the persons hereinbefore stated, then and in that event the bond given by the said Ida McCale for the payment of the debts, legacies, and expenses of administration shall be null and void and the sureties thereon discharged from any and all further liability thereupon."

The bond referred to in the foregoing paragraph of said decree contained this provision:

"The condition of this obligation is such that if the above-named Ida McCale, heir at law of James Henry, deceased, will pay all of the debts, legacies, and expenses of administration so far as the goods, chattels, and credits of the said James Henry, deceased, are insufficient therefor within such time as the surrogate may direct and obey all lawful directions of the said surrogate touching said matters whenever required so to do by the said surrogate or by any court of competent jurisdiction, then this obligation to be void, otherwise to remain in full force and effect and virtue."

Said decree of judicial settlement also contained the closing paragraph:

"And it appearing that said above-named vouchers are herewith filed, and said indebtedness has been paid and discharged by said Ida McCale, it is ordered that the bond given by the said Ida McCale is hereby discharged and canceled and the liability of the sureties thereon canceled and discharged."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On May 11, 1912, the Rome Daily Sentinel Company, a claimant in the amount of \$13.25, as aforesaid, petitioned this court for an order modifying said decree by striking therefrom the said closing paragraph, on the ground that said claim had not then been paid, although duly demanded, as required by the provisions of said decree of judicial settlement.

A hearing was had and evidence taken which showed that the claimant, Rome Daily Sentinel Company, had not been represented by attorney prior to the time of its application for modification of said decree, and that no person, so far as the record discloses, was authorized to receive said \$13.25 for said company. On the hearing no claim was made by said Ida McCale through her attorney that said claim had been paid directly to said Rome Daily Sentinel Company. It was urged by her, however, that it had been included in a settlement made between her and the administratrix of the estate, Maud Henry, the latter of whom was represented by attorney James T. Cross.

Upon the evidence before me, I hold and decide that the claim of \$13.25 in favor of the Rome Daily Sentinel Company was not paid to said attorney James T. Cross, and at the time of the settlement between him as attorney for said Maud Henry and Mr. M. H. Powers as attorney for said Ida McCale the Rome Daily Sentinel Company was not represented, and that its bill was not included in said settlement, nor was it intended to be included, nor was it mentioned at all in said settlement, nor has any voucher, signed by Rome Daily Sentinel Company, nor any one in its behalf, been filed in this court, as required by the provisions of said decree, showing that its claim has been paid. It therefore follows as a matter of fact that the last provision of said decree which it is sought to have stricken out was not true at the time that it was made a part of said decree.

Section 2481, subd. 6, of the Code of Civil Procedure, confers jurisdiction upon the surrogate "to open, vacate, modify, or set aside, or to enter, as of a former time, a decree or order of his court; or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause." It is not contended that any fraud has been perpetrated, nor that any new evidence has been discovered, nor that a clerical error was made, so that, if the relief asked for is granted, it must be under the clause—"or other sufficient cause." "Other sufficient cause" has been construed to mean a cause kindred to those specified in the section. An untrue statement in a decree, whether intentional or not, if it works an injury, is kindred to a fraud, and, as I view it, justifies a modification of a decree containing it. It is true that the decree has this indorsement: "O. K. James T. Cross, Atty. for Admrtx." The Rome Daily Sentinel Company, however, not having been represented by Mr. Cross, is not bound by his approval of the decree.

An order may therefore be entered modifying said decree by striking therefrom the said last provision thereof, and, as so modified, it may stand as the decree of judicial settlement herein.

Decreed accordingly.

(79 Misc. Rep. 74.)

In re KUTTER'S ESTATE.

(Surrogates' Court, New York County. January, 1913.)

1. **MARRIAGE (§ 54*)—REMARriage WHILE OTHER SPOUSE LIVING—VALIDITY.**
Under Domestic Relations Law (Consol. Laws 1909, c. 14) § 6, a second marriage in New York in good faith of a person whose spouse has been absent for five successive years without being known to be living subsists until death or an adjudication avoiding it, though the disappearing spouse reappear; and the validity of such second marriage cannot be questioned collaterally.
[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 93-103, 105, 106, 109; Dec. Dig. § 54.*]
2. **MARRIAGE (§ 54*)—REMARriage WHILE OTHER SPOUSE LIVING.**
At common law, the remarriage of a person having a husband or wife actually living, although unheard of for years and believed to be dead, was void from the beginning.
[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 93-103, 105, 106, 109; Dec. Dig. § 54.*]
3. **MARRIAGE (§ 3*)—REMARriage WHILE OTHER SPOUSE LIVING—WHAT LAW GOVERNS.**
On an application to revoke letters of administration granted to intestate's widow, because her marriage to intestate which occurred in New Jersey was invalid, the validity of the marriage must be determined by the law of New Jersey.
[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 3, 23; Dec. Dig. § 3.*]
4. **EVIDENCE (§ 80*)—LAWS OF ANOTHER STATE—PRESUMPTION.**
Where, in such case, there was no proof of any New Jersey statute altering the common-law rule that remarriage of one having a husband or wife actually living is in all cases void from the beginning, the presumption was that such rule was in force in New Jersey; and hence the marriage must be held invalid and the letters revoked.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.*]

Application to revoke letters of administration on the estate of Howard Kutter, deceased, issued to his widow. Letters revoked.

Howard S. Kinney, of New York City (James B. Fox, of counsel), for applicant.

John F. Valieant, of New York City, opposed.

FOWLER, S. This is an application under subdivision 4, § 2685, Code of Civil Procedure, to revoke letters of administration obtained by an alleged false suggestion. The administratrix received the letters of administration as widow of Howard Kutter, deceased. She alleged and now insists that she is such widow. This is denied by the mother of the deceased, who petitions to revoke the letters. The issues of fact came on for hearing before me. It was then established that the administratrix was married to one Horton in May, 1900. In or about the year 1901 Horton disappeared, and was not known to administratrix to be living in November, 1908. In 1905 the administratrix entertained the idea of divorcing Mr. Horton, but could not find him. Not hearing from Horton in more than seven years, the admin-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

istratrix married the deceased Mr. Kutter in November, 1908, in the state of New Jersey. At that time the precise domicile of the deceased and the administratrix is not very clear, but the evidence points to New Jersey. In May, 1910, Mr. Horton reappeared at the home of Mrs. Kutter in the city of New York, and Mr. Kutter then saw him, and sent him away with the statement to Horton, in effect, that the administratrix was now Mrs. Kutter. Mr. Horton seems to have acquiesced in this statement so far as to disappear again without contradiction. The only question before me is the effect of her marriage to deceased on the title of the administratrix to the letters of administration. Is she or is she not the widow of the deceased Mr. Kutter, so as to entitle her to letters of administration?

[1] Had the marriage of administratrix to the deceased taken place in the state of New York, the question here would be very different. Under the law of this state the remarriage of a person whose husband or wife has absented himself or herself for five successive years then last past without being known to such person to be living during that time is not void, but voidable (2 R. S. p. 139, § 6; section 6, Domestic Relations Law, c. 19, Laws of 1909 [Consol. Laws 1909, c. 14], formerly section 3, c. 272, Laws of 1896), and such a second marriage subsists until death or an adjudication avoiding it, and this is so even if it transpires that the disappearing spouse of the prior marriage reappear. (*Stokes v. Stokes*, 198 N. Y. 301, 305, 91 N. E. 793), unless there is bad faith apparent in the new marriage (*Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106; *Jones v. Zoller*, 29 Hun, 551). In the absence of bad faith, the validity of such a second marriage cannot be questioned collaterally (*Cropsey v. McKinney*, 30 Barb. 48; *Matter of McKinley*, 66 Misc. Rep. 126, 122 N. Y. Supp. 807; *Taylor v. Taylor*, 25 Misc. Rep. 566, 55 N. Y. Supp. 1052; *Griffin v. Banks*, 24 How. Prac. 213, reversed on other grounds 37 N. Y. 621), and after the death of the disappearing spouse of the former marriage it would seem not at all (*Combs v. Combs*, 17 Abb. N. C. 265; *Stokes v. Stokes*, 198 N. Y. 301, 304, 91 N. E. 793). But this condition of the matrimonial law is the effect of the statutes of this state.

[2] At common law the remarriage of one having a husband or wife actually living, although unheard of for years and believed to be dead, was void ab initio (*Fenton v. Reed*, 4 Johns. 52, 53, 4 Am. Dec. 244; *Williamson v. Parisien*, 1 Johns. Ch. 389, 393; *Price v. Price*, 124 N. Y. 589, 596, 27 N. E. 383, 12 L. R. A. 359), as the old statutes relieving him or her from the penalties for bigamy did not validate the subsequent marriage contract, even if contracted under an honest mistake of fact (*Fenton v. Reed*, *supra*; *Price v. Price*, *supra*; *Schouler*, Domestic Relations, § 21).

[3] But the marriage of the administratrix to the intestate Kutter did not take place in this state. It took place in New Jersey. Its validity is to be determined there by the law of the state of New Jersey. *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505. In this respect locus regit actum, and, if valid in New Jersey, the marriage is valid everywhere. *Story*, Conflict of Laws, §§ 85, 89, 103; *Wheat-*

on, 141; Hynes v. Hynes, 91 N. Y. 451, 457, 43 Am. Rep. 677. If not valid there, it is not valid here.

[4] Now, the common law is presumed to be in force in New Jersey, and the statutes of this state have, of course, no extraterritorial effect there. No proof has been made before me of any statute of New Jersey altering the common law, and the surrogate cannot take judicial notice of the statutes of New Jersey. The presumption is that the common law prevails in New Jersey, when no statute altering it is proved as a fact. Vanderpoel v. Gorman, 140 N. Y. 563, 568, 35 N. E. 932, 24 L. R. A. 548, 37 Am. St. Rep. 601; First Nat. Bank v. Nat. Broadway Bank, 156 N. Y. 459, 472, 51 N. E. 398, 42 L. R. A. 139; Robb v. Washington & Jefferson College, 185 N. Y. 485, 496, 78 N. E. 359; Monroe v. Douglass, 5 N. Y. 447; Electro Co. v. Amer. H. Co., 130 App. Div. 561, 115 N. Y. Supp. 34.

At common law the marriage of the administratrix to Kutter was absolutely void, if she then had a husband living. The proofs show that she then had a husband living. This being so, there is no escape from the conclusion that the present administratrix of intestate is not and was not the widow of the intestate Kutter at the time she applied for letters of administration upon his estate. The suggestion by which the administratrix obtained such letters was therefore false when made. Kerr v. Kerr, 41 N. Y. 272.

This being so, the letters in question must be revoked. Decree accordingly.

IN RE NEW YORK LIFE INS. & TRUST CO.

(Surrogate's Court, New York County. January 15, 1913.)

1. TRUSTS (§ 298*)—ACCOUNTING BY TRUSTEE—SCOPE OF SURROGATE'S JURISDICTION.

While the surrogate cannot decide abstract questions, he may on an accounting by the trustee under a will for testator's daughter, a domiciled Italian by marriage, and the remaindermen, decide a motion by one respondent surviving husband of the daughter to overrule a defense set forth in the answer of an adverse respondent as insufficient in law, in that the construction of the daughter's will, made in New York as an execution of a power given by testator, was to be determined by the laws of the state of New York, and not by the laws of Italy.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 417; Dec. Dig. § 298.*]

2. COURTS (§ 202*)—PROBATE JURISDICTION—PLEADING IN SURROGATE'S COURT—DEMURRER—ADMISSIONS.

Although there is no such thing as a demurrer in the Surrogate's Court, a motion by a respondent in an accounting to overrule a defense set up in an answer of an adverse respondent as insufficient in law necessarily involved the admission of all the allegations of the petition so far as they are not denied by the answer, and also the admission of all of the allegations contained in such answer.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 480-486; Dec. Dig. § 202.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. POWERS (§ 36*)—EXECUTION—REFERENCE TO POWER.

A will of the donee of a power of appointment making no reference to the power would not at common law be an exercise of the power.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 137-149, 155; Dec. Dig. § 36.*]

4. WILLS (§ 436*)—CONSTRUCTION—WHAT LAW GOVERNS.

It is a general principle, both of international and municipal law, that wills of personalty are to be construed and effect given them by the law of the domicile.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 947-950; Dec. Dig. § 436.*]

5. POWERS (§ 36*)—EXECUTION—WHAT LAW GOVERNS.

Where a power is a purely beneficial power or assets of the donee, the *lex loci domicilii* of the donee may govern the construction of the testamentary execution and distribution under the will.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 137-149, 155; Dec. Dig. § 36.*]

6. POWERS (§ 25*)—CONSTRUCTION—INTEREST OF DONEE.

The beneficiary under a testamentary trust, giving her the income of personal property for life, and with a power upon her death to appoint the principal to her issue surviving the donor, and, if there was no surviving issue, to make a testamentary appointment as to one-half of it, in default of which it should go to the donor's next of kin, was merely the instrument through which the donor's will was effected, and had no estate in the property affected by his will.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 71-75; Dec. Dig. § 25.*]

7. POWERS (§ 1*)—PERSONALTY—CONSTRUCTION.

Technical powers in connection with personal property are authorities to do an act in relation to such property, or to create and revoke interests therein or charges thereon which the owner granting the power might himself lawfully perform.

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 1; Dec. Dig. § 1.*]

8. POWERS (§ 25*)—INTEREST OF DONEE—"BENEFICIAL POWER"—"POWER IN TRUST."

A power to appoint to others than the donee of the power is a "power in trust," and not a "beneficial power." It is a mandate rather than the property of the donee.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 71-75; Dec. Dig. § 25.*]

For other definitions, see Words and Phrases, vol. 1, pp. 748-749; vol. 6, p. 5480.]

9. POWERS (§ 36*)—WHAT LAW GOVERNS—DOMICILE OF DONOR.

In respect of powers of testamentary appointment over settled property in England or America, the law of the domicile of the donor of the power, and not that of the donee, determines, in most cases, whether there is sufficient testamentary execution of the donee's power of appointment.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 137-149, 155; Dec. Dig. § 36.*]

10. DOMICILE (§ 5*)—DOMICILE BY OPERATION OF LAW—MARRIAGE.

The marriage of a New York lady to a subject of Italy, there domiciled, made Italy her domicile.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 24-35; Dec. Dig. § 5.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

11. POWERS (§ 36*)—EXECUTION—WHAT LAW GOVERNS—STATUTES.

A lady domiciled in Italy because of her marriage to an Italian subject domiciled there, having a power of appointment under the will of her father, which was executed and probated in New York as to personal property in the hands of trustees domiciled in New York, while herself in New York, executed her will giving all her real and personal property to her husband, which will was proved in Italy and also by ancillary proceedings in New York. *Held* that, the factum of the will having been adjudicated, the execution of the power of appointment was to be construed according to the law of New York.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 137-149, 155; Dec. Dig. § 36.*]

12. POWERS (§ 36*)—EXECUTION—REFERENCE TO POWER—STATUTES.

Under Personal Property Law (Consol. Laws 1909, c. 41) § 18, which dispenses with the necessity of a special reference to personal property embraced in a power to bequeath, unless the intent that the will of the donee shall not operate as an exercise of the power expressly or impliedly appears, a will which gave all testatrix's real and personal property to her husband, without making any reference to her power of appointment, under her father's will, of personal property in the hands of trustees in New York, operated as an exercise of the power.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 137-149, 155; Dec. Dig. § 36.*]

13. WILLS (§ 436*)—TESTAMENTARY DISPOSITION—WHAT LAW GOVERNS—STATUTES.

Decedent Estate Law (Consol. Laws 1909, c. 13) § 47, which declares that, in the absence of special statutory provision, the effect of the testamentary disposition of the personal property situated in the state, and the disposition of it where not disposed by will, are regulated by the law of the state or country of which decedent at the time of his death was a resident, as well as Code Civ. Proc. § 2694, from which it was taken, are only declaratory of the prior law, and the law of the state as to the validity and effect of testamentary disposition as depending upon the rules of private international law stand as if neither section 47 nor section 2694 had been enacted.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 947-950; Dec. Dig. § 436.*]

Accounting of the New York Life Insurance & Trust Company as executor of Edwin C. Philbrick, deceased, for the proceedings of said Philbrick as substituted trustee under the will of Adolph Hallgarten, for the benefit of Alice Franchetti. Motion by respondent (Baron) Leopold Franchetti to overrule the second defense in the answer of the adverse respondent, Eleanor von Koppenfels. Motion granted.

Motion by respondent (Baron) Leopold Franchetti to overrule and dismiss (or suppress) the second and separate or second defense (or position) set forth in the answer of respondent Eleanor von Koppenfels as insufficient in law, and on the further ground that the validity, effect, and construction of the will of (the Baroness) Alice Franchetti as an execution of the power created under the will of her father, the late Mr. Adolph Hallgarten, are to be determined by the laws of the state of New York and not by the laws of Italy; it sufficiently appearing that the donee of the power, the Baroness Alice Franchetti, was domiciled in Italy, being married to an Italian subject, domiciled in the kingdom of Italy at the time her will, in execution of the power conferred on her by her father, was executed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Duer, Strong & Whitehead, of New York City, for New York Life Ins. & Trust Co.

Gregory, Stewart & Wrenn (Allen S. Wrenn, of New York City, and Douglas B. Stewart, of counsel), for respondent Eleanor von Koppenfels.

Steinhardt & Goldman, of New York City (Benjamin N. Cardozo, of New York City, of counsel), for respondents Leopold Franchetti and Paul M. Warburg, as ancillary executor, etc.

FOWLER, S. This is a very interesting matter, and extremely well argued by counsel. I had some doubt at the outset, and so stated in a memorandum, whether the cause was in a position for adjudication without the appointment of a new trustee, but all the learned counsel insisted that it is so. They ought hereafter to abide by that position, if there should be any further doubt, as it was they who invoked the jurisdiction of the surrogate and quieted his scruples about proceeding as the matter stood. They all likewise now insist on the regularity of the practice employed to present the following question:

"Was the will, executed in the state of New York by Alice Franchetti, then married to a subject of the king of Italy, and with her husband domiciled in Rome, a good and sufficient execution of a certain power of appointment, conferred on the said Alice Franchetti by the will of her father, the late Adolph Hallgarten, who in his lifetime was a domiciled citizen of the state of New York, and whose will was made and proved here?"

If the question put is to be determined by the law of the state of New York, unaffected by the law of the kingdom of Italy, the promovents will prevail and extended and costly proceedings to prove the law of Italy will then be avoided as unnecessary, and consequently the progress of this cause will be expedited and ameliorated. The surrogate is always pleased to acquiesce in any request of this kind by counsel if, as here, it is thought to be in furtherance of the interests of litigants in this court.

[1] The surrogate is not, however, empowered to decide questions in abstracto. The question to be adjudicated is sub judice by reason of a motion to suppress or overrule an answer, setting up in substance that the donee of a power created by the will of her father, Mr. Hallgarten, was domiciled in Italy, the wife of an Italian subject, domiciled there, at the time she made in New York the last will and testament purporting to be an execution of the power of appointment conferred on her. They therefore invoke the principle of domicile, and insist that the law of Italy governs the execution of such power, and not the law of this state, although Mr. Hallgarten, the grantor of the power of appointment over trust property held here, was a citizen of this state and here domiciled at the time he made the will granting the power in question to his daughter, now the Baroness Alice Franchetti. Mr. Hallgarten's will was originally probated in this county. The will of Mme. Franchetti, the donee of the power in question, though made here, was proved at Rome, Italy, but thereafter ancillary proceedings thereon were had in this county, and the will duly authenticated is now recorded in this jurisdiction.

[2] Although there is no such thing as a demurrer in this court, the motion now here for determination necessarily involves the admission of all the allegations of the original petition as amended so far as they are not denied by the answer of Madame von Koppenfels as amended, and also the admission of all of the allegations contained in such answer as amended. The regularity of the present motion is supported in principle by the decision in *Ampersand Hotel Co. v. Home Insurance Co.*, 198 N. Y. 495, 91 N. E. 1099, 28 L. R. A. (N. S.) 218, 19 Ann. Cas. 839.

As the question to be adjudicated is novel in this state, and one of extreme importance and some nicety, it may be well to state with precision the facts which are, as just indicated, to be assumed by the surrogate in his disposition of the only question now here at the present time for determination. This question arises in the course of an accounting of the New York Life Insurance & Trust Company, executor of Edwin C. Philbrick, for the proceedings of said Philbrick as substituted trustee of the trusts created by the last will and testament of Adolph Hallgarten for the benefit of Alice Franchetti and remaindermen. Mr. Adolph Hallgarten, a citizen of the state of New York, domiciled in the city of New York, at the time of his death, died on February 13, 1885, leaving a will executed March 11, 1882, which was admitted to probate by the Surrogate's Court, New York county, May 19, 1885. In and by said will Mr. Hallgarten created a trust for the benefit of his daughter Alice, the income to go to her for life—

"and upon her death then to pay and transfer the last mentioned share to the issue, if any, of such daughter surviving me, and if she shall leave no issue her surviving, then to pay and transfer one-half of the principal of said last mentioned share to such person or persons as such daughter shall by her last will or appointment duly executed direct, limit or appoint and to pay and transfer the remaining half of the last mentioned share, and in default of such will or appointment, then the whole of said last mentioned share to my next of kin under the laws of the state of New York, as if I had died intestate."

The said testator's daughter Alice married Baron Leopold Franchetti, a subject of the kingdom of Italy, domiciled and residing in the kingdom of Italy. In the year 1909 Alice Franchetti made a visit to this country, and while here on such visit she made her will, which was executed in the city of New York. Alice Franchetti thereafter died without issue, and the aforesaid will was adjudicated or probated at Rome, in the kingdom of Italy, and thereafter, upon such foreign proceedings, probate, or ancillary letters of administration, were issued out of the Surrogate's Court of New York county to Paul M. Warburg. The will of Alice Franchetti is as follows:

"I, Alice Franchetti (formerly Hallgarten), do make, publish and declare this my last will and testament, in manner following, hereby revoking all previous wills by me at any time made.

"First, I give, devise and bequeath to my husband, Leopold Franchetti, absolutely, all my property, both real and personal, whatsoever and where-soever situated.

"I have requested my said husband to make certain disposition of my property after his death, but said request is in nowise obligatory upon him, nor do I intend hereby to create any trust upon said property, and it is my

intention that he shall be in the position of freely exercising his discretion and good judgment absolutely as to the disposition of the said property.

"Second. I nominate and appoint as executors of this my will my said husband Leopold Franchetti and Paul M. Warburg, of the borough of Manhattan of the city of New York, and direct that no bond shall be required of them or either of them for the faithful performance of their duties as such executors. * * *

"In witness whereof I have hereunto set my hand and seal this nineteenth day of October, in the year nineteen hundred and nine.

"[Signed.]

Alice Franchetti. [Seal.]"

Madame Eleanor von Koppenfels is likewise a daughter of the said Adolph Hallgarten, and is now his sole surviving next of kin. The account filed herein shows that the principal of the trust fund here involved consists wholly of personalty. The annexed petition of the accountant, in the third paragraph thereof, alleges:

"The said Alice Franchetti died without issue, and pursuant to the terms of the will of said Adolph Hallgarten the trust terminated upon her death and the entire trust fund is now distributable, one-half to Leopold Franchetti, as appointed by her last will and testament, and the other half to her sister, Eleanor Hallgarten (von Koppenfels), who is the sole surviving child of Adolph Hallgarten. That the said will of Alice Franchetti was made and executed in the city of New York on the 19th day of October, 1909, while said Alice Franchetti was temporarily within the state of New York upon a visit, and she being at the time a resident of and domiciled in the kingdom of Italy."

The answer of Eleanor von Koppenfels "denies, upon information and belief, that one-half of any part of the said trust fund is or ever has been distributable to the said Leopold Franchetti, and also denies upon information and belief that the last will and testament of Alice Franchetti makes any appointment which would entitle the said Leopold to one-half of the said trust fund or any part thereof, but alleges upon information and belief that the respondent, said Eleanor von Koppenfels, is entitled to said trust fund and each and every part thereof as the sole surviving next of kin of Adolph Hallgarten, together with all income thereon since the death of said Alice Franchetti." Said Eleanor von Koppenfels, further answering said petition, for a second and separate defense and claim, alleges upon information and belief:

"(3) That heretofore and on or about the 13th day of February, 1885, Adolph Hallgarten died, a resident of the city, of county, and state of New York, leaving a last will and testament, which was duly admitted to probate by the Surrogate's Court of the county of New York on or about the 19th day of May, 1885, of which said will a copy is hereto annexed, marked 'Exhibit A,' and hereby made a part hereof.

"(4) That the said Adolph Hallgarten left him surviving a widow, Julia Hallgarten, and three children, Walter N. Hallgarten, Alice Hallgarten and Eleanor Hallgarten, as his only heirs at law and next of kin. That the said Alice Hallgarten died on or about the 22d day of October, 1911. That the said Julia Hallgarten and Walter N. Hallgarten both died prior to the death of the said Alice Hallgarten, and that the said Eleanor Hallgarten (Eleanor von Koppenfels), this respondent, is the sole surviving next of kin of said Adolph Hallgarten, deceased. That the said Alice Hallgarten (Alice Franchetti) died without issue, leaving a last will and testament which was proved in Rome, Italy, and that ancillary letters testamentary thereon were issued out of this court to Paul M. Warburg. That a copy of said will is hereto annexed and made a part hereof and marked 'Exhibit B.'

"(5) That prior to the execution of said will hereinbefore referred to the said Alice Hallgarten married one Leopold Franchetti, an Italian citizen, domiciled in the kingdom of Italy. That for about 15 years prior to her death the said Alice Franchetti resided in the kingdom of Italy, and that at the time of her death her domicile was in the kingdom of Italy.

"(6) That under the laws of the kingdom of Italy, as the same existed at the time of the death of the said Alice Franchetti (which said laws it is hereby claimed and contended govern said will as to validity, construction, and legal effect), there was and is no statute, rule, or law to the effect that real property embraced in a power to devise passes under a will purporting to convey all the real property of the testator, or that personal property embraced in a power to bequeath passes by a will or testament purporting to pass all the personal property of the testator, unless the intent that the will or testament shall not operate as an execution of the power appears therein, either expressly or by necessary implication; but, on the contrary, under the laws of said kingdom of Italy any testamentary provision which tends to substitute the will of a third party for that of the testator is, and at said time was, void, and the essential character of a testament under said law is and was at said time that it should be a full expression of the will of the testator, and that nothing should be read into a will not specifically mentioned in it, but the intent of a testator not expressed in the will should have no force or effect.

"(7) That under the laws of the kingdom of Italy, as the same are and were at the time of the death of said Alice Franchetti, there is and was no statute, law, or rule corresponding in letter, substance, or meaning to the provisions of section 176 of the Real Property Law (Consol. Laws 1909, c. 50), or of section 18 of the Personal Property Law of the state of New York (Consol. Laws 1909, c. 41), or either of said statutes.

"(8) That under the laws of the kingdom of Italy as the same are and were at the time of the death of the said Alice Franchetti, there was and is no rule or principle of law whereby a testator may give to another the power to nominate or appoint his legatees, whether by will or deed, but that 'powers,' as known to our system of jurisprudence are prohibited under the laws of the kingdom of Italy.

"(9) That the said Alice Franchetti, in and by her said last will and testament, did not intend to execute the power of appointment given to her over part of the principal of the trust fund created for the benefit of herself and remaindermen, in and by the third clause of the last will and testament of Adolph Hallgarten, deceased.

"(9a) That the said Alice Franchetti at the time of making her will, and at the time of her death, was possessed of large means in her own right, and that she possessed property in her own right in the state of New York at the time of the execution of her will and at the time of her death.

"(10) That the said will of said Alice Franchetti does not constitute or operate as an execution of the power of appointment given to the said Alice Franchetti in and by the third clause of the last will and testament of Adolph Hallgarten, deceased, over part of the principal of the trust fund created for the benefit of said Alice Franchetti and remaindermen, in and by said clause of said will."

The answer of the respondent Leopold Franchetti denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in the third paragraph of the amended petition as to the domicile of the said Alice Franchetti, and further alleges in paragraphs 5 and 6 as follows:

"(5) That pursuant to the terms of said last will and testament of said Adolph Hallgarten the trust herein created for the benefit of Alice Franchetti terminated upon her death, and that, by virtue of the terms of said will and of the terms of the last will and testament of said Alice Franchetti, one-half of the said trust estate became distributable to this respondent.

"(6) Upon information and belief, that, while the will of the said Alice Hallgarten Franchetti was admitted to probate in the kingdom of Italy, the validity and construction thereof as an execution of the power of appointment contained in the will of the said Adolph Hallgarten are to be determined by the laws of the state of New York; but that, even if the validity and construction thereof as an execution of such power were to be determined by the laws of the kingdom of Italy, the laws of the kingdom of Italy give full force and effect to the power of appointment contained in the said will of Adolph Hallgarten, and that, under said laws, the will of the said Alice Hallgarten Franchetti constitutes a valid and lawful exercise of said power of appointment in favor of this respondent, and transfers to this respondent all the estate which under the will of said Adolph Hallgarten the said Alice Hallgarten Franchetti was empowered to transfer and appoint."

It is sufficiently apparent to the surrogate that the property to be effected by the execution of the power given to Madame Franchetti is personal property, the only evidences of title to which are now in this jurisdiction in the hands and possession of a successor trustee, domiciled here and subject to the laws of this jurisdiction. In other words, it is shown that the personal property or fund, by the will of Mr. Hallgarten given to a trustee, domiciled in this jurisdiction, has never been out of the state of New York and is now here to effectuate the trusts. Over this trust property or fund so situated the Baroness Alice Franchetti was bequeathed a power of testamentary appointment by her father, the settlor of the trust created by his last will and testament.

[3] The will of Madame Franchetti, the donee of the power, was executed in New York in conformity with our statute of wills. It makes no reference to the power, and at common law her will would not be an exercise of the power of appointment created by the will of her father. It is only by virtue of the statute of this state that the will of Madame Franchetti is to be taken to operate as an execution of the power. Whether or not the statute does apply to this case is the principal matter for the determination of the surrogate.

Such are the facts now to be taken as established. The parties would apparently like to have the surrogate decide, in the abstract, which law governs the construction of the will of Madame Franchetti—the law of her Italian domicile or the law of New York. But this question is conceived by the surrogate to be much too extended for the concrete necessities of this particular motion now here for decision. The real question here is, Does the will of Madame Franchetti, under the circumstances of this case, operate as an execution of the power of appointment conferred on her by the will of her father, without regard to the state of the law in Italy? There is no other question now here. If her will does so operate, the law of the kingdom of Italy pleaded by the obnoxious answer is immaterial and the motion now here should prevail. *Ampersand Hotel Co. v. Home Ins. Co.*, 198 N. Y. 495, 91 N. E. 1099, 28 L. R. A. (N. S.) 218, 19 Ann. Cas. 839.

To make the real controversy in this proceeding more apparent, we may refer to the written positions of the contending parties, intended to be furthered by the motion sub judice. In the language of the parties themselves their positions are as follows:

"The respondent Leopold Franchetti, the husband of the said Alice Franchetti, now makes claim to one-half of the trust fund created by the will of Adolph Hallgarten upon the grounds that the will of Alice Franchetti, although she was domiciled in the kingdom of Italy at the time of her death, is nevertheless to be construed according to the laws of the state of New York, and, construing the same according to the laws of the state of New York, one-half of the principal of the said trust fund will pass to him under his wife's will by virtue of the operation of section 18 of the Personal Property Law of this state.

"The respondent Eleanor von Koppenfels, on the other hand, claims that the will of the said Alice Franchetti is to be construed according to the laws of the kingdom of Italy, which was her domicile at the time of her death; that under the laws of the kingdom of Italy there is no such statute as section 18 of the Personal Property Law of this state, but, on the contrary, under the Italian law the power in question could not be executed without affirmative evidence of an intent to execute it, that construing said will according to the Italian law said power was not executed, and that said respondent is therefore entitled as sole surviving next of kin of said Adolph Hallgarten to all of the principal of said trust fund."

As the estate is large, the real point presented for adjudication is both of consequence and wholly undecided in this jurisdiction. This much for the facts, and now to the law of the matter.

Since the eighteenth century and the modification of the territorial conceptions of law both America and England have come to defer to that established principle of the law of nations known as "domicile," and ordinarily domicile regulates the succession to personal property and the received maxim, "*Mobilia sequuntur personam*," is applied both in this country and state and in England.

[4] In short, it may be stated as a received general principle of both international and municipal law that wills of personalty are to be construed, and effect given them by *lex domicilii*. *Parsons v. Lyman*, 20 N. Y. 103, 112; *Dammert v. Osborn*, 140 N. Y. 30, 40, 35 N. E. 407; *In re Price*, L. R., 1 Ch. Div. 1900, 442; *Bloxam v. Favre*, L. R., 9 P. D. 130.

It is, however, stated by at least one elementary writer on the law of domicile that testamentary executions of powers are an exception to the general principle of domicile, and that the trend of authorities is to sustain the general exception. I do not think this is wholly an accurate statement of the existing law. Nor do I find that even the American cases justify so general a proposition. But, if they did justify it, it would still be doubtful whether American decisions, on questions arising between citizens of different states of our own country, could justify the alteration of an established rule of international law. While to some extent the principle of domicile prevails between different states of the United States, the relations between the states of the United States are too intimate to make their preference for a working rule a true basis of a stated general exception to a particular rule of private international law. In the state of New York, one of the greatest commercial states of the world, we should be very cautious in the adoption of a general exception deviating from accepted rules of international dealing. In this matter the alleged divergence is between the law of Italy and the law of New York, not between the law of Massachusetts and the law of Maryland. In so far as the de-

cisions of the American cases are confined to the facts, they are, I say it with respect, just decisions. But they are not authority for a general doctrine that all powers are to be governed in their execution by the law of the donor's domicile. It is not, I think, a universally accurate proposition of law that the question, whether or not there is a due execution of a power by last will and testament, is never to be determined by *lex loci domicilii* of the donee of the power, but always by the law of the donor's domicile. The American cases cited, it seems to me, go much too far, if they go to that extent, I do not, however, think that they do extend so far.

[5] If a power is a purely beneficial power or assets of the donee of the power, the *lex loci domicilii* of the donee of the power may govern the construction of testamentary execution and distribution under the will. But this is not that case.

The alleged basis of the claimed exception of all technical powers from the principle of domicile is sometimes stated to be that technical "powers" are known only to the law of England and America, or countries subject to the common law, and therefore that "powers" are not in the contemplation of the principle of domicile. Certainly questions of this character most frequently arise on settlements for the benefit of English or American ladies domiciled abroad or married to foreigners; consequently there is some force in the contention that the principle of domicile if applied too rigorously to powers may operate harshly in particular cases. But this is only the argument *ab inconvenienti* which must always give way to a general rule of law. If, however, the doctrine stated as a general exception to an established principle of domicile or rule of international law is confined to certain powers attempted or sought to be executed abroad under certain circumstances, I am quite willing to subscribe to it; otherwise not. There is a great distinction, not, I think, noticed in the American cases cited to me by counsel, nor in the briefs of the learned counsel, between "powers" which are property of the donee of the power and "powers" which are the property of the donor of the power. The principle of domicile may apply to the one and not to the other.

It is obvious that technical powers of Anglo-American law are either peculiar forms of property or else fiduciary mandates unknown to the jurisprudence of countries not subject to the common law. It is probable that, when Mr. Hallgarten bequeathed "powers" of appointment to his daughter, he, at least, may be presumed to have had in mind the particular law of his own domicile, where such powers are tolerated and legalized, and not the law of some foreign domicile of choice or of some other possible *domicilium necessarium* of the donee of the power. This would be a fair presumption in a case arising on a settlement by Mr. Hallgarten himself, and a like presumption, I think, would extend to the construction of any settlement made by his own last will.

[6] Now, the mandate in question to Madame Franchetti issues from Mr. Hallgarten's will, and he was a citizen of New York and his will was proved in New York. The property affected by his will forms no part of the estate of the donee. The donee is merely the

instrument through which the donor's will is effected. As Chancellor Kent said (4 Kent's Comm. 338), to be found quoted in *Matter of Harbeck*, 161 N. Y. at page 218, 55 N. E. at page 852:

"An estate created by the execution of a power takes effect in the same manner as if it had been created by the deed which raised the power. The party who takes under the execution of a power takes under the authority and under the grantor of the power, whether it applies to real or personal property, in like manner as if the power and the instrument creating the power had been incorporated in one instrument."

In *Sewall v. Wilmer*, 132 Mass. 131, it was held:

"The property of which Mrs. Wilmer has the power of appointment is not her property, but the property of her father; and the instrument executed by her takes effect not as a distribution of her own property, but is the appointment of property of her father under the power conferred upon her by his will."

The decisions in *Matter of Dows*, 167 N. Y. 227, 60 N. E. 439, 52 L. R. A. 433, 88 Am. St. Rep. 508, and *Matter of Delano*, 176 N. Y. 492, 68 N. E. 871, 64 L. R. A. 279, cited to the contrary, were decisions under the Transfer Tax Law (Consol. Laws 1909, c. 60, §§ 220-245), which expressly provided that the property affected by the power of disposition given to the donee thereof was to be treated for taxing purposes as if it was the property of the donee of the power, thereby impliedly recognizing that without such an act such property was not a property interest of the donee, such decisions are exclusively confined to matters arising under the Transfer Tax Act. They do not justify, as counsel contend, the notion that for other purposes a person having a power of this character has a property right in the property to which it relates.

[7] It is perhaps quite unnecessary to notice at this point that technical "powers" now recognized in the reformed law of this state in connection with personal property are authorities to do an act in relation to such property or to create and revoke interests therein or charges thereon which the owner granting the power might himself lawfully perform. There is no need to cite authorities to the recognized proposition that in this state "powers" themselves and the law of "powers" over personal property since the Revised Statutes tend to become uniform with technical powers and the law of powers over real estates, although the analogies between them were far from complete before the Revised Statutes. "Powers" in this state are now due to the Revised Statutes and their several re-enactments, the common law of powers having been abrogated in this state in the year 1829. Section 130, Real Property Law. I myself, when at the bar, prepared for the Legislature section 130 as it now reads, section 110 of the Real Property Law of 1896 (chapter xlv) being equivocal (see note 19 of Board of Statutory Consolidation, chapter 52, Laws of 1907). The classification of powers, adopted in this state by the Revised Statutes, takes no note of "powers of appointment." But in practice and by a late statute they are now recognized as a species of trusts of powers. Section 31, Real Property Law.

[8] A power to appoint to other than the grantee of the power is

now in our system a power in trust or trust of a power, and not a beneficial power. It is, in other words, a mandate rather than the property of the donee of the power. Brett, J., in *Re D'Augiban* (*Andrews v. Andrews*, 15 C. D. at page 243), very well points out the distinction between the two kinds of powers. He says:

"It seems to me that the power given in this case is what I should prefer to call a pure mandate; that is to say, it did not deal with any property or interest of the (donee), but did deal with the property and the interest in the property of the settlor (the donor of the power). * * * The moment that mandate is executed it seems to me that the mandator's intention takes legal effect not from the exercise of the mandate, but from the gift of the person who delegated the power to exercise his will."

But some part of the decision of Brett, J., is old law. As early as the year 1752, in *Wilkes v. Holmes*, 9 Mod. 485, Lord Chancellor Hardwicke held in substance that it was not the will of the donee of the power, but the power that passed the estate. This was a case simply of defective execution. Such has since been the recognized doctrine of powers both in this country and in England. 4 Kent, Com. 338; *Matter of Harbeck*, 161 N. Y. 211, 218, 55 N. E. 850. There is no need to review in detail the cases only apparently to the contrary arising under the new laws taxing powers of appointment. They are cases of statutory construction for taxing purposes only.

Let us review first for a moment what I conceive to be the state of the law of England on the effect of foreign domicile on testamentary executions of powers created in England. In 1838 in *Tatnall v. Hankey*, 2 Moo. P. C. 342, the English Privy Council held that an English court of probate had jurisdiction to examine into the execution of a power of testamentary appointment executed out of England, so far as to determine whether the instrument executing it was in fact and in law testamentary. There, under the will of her father, Mr. Boone, Lady Drummond, an Englishwoman, was entitled to a power to dispose of real and personal property by last will and testament, executed in the presence of two or more credible witnesses. Lady Drummond made her will in Paris, reciting the power. The will was not executed according to the law of England, but it was ultimately proved in England. At her death Lady Drummond's domicile was in Naples. Her will did not conform to the Neapolitan law. Lord Brougham laid down the general principle as follows:

"The real question is not whether this is a testamentary instrument according to the law of domicile, for we admit, as far as the execution of it goes, that it does not conform to Neapolitan law, but whether it is not a part of Mr. Boone's will (the donor of the power), carrying into effect the provisions he has made respecting the ultimate disposal of his estate. * * *"

This opinion does not deal explicitly with the effect of the law of domicile on testamentary execution of powers, and in 1859, in *Crookenden v. Fuller*, 8 W. R. 49, Sir Creswell Creswell intimated that domicile governs the testamentary execution of powers. But in *Re Sophia Alexander*, in 1860 (8 W. D. 451), he retracted this opinion and followed *Tatnall v. Hankey*. In 1866, in the *Goods of Hallyburton*, L. R., 1 P. & D., 90, a will made in Scotland in the English form by a

married woman domiciled in Scotland, although not valid by the law of the Scotch domicile, was admitted to probate in England as a testamentary execution of a power of appointment over English settled property on the authority of the decision (*In re Sophia Alexander*, 8 W. D. 451), but the court questioned the authority of the latter decision and thought the decision in *Crookenden v. Fuller* was to be preferred. In 1896 the Probate Division of the High Court of Justice, in the *Goods of Huber*, L. R. P. D., 1896, 209, where a testatrix, who at the time of her death had a French domicile, had executed in pursuance of a power of appointment a will in the English form over English settled property, held that they would follow Sir Creswell Creswell's judgment in *Re Sophia Alexander*, but under protest. *Poncy v. Hordern*, L. R., 1 Ch. D., 1900, p. 492, although much discussed as to its purport, may be cited to the same general effect. In 1909 the English House of Lords, in *Murphy v. Deichler*, A. C., 446, put an end to controversy, and held distinctly that a power of appointment by will over Irish property was well exercised by a will executed in Irish and English form, although the donee of the power was domiciled in Germany and the will was not validly executed according to the law of the appointer's own domicile, and they held also that such will was entitled to be probated in Ireland or England for the purpose of the appointment, although for no other purposes. They said incidentally that had the contention to the contrary been made 70 years before it might have prevailed. This is a very plain decision, and puts an end to the prior controversy on this point in England.

From this review of the English cases the surrogate is satisfied that in England a power of appointment over settled English property, real or personal, executed in conformity with English law, is well executed and entitled to probate for the purpose of an appointment, even if such will does not conform *modo et forma* to the law of the domicile of the appointer. But I think in all the English cases noticed the foreign will under examination expressly referred to the power of appointment. Thus it is that they are not expressly in point here. They turned on the question whether or not the instruments of execution were testamentary. The English cases more in point here will be reserved for consideration at the more appropriate place in this opinion.

Having reviewed the state of the English authorities to the extent noticed, let us next consider the American decisions dealing with the same point. In *Sewall v. Wilmer*, 132 Mass. 131, the facts, briefly stated, were as follows: A testator domiciled in the commonwealth of Massachusetts devised real and personal estate situated there to trustees in trust to the use of his daughter until her arrival at the age of 21 years, or marriage within that age, and then in trust to convey one half to her discharged of all trusts, and to hold the other half during her life, paying her the income thereof and on her death in trust to convey the same as she should by deed or writing or by her last will, or by any writing purporting to be her last will, appoint, and, in default of such appointment, to the use of her children and their heirs. The daughter married a resident of Maryland and died there pos-

sessed of property real and personal other than that over which she had the power of appointment, and leaving the husband and two children, and a will, which was duly admitted to probate in Maryland and in Massachusetts, by which she devised to her husband all the real and personal estate to which she should be entitled in law or equity at the time of her decease, but made no mention of the power of appointment. By the law of her domicile her will was not a good execution of the power of appointment. The court held:

"That the property of which the daughter had the power of appointment was not her property, but the property of her father, and that the instrument executed by her took effect, not as a disposition of her own property, but as an appointment of property of her father under the power conferred upon her by his will. The domicile of the testator whose property is in question is therefore the domicile of the father. The property is held by trustees residing and appointed in Massachusetts, and must be distributed here, and the trustees cannot be held to account for it in Maryland or in any other state even if they should be personally found there."

And the court held that the instrument executed by the daughter being sufficient under the law of Massachusetts was therefore a good execution of the power.

In Bingham's Appeal, 64 Pa. 345, the facts were as follows: William Bingham was domiciled in Pennsylvania, and his will was proved there June 16, 1856. In said will he created a trust income to his son Alexander Baring Bingham, giving to his son in case he should never marry the power of bequeathing his share by any last will and testament signed in the presence of two witnesses to such person or persons as he should think proper. Alexander Baring Bingham never married and died in England in 1865, that being the place of his domicile, leaving a will containing a general residuary devise and bequest, but in no way alluding to the power or to the property the subject of the power. The court held that:

"Where the situs both of the will containing the power and of the property subject to it lies beyond the domain of Parliament, it is evident that a statutory construction of the instrument of execution can have no operation upon it. That would be to subject Pennsylvania rights to English domain. Whether a power contained in a Pennsylvania will over Pennsylvania property has been duly executed is evidently a question of Pennsylvania law and not that of a foreign country having no jurisdiction. * * * The rule that the same interpretation of a will should be given in a foreign country which the will has in the place of domicile is misapplied to this case. That is precisely the rule we are now applying. The will, the property, and the domicile of William Bingham being within Pennsylvania, the law of this state must govern the interpretation both of the power and the execution of it."

In *Cotting v. De Sartiges*, 17 R. I. 668, 24 Atl. 530, 16 L. R. A. 367, Mary M. Bourne, domiciled in Rhode Island, gave by will one-sixth of her residuary estate in trust for the benefit of her grandson, Charles Allen Thorndyke Rice, during his life, and upon his decease to transfer and pay over the same to his issue if he should leave any, and he should appoint "by will or instrument in the nature thereof executed in the presence of three or more witnesses; and if he leaves no issue, to and among such persons and upon such uses and trusts

as he shall so appoint," and, in default of such appointment and issue, to and among those who should then be her heirs at law. The will was dated in 1879, and was proved in 1882. Rice died in 1889, leaving a will executed in England in 1881. His will contained a general residuary clause, but no specific execution of the power of appointment and no mention of the fund to which the power was given. By statute in England and New York Rice's will was an execution of the power; no such power existing in Rhode Island. The court held that the question whether Rice's will executed the power given by Mary M. Bourne was to be decided by the law of Rhode Island.

In *Lane v. Lane*, 4 Pennewill (Del.) 368, 55 Atl. 184, 64 L. R. A. 849, 103 Am. St. Rep. 122, the court held that questions as to the execution of a power of appointment of personal property are to be decided by the law of the domicile of the donor of the power, and not by the law of the domicile of the donee. The material facts of this case are as follows: James Lane, the elder, by his will bearing date April 15, 1880, bequeathed unto Edward Bringham, Jr., the sum of \$50,000 in special trust, the income of the same to be paid over unto son of the testator, Augustin S. Lane, during his natural life, and "upon his decease then in trust to dispose of said principal sum of \$50,000.00 in such manner as my said son Augustin by his last will and testament or by any writing executed as such shall direct and appoint." The said testator, James Lane, was at the time of making said will and at the time of his death domiciled in and a citizen of the state of Delaware, and his will was proved in that state. He died in 1881. The said Augustin S. Lane made his last will and testament bearing date October 8, 1887. He was at the time of making his said will and at the time of his death domiciled in and a citizen of the state of Pennsylvania, and his will was proved in that state. The court held that:

"The donor of the power, James Lane, being a citizen and resident of this state and his will a Delaware will and the trustee a citizen and resident of this state, the question as to the execution of the power is to be determined by the law of this state and not by the law of Pennsylvania, the domicile of Augustin S. Lane. The questions of the execution of the power of personal property are to be decided by the will of the donor of the power, and not by the will of the donee of the power. This was conceded in the argument of the counsel of the defense and is absolutely so by authority in this country and in England."

In *Prince de Bearn v. Winans*, 111 Md. 434, 74 Atl. 626, it was held:

"When a deed of trust provides that a cestui que trust, having a life interest in the property conveyed, shall have the right to dispose of the fund by last will, then the person appointed to take by the last will takes the property from the grantor in the deed in the same manner as if the will executing the paper had been incorporated in the deed.

"A deed of trust giving to the beneficiary a power of appointment by will should be construed according to the law of the domicile of the grantor in the deed; and the effect and construction of the will executing the power are likewise governed by that law, and not by the law of the domicile of the testator."

[9] Having now reviewed both the English and American decisions bearing on the point before us, it will be perceived that in respect of powers of testamentary appointment over settled property in England or America the law of the domicile of the donor of the power, and not that of the donee of the power, determines in most cases whether or not there was a sufficient testamentary execution of the power of appointment given to the donee of the power. Further than this the decisions cited do not, I think, proceed. They do not refer to the execution of powers other than powers of appointment, or, in other words, they do not refer to other than mandates which the donor of the power might himself lawfully perform.

Had the power given by Mr. Hallgarten to his daughter, Madame Franchetti, been that species of power which in our law is now denominated a "beneficial power," the rule here might be quite otherwise; or had it not been for the decisions of our courts in *Cutting v. Cutting*, 86 N. Y. 522, and *Farmers' Loan & Trust Co. v. Kip*, 192 N. Y. 266, 85 N. E. 59, the mere execution of a general power of appointment by Madame Franchetti might have made as at common law the property appointed immediately assets of Madame Franchetti herself for all purposes, including distribution. In that condition of the law of New York, assuming the same to be the Italian law, a totally different question from that now here would have been presented for my consideration, and none of the cases thus far referred to in this opinion would then have been in point. In *re Pryce*; *Lawford v. Pryce*, 105 Law Times Reports, 51.

After this very general survey of the adjudications we may approach nearer to the facts and the law of this particular case:

[10] Madame Franchetti, the daughter of Mr. Hallgarten of New York, although undoubtedly domiciled in Italy, by reason of her marriage to an Italian subject there domiciled (In the Goods of Huber, L. R. P. & D. 1896, p. 210; *Jones v. Jones*, 8 Misc. Rep. 660, 30 N. Y. Supp. 177), duly executed in the state of New York her last will and testament. This is a very significant fact in this particular case.

[11, 12] It is a consequential fact that her will is in the English language, not in Italian, and more than that it is in the technical language of the law of this state, and it is, I think, to be taken as executed with especial reference to our existing Law of Wills, which would include section 18, Personal Property Law. While under the Massachusetts decision already noticed, had Madame Franchetti's will been made in Italy and in Italian, it would have been a good execution of the power in question if it had been a general disposition of her estate, yet to my mind this instance before me is a much stronger case than any of those I have yet had in contemplation. When the will of a domiciled Italian lady, having a power of appointment, is executed by her here, and it may have reference to property here in the hands of a trustee, even although it is personalty, it is a proximate inference that she had the law of New York in mind, and that such will was executed with reference to our law, at least in so far as such will is concerned with the property in the hands of a domiciled trustee, affected by the power of appointment. This being so and the law of

New York then dispensing with the necessity of a special reference to the power conferred on her (section 18, Pers. Prop. Law), her will, I think, is to be taken to operate as an execution of the power in question. The principle of domicile is always applied on the presumption that the domiciliary contemplated the law of domicile only. It is sufficiently apparent that the instrument executing the power was of a testamentary nature even by Italian law, for by ancillary process the will, duly authenticated, is sent here, and is now practically adjudicated to be a testamentary instrument in this jurisdiction. Thus we have the factum of will in this matter adjudicated both by Italian law and the law of New York. The law of Madame Franchetti's domicile in this particular is only important for seeing whether the document executed by her is good as a will. *In re D'Este's Settlements*, 1 Ch. 1903, at page 900.

There was to my mind a very significant doubt suggested by Lord Brougham in his judgment in *Barnes v. Vincent*, 5 Moo. P. C., 216, whether if a power of appointment over English settled property was to be executed by will, English ancillary probate was originally necessary if the foreign instrument purporting to execute the power was in fact of a testamentary character. Lord Brougham cites Mr. Powell's note to *Swinburne*, 155, in support of this proposition. But the English courts had then irrevocably held that the factum of will must be established by ancillary process in the English ecclesiastical courts before a foreign will operated to execute a power over property settled by an Englishman on English trusts. *Tatnall v. Hankey*, 2 Moo. P. C., 342; *Barnes v. Vincent*, 5 Moo. P. C., 216; *D'Huart v. Harkness*, 34 Beav. 324, 327; *In re Price*, L. R., 1 Ch. Div., 1900, 442. Had it not been for such decisions, the law might have taken a different course. This point is now alluded to only in order to show how far away the principle of domicile really is when the foreign donee of a power of appointment is possibly in the way of executing a power given to such foreigner by one domiciled here. Had the early English cases at first rejected the necessity of establishing factum of will in the ecclesiastical courts in the instance of a foreign testamentary execution of a power of appointment, the principle of domicile would have had no application to such a case as this. Equity would have then passed on the question of due execution of the power of appointment, without reference to the domicile of the donee of the power or the particular law of wills established in his domicile. By relation the act of execution would then be assumed to be in the country of the donor of the power. Any paper of a testamentary character would have sufficed in equity for an execution of the power. Thus by a little different process of reasoning we should have arrived at almost the same result as the present adjudications. But the English and American law did not take that course. They required the testamentary character of the instrument in execution of the power to be first formally adjudged in a court of probate.

The elaborately considered case of *Sewall v. Wilmer*, 132 Mass. 131, is a domestic precedent for the conclusion that I should apply to this will before me section 18 of the Personal Property Law of this state to the effect that "personal property embraced in a power to bequeath

passes by a will or testament purporting to pass all the personal property of the testator" unless an intent otherwise "appear therein either expressly or by necessary implication." The Massachusetts case goes much farther than modern foreign cases on the same point, and the surrogate is dealing with a question of private international law, not with the law of Massachusetts. Unless, however, I do apply section 18, Pers. Prop. Law, the will of Madame Franchetti cannot be regarded as an execution of the power of appointment vested in her by the will of her father.

The present law of England, it will be observed, contains a similar provision to section 18, Personal Property Law (section 27, Wills Act). The English provision is not, however, so extensively applied to foreign wills of donee of powers as the case of *Sewall v. Wilmer*, 132 Mass. 131, would justify me in this instance. Indeed, the modern English decisions are the other way. In *re D'Estes' Settlements*, L. R., 1 Ch. Div., 898, 1903; In *re Scholefield* (*Scholefield v. St. John*, L. R., 2 Ch. Div., 1905, 408). But in all the late English adjudications there is noticeable this admitted exception to the principle of domicile: If the foreign will on its face bears any indication that the will was executed with reference to the law of some other country than that of the domicile of the maker of the will, the principle of domicile is not applicable. In *re Price*, L. R., 1 Ch. Div., 1900, 442; In *re Scholefield*, L. R., 2 Ch. Div., 1905, 408, 416. But, irrespective of any modern English decision on that point it is apparent to the surrogate that the facts disclosed in this matter about the creation of the power of appointment by Mr. Hallgarten, the donor of the power, who was then domiciled here, and the other facts apparent that the will of the donee of the power, Madame Franchetti, was executed in this state, in the English language and with apparent special reference to the law of this state, make it conclusive in this matter that the will of Madame Franchetti (but in so far only as it purports to be an execution of the power of appointment over the settled property) was intended by her to be construed by the law of this state, including section 18 of the Personal Property Law of this state.

My conclusion is in accord with both domestic and foreign precedents, discordant as they are, because it is to be taken here that Madame Franchetti herself intended her will to have effect according to the law of New York. This being so, and section 18 of the Personal Property Law being then part of that law by express enactment, as it would have been, indeed, without such re-enactment (*Hutton v. Benkard*, 92 N. Y. 295), the will of Madame Franchetti must have the benefit of section 18 of the Personal Property Law and construed accordingly.

[13] It is strenuously urged by counsel for Madame von Koppenfels that section 47, Decedent Estate Law (Consol. Laws 1909, c. 13), makes it imperative on me to construe the will of Madame Franchetti by the law of her Italian domicile. I cannot accede to this. That section was only a re-enactment of prior statutes to the same end, and is to be given the same construction. I myself had the honor while at the bar to prepare the first draft of the present "Personal Property Law" for re-enactment by the Legislature, and to some ex-

tent, therefore, I am necessarily somewhat familiar with the want of power in the late board of statutory consolidation to report any substantial change in the pre-existing law. The statute from which section 47 was mediately taken was only a declaratory statute and in no wise affected the prior law. Mr. Throop's Note to section 2694, Code Civ. Proc. The law of this state now stands as if neither section 2694, C. C. P., nor section 47, Pers. Prop. Law, had ever been enacted. We cannot make rules of private international law in this state by acts of our own Legislature. Such an absurd attempt must not be imputed to a statute of this state.

In view of all the foregoing considerations, the surrogate now holds that the law of New York, including section 18 of the Personal Property Law, and not the law of Italy, governs the construction of the will of Madame (the Baroness) Alice Franchetti, in so far as the will is concerned with the settled property of her father, the late Mr. Hallgarten, and that therefore the Italian law in respect of the execution of testamentary powers is quite inconsequential in this particular. But farther than this the surrogate does not hold. He does not wish to be taken as holding that as to Madame Franchetti's private property (or that outside of the trust settlement created by the will of her late father) the law of her domicile is not prevalent in a proper case.

Motion granted.

(79 Misc. Rep. 200.)

In re HOLLINS et al.

(Surrogate's Court, New York County. January 27, 1913.)

1. DESCENT AND DISTRIBUTION (§ 5*)—WHAT LAW GOVERNS.

The disposition of the personalty of an English woman is primarily governed by the laws of England, including the laws taxing bequests.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 19-22; Dec. Dig. § 5.*]

2. COURTS (§ 512*)—INHERITANCE TAX—FOREIGN INHERITANCE TAX.

This state should recognize the right of a foreign state or nation to impose a succession tax upon personalty belonging to its subjects wherever situate; New York imposing a similar tax.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1432; Dec. Dig. § 512.*]

3. EXECUTORS AND ADMINISTRATORS (§ 518*)—PLACE OF ADMINISTRATION.

Though executors were appointed in this country where an English subject had securities, and the will was proved here de novo, England remained the principal place of administration; it not being permissible to have two principal places of administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2290-2309; Dec. Dig. § 518.*]

4. EXECUTORS AND ADMINISTRATORS (§ 523*)—DEDUCTION OF SUCCESSION TAX.

The American executors of an English subject leaving personalty in this country from which bequests were made properly deducted the succession tax required by the laws of England before paying over such bequests; England being the principal place of administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2329; Dec. Dig. § 523.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. COURTS (§ 98*)—WHAT LAW GOVERNS.

The surrogate, in construing the duties of American executors of an English subject in distributing the estate in this country, should recognize the decision of the English courts that property sent to Great Britain by the American executors may be there appropriated for any unpaid legacy due.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 324; Dec. Dig. § 98.*]

6. COURTS (§ 512*)—SUCCESSION TAX—FOREIGN LAWS.

The courts of this state will not ordinarily aid a foreign country in the enforcement of its revenue laws.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1432; Dec. Dig. § 512.*]

In the matter of the judicial settlement of the account and supplemental accounts of Harry B. Hollins and others, as executors of Consuelo, Dowager Duchess of Manchester. On hearing of objections to the supplemental accounts. Objections overruled, and decree entered as stated.

Strong & Cadwalader, of New York City (Henry W. Taft and Francis Smyth, both of New York City, of counsel), for the American executors.

Edmund L. Baylies and Edwin D. Bechtel, both of New York City, for the Countess Zichy.

Rush Taggart, of New York City, for the Duke and Duchess of Manchester.

Russell S. Wolfe, of New York City, for trustees H. B. Hollins et al. Lawrence Millet, of New York City, for Elizabeth Reynolds.

Egerton L. Winthrop, Jr., of New York City, special guardian for Lord Manchester et al.

A. Perry Osborn, of New York City, special guardian for Ernesto Yznaga et al.

FOWLER, S. The Dowager Duchess of Manchester at the time of her death was a British subject, domiciled in England, where her last will and a codicil thereto were duly probated on the 17th of December, 1909. Subsequently the same testamentary instruments were proved de novo in this jurisdiction before a surrogate for this county, and letters testamentary were thereupon granted by this court to the gentlemen called the "American executors" of the late Dowager Duchess of Manchester. It appears that the testamentary instruments aforesaid designate executors for the English estate, and separate executors, domiciled here, for the American estates. It is the accounts of the "American executors," so called, which are now filed for settlement in this court. The Countess Zichy, a legatee under the will, objects to that part of the proposed decree which in substance provides that the American executors and trustees shall deduct from the annuity coming to her under the said will a certain amount in satisfaction of the legacy duty payable thereon under the laws of England to the crown. A sum sufficient to pay such legacy duty has been remitted by the American executors to the English executors. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Countess Zichy is now nationally an Austrian subject, domiciled in Austria, and in her behalf it is claimed in substance that the American executors should have ignored the laws of England and are bound to pay over to the Countess Zichy, free of the English duty or tax, the annuity given to her by the will of the late Dowager Duchess of Manchester. The only question before the surrogate is whether or not the American executors were justified for the purpose of this accounting in remitting to the English executors a sum sufficient to discharge the legacy duty imposed by the laws of England on the annuity to the Countess Zichy.

[1] As the Dowager Duchess of Manchester had become an English woman and was domiciled in England at the time of her death, the devolution and disposition of her movable estate, or, in other words, her personal property, are primarily governed by the law of her English domicile. *Parsons v. Lyman*, 20 N. Y. 103. The law of England provides for a legacy duty upon every bequest of personal property contained in the will of the late Dowager Duchess. The annuity to the Countess Zichy was clearly, in the abstract, subject to the payment of such legacy duty.

[2] As our own tax law imposes a similar succession tax or duty upon the personal property of a resident of this state, wherever such property may be situated (*Matter of Estate of Swift*, 137 N. Y. 77, 32 N. E. 1096, 18 L. R. A. 709), we ought not in this matter to question the right of a foreign state to impose a succession tax upon personal property, wherever situated, belonging to its subject domiciled in such foreign state.

[3] Although the will of the late Dowager Duchess of Manchester was proved here *de novo*, nevertheless England is, in this instance, the principal place of administration. The administration here, whether so termed or not, is to some extent necessarily an ancillary administration only. There cannot be two principal places of administration in respect of the estate of this deceased English lady. *Despard v. Churchill*, 53 N. Y. 192; *Matter of Accounting of Hughes*, 95 N. Y. 55. The possession of the American executors is to be regarded in this instance, there being no claims of American creditors interposed, to some proper extent as a possession of an English estate. The mere fact that the Dowager Duchess named executors domiciled in the various countries where her estate or her securities were situated does not make her foreign executors any the less her executors. If not strictly her executors, they are, in any event what in some systems is termed, her "posthumous agents." For some purposes executors and a testator are *eadem persona* in legal contemplation. Otherwise such executors are "posthumous agents," and, where no local impediment exists, their obligations are not different from the paramount and legal obligations of the deceased whom they represent. It may be assumed, I think, that the Dowager Duchess of Manchester contemplated that her posthumous agents or executors, wherever they might be, would in respect of her estate comply with the law of her domicile in so far as possible, unless the *lex fori* prohibits such compliance.

[4] This it does not, in this instance, do, as there is no pretense that

her estate is not entirely solvent. It does seem to me, there having been no local interposition, that the American executors of the late Duchess did precisely what they should have done when they remitted, *ex debito justitiæ*, the money to discharge the duties due by her estate to the government of England, that being the government to which their testatrix owed her primary allegiance in later life and at the time of her death. I should be sorry to think that this was not our law on this matter. I believe that the spirit of the adjudications already cited by me, if largely interpreted, bears me out in this conclusion. But there are other considerations to which I shall proceed.

It is generally true that the courts of this state will not go out of their way to aid a foreign state in the enforcement of its peculiar revenue laws. It is contended on behalf of the Countess Zichy that while England may impose a tax upon her annuity or legacy, the English authorities cannot collect it, as the property out of which the annuity is payable is not actually in England, and the Countess herself is not within English jurisdiction. Apparently Countess Zichy would like to have her annuity regarded here as one given by an American lady to another American lady out of American property. But both ladies have long ceased to be Americans, and by figure of speech only is the property here American. The contention of Countess Zichy is only literally true in any aspect. When the Countess Zichy became the recipient of a legacy given by the will of an English woman and payable out of an English estate, wherever situated, the legacy itself, to my mind, was burdened with certain implied conditions which bind the legatee whether in or out of English jurisdiction. In other words, the legatee must be taken to receive such legacy subject to any burdens which the sovereign of the donor lawfully imposes on the gifts of its subjects. This fact the American testamentary executors of the Dowager Duchess have a right to recognize provided the claims of local creditors are not paramount. This is not pretended to be the case here. When the aid of this court is invoked by foreigners, as is virtually the case here (the local executors having no independent legal existence apart from their testatrix), the court should not be expected to ignore plain principles of justice. The entire content of private international law depends on natural justice and equity.

It is strenuously contended in behalf of the Countess Zichy that a legacy duty under the English law is payable only out of the particular legacy on which it is imposed, and that the English executors are liable for payment of the duty on her legacy only in the event that property shall come into their hands applicable to the discharge or payment of the particular legacy to the Countess Zichy. As the property on which the annuity to the Countess Zichy is charged, or out of which it is payable, has not come directly into the hands or possession of the English executors, and will not in the course of the administration of the estate of the late Dowager Duchess be received by the English executors, it is contended that the duty on the legacy to Countess Zichy, although payable under English law, should not be deducted by the American executors or by them paid or transmitted to the English executors of the late Dowager Duchess. I do not quite see how the

American executors can be expected to ignore the state of the law of the country of their testatrix, unless compelled so to do by the *lex fori*.

From the papers submitted to the surrogate on the hearing, it would appear that Mr. Justice Swenfin Eady, a judge of the English "High Court of Justice," has decided, or authoritatively intimated in substance, that any property sent by the American executors or trustees to Great Britain for any purpose may be intercepted and appropriated by the crown in satisfaction of any unpaid legacy duty on legacies given by the late Dowager Duchess to her foreign legatees. It is not for this court to reconcile the decision of this English judge with the decisions cited by the learned counsel for the Countess Zichy.

[5] It is sufficient here that the decision in question was rendered by a foreign court of competent jurisdiction. The decision or intimation should be recognized by the surrogate in his consideration of the duty and liability of the American executors of the late Dowager Duchess. As the English courts will, I have no doubt, enforce payment of the legacy duty upon the legacy to the Countess Zichy from any property of the estate of the late Duchess located in England or forwarded to England by the American executors or trustees for the purpose of being applied to the payment of other legacies, the other legatees will in that event be compelled to pay the duty properly payable by the Countess Zichy, but unenforceable against her because of a lack of jurisdiction over her by the English court. This would result in an injustice which the courts of this country should not sanction.

[6] While it is doubtless true that this court will not aid a foreign country in the enforcement of its revenue laws, it will not refuse to direct a just and equitable administration of that part of an estate within its jurisdiction merely because such direction would result in the enforcement of such revenue laws. The court should favor such an administration of the estate here as will be in conformity with the intention of the testatrix. It certainly was not the intention of the late Duchess that the bequests made by her to the English legatees should be partly confiscated in the payment of death duties imposed upon the bequests to foreign legatees. The orderly and equitable administration of the estate seems in this instance to require that the legacy duty imposed by English law upon the annuity given to the Countess Zichy by the will of the late Dowager Duchess of Manchester should be paid out of the property set apart by the executors in this country for the production of such annuity.

The objection should be overruled, and the decree submitted by the accountants signed.

REILLY v. CITY OF NEW YORK.

(Municipal Court of City of New York, Borough of Manhattan, Ninth District.
December 23, 1912.)

MUNICIPAL CORPORATIONS (§ 213*)—SALARY OF OFFICERS—DEDUCTION FOR ABSENCE.

Under New York City Charter (Laws 1901, c. 466) § 1543, providing that heads of departments may deduct from the salaries of subordinates for absence without leave, the commissioner of bridges had authority to deduct from the salary of an auditor of the department of bridges for time absent without leave or notice, though his absence was caused by sickness, especially where the sickness was not of such sudden or disabling character as to prevent the auditor's applying for leave or giving notice.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 573, 574; Dec. Dig. § 213.*]

Action by Arthur T. Reilly against the City of New York. Defendant is entitled to judgment.

Max Schleimer, of New York City, for plaintiff.

Archibald R. Watson, Corp. Counsel, of New York City (Henry J. Shields, of Brooklyn, of counsel), for defendant.

STURGES, J. In the year 1911 plaintiff was employed as an auditor in the department of bridges of the city of New York at an annual salary of \$2,700, or \$225 a month. He received \$157.50 for the month of April, \$152.42 for the month of July, and \$37.50 for the month of September. He claims \$67.50 balance of salary for April, \$72.58 balance for July, \$15 balance for September, and \$90 for salary in November. He resigned September 8th, was reinstated October 2d, and was removed from his position on November 13th. Subsequently, in March following, the action by which he was removed was rescinded, and he was allowed to resign. The amounts which plaintiff seeks to recover were deducted from his salary for April, July, and September by reason of his absence from duty during the periods for which the deductions were made; and he also claims salary for 12 days in November. Plaintiff contends that the deductions were unauthorized by reason of the fact that his absence was due to illness; his testimony showing that at the times in question he was ill, either in a hospital or at his home. Defendant claims that the deductions from the monthly salary payable to the plaintiff were lawfully made by virtue of the provisions of section 1543 of the Charter (Laws 1901, c. 466), which provides:

"Every head of department or borough president and every officer of any of the counties contained within the territorial limits of the city of New York is empowered to make ratable deductions from the salaries and wages of the employes and subordinates of his department or office on account of absence from duty without leave."

The testimony shows that in the month of January, 1911, plaintiff was absent from duty without leave, and upon his return to work

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

learned that a deduction was about to be made from his salary for that month by reason of such absence, and applied to the commissioner of bridges with the request that his salary 'be paid in full for that month. The commissioner at that time acceded to plaintiff's request, informing him that in the future no allowance would be made for absence without leave. After plaintiff had received his salary for the month of April, from the full amount of which deductions had been made for his absence during that month, he applied to the chief clerk of the department, requesting that he be allowed his full salary, and was then advised by the latter that the deductions had been made by direction of the commissioner, and that his remedy was to see the commissioner. Plaintiff did not apply to the commissioner, probably because of what he had been told the January preceding. After he had received his pay for the month of July, from which deductions had been made for absences during that month, he applied to the deputy commissioner for his full pay, who declined to allow it. At no time did the plaintiff receive or apply for leave of absence, or notify the commissioner of his absence, or the reason therefor. It is contended, however, on his behalf that the provision of the statute is not applicable where the absence of an employé or subordinate is actually due to illness, which might constitute a sufficient ground upon which to apply for leave for absence. I am unable to read into the statute any such exception. The language is clear and unambiguous, and vests proper discretion in the heads of departments to take the action therein prescribed. Circumstances might be shown sufficient to justify the head of a department, by whose direction deductions had been made from the salary of an employé, to rescind such action; but there is nothing in the case at bar to show that plaintiff's illness was of such a sudden or completely disabling character as to prevent him from applying for leave of absence, or from communicating with the department after he became ill, and procuring leave of absence. He knew from his interview with the commissioner in January that he would not receive his full salary for absence from duty without leave, and also when he signed the pay rolls in April and July, from which deductions had been made from his salary for such absence. It is not necessary to consider the reasons for enacting the provisions of the Charter under which the commissioner acted in directing the deductions to be made from plaintiff's salary. Such a provision is manifestly for the best interests of the city in the administration of its departments, and its legality cannot be questioned. I am unable to see how the exercise by the commissioner of a discretion expressly given by statute can be reviewed in an action such as the case at bar. The plaintiff was absent without leave, and by reason of such absence ratable deductions from his salary for the time he was absent were made by the commissioner or head of the department in which plaintiff was employed. This question has been considered in *People ex rel. Grimshaw v. Prendergast*, 132 App. Div. 937, 135 N. Y. Supp. 164, affirmed 197 N. Y. 538, 91 N. E. 1119. This was an application for a peremptory writ of mandamus to require the register

of Kings county to certify to the civil service commission pay rolls for certain months, in order that the relator might secure his full salary for those months; he having been absent from duty on account of illness. Maddox, J., says:

"The relator held a definite position, and his salary was an incident thereto; his tenure being protected by statute. He was subject to removal and suspension for cause, and, although removed or suspended in manner as provided by statute, was entitled to his salary, but subject, however, to a ratable deduction therefrom, in the discretion of the respondent, for any absence without leave. * * * By the Charter (section 1543) the respondent, as a county officer, had the power to make a ratable deduction from relator's salary on account of absence from duty from November 17th to December 17th, such absence from duty being 'without leave'; and therefore relator had shown no clear legal right to the writ sought. The writ was denied."

In *People ex rel. Meany v. Metz*, reported in *N. Y. Law Journal*, May 2, 1905, a similar application was made by the relator, who because of serious illness had been unable to perform his duties. Stapleton, J., says (opinion apparently not reported):

"Ratable deductions from salaries of subordinates may only be made on account of absence from duty without leave. Greater N. Y. Charter, § 1543. It is conceded relator was absent with leave. The defendant was confronted with the obligation to remove the relator to determine the salary fixed by the board of aldermen (Greater N. Y. Charter, §§ 56, 1543), and attached to his employment as an inseparable incident."

The writ was issued. The case of *O'Hara v. City of New York*, 33 Misc. Rep. 53, 66 N. Y. Supp. 909, cited by plaintiff's counsel, was decided in 1900, which was prior to the amendment of section 1543 of the Charter, which was enacted in 1901. In that case the plaintiff, who had become incapacitated by illness, communicated from time to time with his superior respecting his condition, and was carried on the pay rolls of the city until his death. The court said, under those circumstances:

"While sickness may furnish sufficient reason for the removal of a public officer, when his absence on that account has been permitted, he is entitled to compensation until some action is taken on the subject. * * * The assignor was carried on the defendant's pay roll, the defendant received reports from time to time as to his condition, and not only took no action in the matter, but inferentially assented to the absence."

Defendant is entitled to judgment.

PEOPLE v. LONGEBODI.

(Supreme Court, Appellate Division, Second Department. January 28, 1913.)

1. ASSAULT AND BATTERY (§ 91*)—ASSAULT IN SECOND DEGREE—EVIDENCE—SUFFICIENCY.

Evidence held to support a conviction of assault in the second degree.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 136; Dec. Dig. § 91.*]

2. ASSAULT AND BATTERY (§ 82*)—PRESUMPTION OF GUILT—FAILURE OF ACCUSED TO DENY.

The failure of accused, testifying in his own behalf on his trial for assault by cutting complainant with a razor, to deny that he had a razor at the time, or that he cut complainant, raised of itself a strong presumption of guilt.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 127; Dec. Dig. § 82.*]

3. WITNESSES (§ 390*)—IMPEACHMENT—PROOF OF CONTRADICTIONARY STATEMENTS.

Where an officer, called as a witness for accused on trial for assault, testified that complainant had told him in the station house that he did not know who assaulted him, that the only other information he obtained was a telephone communication from Assistant District Attorney W., and that he had a telephone conversation, but did not know whether it was with Assistant District Attorney W. or Assistant District Attorney F., the testimony of Assistant District Attorney F. that he called up the officer at the police station, and was told that he was talking with the officer, and that the latter told him he was looking for accused, and that he thought it was a case of self-defense, as accused was attacked by complainant and his friends, was not hearsay, but was admissible to affect the credibility of the officer.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1247; Dec. Dig. § 390.*]

4. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

The admission of testimony that an officer looked for accused was not prejudicial, since it did not tend to show that accused was guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3130, 3137-3143; Dec. Dig. § 1169.*]

Appeal from Trial Term, Kings County.

Michael Longebodi was convicted of assault in the second degree, and he appeals. Affirmed.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

George W. Martin, of Brooklyn (Frederick B. Bailey, of Brooklyn, on the brief), for appellant.

Hersey Egginton, Asst. Dist. Atty., of Brooklyn (James C. Cropsey, Dist. Atty., of Brooklyn, and Edward A. Freshman, Asst. Dist. Atty., of New York City, on the brief), for the People.

WOODWARD, J. [1] The defendant has been convicted of the crime of assault in the second degree—the evidence being substantially that the complainant went to a boot-blackening parlor in Hamilton avenue, Brooklyn, with some companions, and that he found there the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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defendant, with some eight girls and six fellows, all of whom had been indulging in the refreshments served at a christening; that he stayed there a few minutes, during which time he got into a fight with the defendant over one of the girls, and was pushed out of the place by a Mrs. Zurica, the proprietress; that he and his friends went down the street for some distance, and then started back; that on their way back they met defendant, with several others, the defendant being accompanied specially by one of the girls, and that as the two parties met the defendant took out a razor and slashed the complainant across the face, and also across his breast, though the blade does not appear to have passed through the coat; that thereupon all of the parties ran away, the defendant running into the arms of a policeman on the opposite side of the street, who made some inquiries in reference to the trouble, and permitted the defendant to be taken home by the girl who was accompanying him, while the complainant and his friends ran in different directions, looking for the man who did the cutting, but failed to find him.

There is little dispute as to the affair down to the time of the meeting on the street where the cutting occurred. The defendant's friends assert that the complainant made the first assault with something black in his hand, and that the defendant ran away without returning the assault; while the complainant and his friends testify that the defendant stepped out away from the girl with whom he was walking and cut the complainant as above stated. There was clearly sufficient evidence to justify the verdict of the jury, and, aside from the fact that a certificate of reasonable doubt has been granted, it would hardly require any serious discussion.

[2] The learned court granting the certificate appears to have been in doubt as to "whether or not the conviction is against the weight of testimony"—a doubt which we do not share, for the defendant took the stand in his own behalf, and nowhere denies that he had a razor, or that he cut the complainant, which, of itself, would raise a strong presumption of guilt. *Stover v. People*, 56 N. Y. 315; *People v. Tice*, 131 N. Y. 651, 657, 30 N. E. 494, 15 L. R. A. 669, and authorities there cited.

[3] The point which appears to have had determining weight in the granting of the certificate is the alleged hearsay evidence of one of the assistant district attorneys. The defendant was accused of cutting Connors, and Officer Manning was called as a witness for the defense, and testified in substance that Connors told him in the station house he did not know who cut him. Thereafter Assistant District Attorney Freshman was called as a witness to contradict Manning, by giving a conversation over the telephone with him; and the learned justice says that no foundation for such a contradiction was laid, as Manning was not asked in the first instance anything about a conversation over the telephone with Freshman, and that this testimony of Freshman was taken as substantive testimony, clearly hearsay, against the defendant, and not, under the rules of evidence, for the purpose of impeaching Manning. It appears from the record, however, that Manning had testified that "the only other informa-

tion I got was a telephonic communication from Mr. Warbasse, the assistant district attorney, as to why I didn't make the arrest," and the latter part of this testimony was stricken out on motion, and Manning subsequently said that he had a telephonic conversation, but did not know whether it was with Mr. Freshman or Mr. Warbasse, and Mr. Freshman subsequently testified that he called up the officer at the police station, and was told that he was talking with Officer Manning, and that the latter told him that he was looking for Longebodi, the defendant, and that he thought it was a case of self-defense, as Longebodi was attacked by the complainant and his friends.

[4] We are unable to discover that this was in any sense hearsay testimony. It merely went to the credibility of one of the defendant's witnesses, and was not in itself prejudicial to the defendant, except as it tended to contradict his witness, for the fact that an officer may have been looking for the defendant did not tend to show that he was guilty of the crime on which the trial was progressing.

The judgment appealed from should be affirmed. All concur.

MERWIN v. ROBERTSON.

(Supreme Court, Appellate Division, Second Department. January 24, 1913.)

USURY (§ 18*)—USURIOUS CONTRACT.

A contract by which plaintiff advances money to defendant to satisfy claims for payment of which she is pressed, plaintiff to be repaid the amount advanced, with interest, plus the amount of discount obtained by plaintiff on the claims by reason of cash payments, is usurious.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 31-34, 36-38, 40; Dec. Dig. § 18.*

For other definitions, see Words and Phrases, vol. 8, pp. 7246-7249.]

Jenks, P. J., and Thomas, J., dissenting.

Appeal from Trial Term, Kings County.

Action by George P. Merwin against Margaret Robertson. From a judgment dismissing the complaint on the merits, after a trial without a jury, plaintiff appeals. Affirmed.

Argued before JENKS, P. J., and HIRSCHBERG, THOMAS, CARR, and WOODWARD, JJ.

J. Stewart Ross, of Brooklyn, for appellant.

Sarah Stephenson, of Brooklyn (Arthur Garfield Hays, of New York City, of counsel), for respondent.

HIRSCHBERG, J. The action is brought to foreclose a bond and mortgage on an apartment house belonging to the defendant, at 53-54 Ocean avenue, borough of Brooklyn. The mortgage is for \$7,464.28, which had been reduced by payments at the time the action was commenced, leaving a balance of \$3,850.79. At the close of the plaintiff's case a motion was made to dismiss on the merits, on the ground that the bond and mortgage were usurious. The appeal is from the judgment entered on the granting of the motion.

The plaintiff is a married woman, and appears to have acted in the transactions relating to the loans which constitute the basis of the deal-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ings, and to the giving of the mortgage intended to secure such loans, solely through her brother, Frank A. Peavey the only witness in her behalf. Neither she nor the defendant took any personal part in the transactions; the defendant being represented by Effingham L. Holywell, her attorney at law, who occupied an office jointly with Peavey. The apartment house was in process of construction, and the defendant was indebted to certain of the contractors who were engaged in building it and who were pressing her for payment. The agreement was made that Peavey should advance from time to time such money as should be necessary to settle the claims of the contractors, with the understanding and agreement that, if he should procure such settlements in any instances at a discount, the defendant nevertheless would pay for the use of the money so advanced the entire amount of the claim of the creditor, including the discount, with interest at 6 per cent. In other words, assuming that the plaintiff is the real party in interest, the agreement made for her by her agent was in effect that she would lend the money necessary to settle the claims, in consideration of the defendant repaying to her the money so loaned, with lawful interest, together with whatever sum the creditor might be willing to deduct from his claim, with interest thereon also. The question of fact is undisputed, and the learned trial court has found that the agreement was made with the corrupt understanding constituting usury. The bond and mortgage were given to secure the entire advances made, as well as the discounts or bonuses, which were not advanced.

It is sought on behalf of the plaintiff to support the transaction on the ground that the plaintiff had purchased the claims against the defendant, and was therefore entitled to enforce them in full against her, whether secured by her mortgage or otherwise. No such transaction, however, ever took place. Each claim was canceled or released when it was settled, and no assignment of any of the claims was made to the plaintiff or to any one in her behalf. It is true, as stated in the dissenting opinion of the learned Presiding Justice, that there is nothing in the bond and mortgage, of themselves, indicating the usurious agreement; and it is equally true that, as the defendant owed her creditors all the money, no additional burden was imposed upon her by the agreement in question. The agreement is fairly stated in the dissenting opinion, as follows:

"It was agreed that the plaintiff should advance from time to time such money as would satisfy these claimants, with the understanding that she might retain any discount obtained from them upon cash payments."

I do not see how stronger language can be used to indicate usury; the corrupt understanding having been found by the court below as a fact. A party, having money, agrees to advance it from time to time for the use of another, with the understanding that she shall be repaid, not only the amount so advanced, with lawful interest, but also such other sums of money as might have been required in the transactions, but which circumstances rendered it unnecessary for her to advance. As I understand it, lawful interest is the limit of what a lender may receive for the use of his money, and the payment of more for such use is forbidden. By the terms of the agreement, that burden

was imposed on the defendant, of repaying to the plaintiff, with interest, more than the plaintiff had loaned.

It necessarily follows that the judgment should be affirmed.

CARR and WOODWARD, JJ., concur. JENKS, P. J., reads for reversal, with whom THOMAS, J., concurs.

JENKS, P. J. (dissenting). This action is for foreclosure of a mortgage upon premises of the defendant. The plaintiff appellant was dismissed at the close of her case, and judgment upon the merits was entered against her, on the ground that the bond and mortgage were usurious. The obligation was to secure payment to the plaintiff on demand of the sum of \$7,467, with interest from a specified date, or so much thereof as should at the time of the demand have been advanced by the plaintiff. At the time of the execution of the obligation the defendant was building upon the premises, and was pressed for payment for labor and materials, with threats of legal actions and of the filing of mechanics' liens. It was agreed that the plaintiff should advance from time to time such money as would satisfy these claimants, with the understanding that she might retain any discount obtained from them upon cash payments. The learned Special Term decided that if the plaintiff had taken assignments of the claims, and the defendant had agreed to satisfy them by a bond and mortgage for the face of the claims, the transaction would have been *prima facie* lawful; but as the evidence showed that the plaintiff extinguished the various claims, and that the discounts received by the plaintiff upon such extinguishment were not advanced by the plaintiff to the defendant, the receipt of these discounts by the plaintiff to her own benefit constituted usury that voided the bond and mortgage.

It is not pretended that the obligation called for a usurious rate of interest, so that the question is whether the separate agreement as to the said discount was "a corrupt agreement whereby more than legal interest was to be paid." *Clarke v. Sheehan*, 47 N. Y. 188. It was not enough to show that the lender was "moved by considerations of collateral benefits to himself which may indirectly result from the transaction," but that they are "a burden imposed upon the borrower, and to which he submits as the means of obtaining the loan, and which are intended as a compensation to the lender beyond the legal rate of interest, for the use of the money." The Court, per Rapallo, J., in *Clarke v. Sheehan*, *supra*. There is no proof that indicates that the agreement as to these discounts was merely a device or scheme to conceal the exaction of usurious interest, for it is conceded that the urgent need of the defendant was relief from these very claims which were settled by the plaintiff. Doubtless the plaintiff indirectly profited by the transaction, but I think that it was not established that there was any burden imposed upon the defendant. She was liable upon the claims, they were discharged, and she but refunds the face value of the claims against her, with interest. In *American and English Encyclopedia of Law* (2d Ed.) vol. 29, the principle is expressed:

"Where the lender, as part of the consideration of the loan, assumes a debt of the borrower to a third person, the fact that the lender compromises the

debt assumed for less than its face value, and thereby secures more than legal interest, will not render the transaction usurious."

It was incumbent on the defendant to establish her defense of usury "by clear and satisfactory evidence," and to establish the facts that constituted it "with reasonable certainty," and that there was a usurious agreement between the respective parties. *White v. Benjamin*, 138 N. Y. 623, 33 N. E. 1037.

"A corrupt and usurious agreement will not be presumed from a fact which is equally consistent with a lawful purpose." *Valentine v. Conner*, 40 N. Y. at page 253, 100 Am. Dec. 476.

The evidence shows that a representative of the plaintiff talked with the defendant as to the possibility of his obtaining discounts from the claimants when he paid cash to satisfy their claims, and that he also informed the defendant when he had done so, and that she expressed her satisfaction. The evidence further shows that the said representative, at the request of the defendant, went to the premises once and sometimes twice a week to push the work, and that he rendered personal services in seeing these various claimants and securing a settlement of their claims. I think that the proof was not sufficiently clear to establish that the agreement for the discounts was merely a device to take usury. See *Thurston v. Cornell*, 38 N. Y. 281.

I think the judgment should be reversed, and a new trial be granted; costs to abide the final award of costs.

THOMAS, J., concurs.

ROBERTSON v. MERWIN (two cases).

(Supreme Court, Appellate Division, Second Department. January 24, 1913.)

1. USURY (§ 53*)—USURIOUS CONTRACT.

A transaction by which one makes a loan and receives a note for the full amount, but delivers only part of the money, retaining the balance as compensation for pretended services, this being but a trick and device for obtaining usurious compensation for the loan, makes the note usurious.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. §§ 91, 114-118; Dec. Dig. § 53.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7246-7249.]

2. USURY (§ 85*)—PERSONS AFFECTED BY USURY.

A transaction by which P., one of the three owners of a fund, acting for all, makes a loan therefrom, pays over only part of the amount, for which he takes a note, running to M., one of the other owners, retaining the balance on a pretended claim of personal services for the borrower, but never drawing it from the fund, makes the note usurious as to all; it being a case in which he was not acting as mere agent for another, but as one of the principals, for the benefit of all in a joint enterprise, so that his knowledge would be that of all.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. § 186; Dec. Dig. § 85.*]

Thomas, J., dissenting in part.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, Kings County.

Two actions by Margaret Robertson against George P. Merwin. From judgments for plaintiff, defendant appeals. Affirmed.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

J. Stewart Ross, of Brooklyn, for appellant.

Sarah Stephenson, of Brooklyn (Arthur Garfield Hays, of New York City, of counsel), for respondent.

CARR, J. These are appeals from two separate judgments in two distinct actions, but which were tried together as one. In their main features the pleadings are the same, and the testimony in each action is entirely the same, and both cases were decided upon the same theory by the trial court. The actions were brought in equity to cancel and set aside certain bonds and mortgages made by the plaintiff in favor of the defendant. In each complaint there were three separate causes of action set forth; but the evidence given at the trial was confined to only one of the three causes of action, and the findings made by the trial court are likewise so confined. As the cases were tried and decided, the actions assumed the form of one to set aside the bonds and mortgages as usurious.

[1] As to action No. 1, it appeared that the plaintiff, on the 16th day of November, 1908, made and delivered her bond and mortgage to the defendant, in which she agreed to pay to the defendant the sum of \$2,100 on the 15th day of May, 1909, with interest thereon at the rate of 6 per cent., to be paid on the maturity of the bond and mortgage. The trial court found that said bond and mortgage were given by the plaintiff to the defendant to secure to the defendant the sum of \$1,509.75, which had been advanced by the defendant on account of the plaintiff, together with a bonus of \$590.25, for the use and forbearance of the moneys so paid by the defendant for the account of the plaintiff. It appeared on the trial that, at the time of the execution and delivery of the bond and mortgage in question, the plaintiff was engaged in erecting a building on some real estate owned by her, and that the building contractor was a corporation known as the Henry Kroeger Building Construction Company. She was represented in this transaction by one Holywell, a lawyer who had an office at 44 Court street, Brooklyn, N. Y. One F. A. Peavey shared the office with Holywell. Peavey was not a lawyer. Peavey's mother, Mrs. Peavey, and his sister, Mrs. Merwin, together with himself, had a trust account of moneys on deposit in the name of Peavey and Holywell, as trustees. It was held subject to check drawn by both Peavey and Holywell. Whatever moneys were paid to or advanced on account of this mortgage came from this trust fund. It was the course of business of Peavey to take all securities represented by loans from this trust fund in the name of Mrs. Merwin. When this particular bond and mortgage was closed, Peavey gave to Mrs. Robertson the sum of \$50 in cash. He had previously loaned to the Kroeger Construction Company, on account of himself and his joint venturers, the net sum of \$1,509.75, and according to his statement had taken from that corporation orders on Mrs. Robertson for the payment of \$1,-

677.50; the difference between the sums advanced and the amount for which orders were taken being retained by him as a discount on the loans. These orders were never surrendered to Mrs. Robertson, but, on the contrary, were returned, as Peavey says, to the Kroeger Construction Company, when the bond and mortgage were executed. These loans were not made with special relation to the work being done for Mrs. Robertson, and at the time they were made no payments were due from her to the Kroeger Company.

He attempted further to justify his retention of the balance on the claim that \$359 was retained by him for searching fees and for services which he had rendered Mrs. Robertson in another matter. He claimed that he had searched the title himself, although he was not a lawyer. After satisfying the amount of the charge which he claims to have set aside for the searching fees, there would be still a balance of some \$300 remaining, and this amount he claimed to have retained in payment of services rendered by him in a previous attempt by him to negotiate a first mortgage on the property of Mrs. Robertson, under her direction. He admitted that there was no prior agreement between him and Mrs. Robertson for compensation for an unsuccessful attempt to negotiate a first mortgage, and that he had never rendered a statement to Mrs. Robertson of the amount which he had retained under her mortgage to Mrs. Merwin, in compensation for these alleged services. According to his own story, he exacted from Mrs. Robertson as a condition of the loan payment of a claim as to which she had no legal obligation of payment. It appeared that up to the time of the trial, which took place on January 16, 1912, Peavey had never drawn out of the trust account any part of the moneys which he retained from Mrs. Robertson when the bond and mortgage was executed and delivered. The learned trial court found practically that the retention of these moneys by Peavey for his alleged services was but a trick and device for the purpose of procuring a usurious consideration on the making of the loan to Mrs. Robertson. The evidence justified such an inference, and there is no good reason to disturb the judgment on the facts.

[2] The appellant claims, however, that, even though Peavey, while acting for the defendant, made an agreement which, if the defendant had known of and authorized, should have rendered the bond and mortgage void as usurious, yet it was not shown that the defendant had any knowledge of or in any way ratified the acts of Peavey, in so far as he attempted to extort from the borrower an illegal consideration. A number of authorities are cited to the effect that a principal, making a loan through an agent, cannot be charged with usury because the agent extorts for his own use and purpose what would be otherwise an illegal consideration, unless the principal either had knowledge of or subsequently ratified the act of the agent. That such is the law under proper circumstances there is no question here; but in this case it appears that the moneys put out by Peavey belonged to three persons, his mother, the defendant, his sister, and himself, and that the bond and mortgage, though taken in the name of the defendant, his sister, were so taken pursuant to a practice that all investments

made from said trust fund were to be secured by instruments running to his sister, Mrs. Merwin. In the bond and mortgage Mrs. Merwin is described as "George P. Merwin." She is likewise so described in the pleadings and is so named even in the minutes of the trial. Why a woman should be described in legal instruments with a masculine name is rather mysterious.

It seems to me that this is not a simple case of an agent, without the knowledge or ratification of his principal, extorting a consideration for his own benefit and account, which, if extorted for the account of his principal, would be usurious, but one in which Peavey was acting, not as a mere agent for the benefit of another, but as one of three principals, for the benefit of all three in a joint enterprise. Under these circumstances, the knowledge of Peavey would be the knowledge of all three, and what would bind Peavey as a principal would bind the others also, on the same theory.

As to the second mortgage, and likewise the second judgment, it appears that the plaintiff gave to the defendant, through Peavey, her bond and mortgage for the sum of \$265, and that out of the same trust fund Peavey paid on account of the plaintiff the sum of \$210.84, leaving a balance of \$54.16. On the recording of the bond and mortgage secured by this loan, the sum of \$1.50 was paid as recording fees. Peavey claims that the balance was retained by him for services in searching the same title as that which was covered by the other mortgage. This second mortgage was likewise taken in the name of the defendant Mrs. Merwin, according to the usual course of business, and Peavey left undrawn in the trust fund the amount which he claims to have retained for his services in searching the title. Here, again, the court found the giving of a bonus amounting to the difference between the sum actually advanced and the amount of the security. If the evidence would justify this finding of fact, then, of course, the judgment is unassailable. The evidence does justify the finding. It seems to me apparent that Mrs. Robertson was defenseless in the hands of Peavey, and was choused accordingly, and that usury was the purpose of Peavey, and the explanations offered by him a mere cloak to such purpose.

The judgment in both cases should therefore be affirmed, with costs.

JENKS, P. J., and WOODWARD and RICH, JJ., concur. THOMAS, J., votes to affirm, in so far as the interest of Peavey, defendant's brother, is concerned.

(79 Misc. Rep. 118.)

In re ELY.

(Supreme Court, Special Term, Westchester County. January 25, 1913.)

ATTORNEY AND CLIENT (§ 182*)—COMPENSATION OF ATTORNEY—ENFORCEMENT OF LIEN.

Under Judiciary Law (Consol. Laws 1909, c. 30) § 475, providing that from the commencement of an action or special proceeding, and the service of an answer containing a counterclaim, the attorney who appears for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a party has a lien on his client's cause of action, claim, or counterclaim, which attaches to a verdict, report, decision, judgment, or final order in his client's favor, and the proceeds thereof, an attorney cannot enforce a lien for services and disbursements against real estate which has been the subject-matter in a certiorari proceeding to review the assessment of the real estate for taxation.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 315, 399-406; Dec. Dig. § 182.*]

Application by William A. H. Ely, an attorney, to determine and enforce an attorney's lien. Denied.

H. H. & W. L. Morse, both of Tarrytown, for petitioner.

Duer, Strong & Whitehead, of New York City, for respondents.

TOMPKINS, J. The question in this proceeding is whether an attorney can assert and enforce a lien for his services and disbursements against real estate which has been the subject-matter in a certiorari proceeding to review the assessment of such real estate for the purpose of taxation, where the petitioner was the attorney for the owners of the property. The claim by the attorney is made under sections 474 and 475 of the Judiciary Law (Consol. Laws 1909, c. 30). Section 475 provides as follows:

"From the commencement of an action or special proceeding, and of the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come."

I think the petitioner cannot maintain this proceeding, and that his remedy is by an action at law. It does not appear that there has been a "verdict, report, decision, judgment or final order in his client's favor," or that his clients have the "proceeds" of any "cause of action, claim or counterclaim."

The certiorari proceeding appears to have been settled before reaching a final order or judgment, and it does not appear that the owners reaped any direct benefit from that proceeding. For a subsequent year, it is alleged in the petition the assessment upon the property upon the client's real estate was materially reduced, and the petitioner claims that he accomplished that reduction. This is denied, however, by the respondents. Conceding that the petitioner's claim in this respect is true, I cannot see how a lien can be asserted against the real estate for the attorney's services before the town assessors in securing a reduction of the assessment. The provisions of section 475 of the Judiciary Law were not, in my opinion, intended to cover such a proceeding, nor do I think that an attorney's lien can be enforced against real estate which is the subject of a certiorari proceeding, upon the theory that such real estate is the "proceeds thereof," within the meaning of section 475.

Motion denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MORAN v. NEW YORK STATE RYS.

(Supreme Court, Appellate Division, Fourth Department. January 8, 1913.)

1. MASTER AND SERVANT (§ 289*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In a motorman's action for injuries caused by the derailment of a car, where there was evidence tending to show that the motorman was negligent in running the car around a curve at an excessive rate of speed, while he testified that he used the usual means to control the speed of the car, such as had always before proved sufficient at that curve, his negligence was a question for the jury, and a verdict in his favor would not be disturbed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

2. MASTER AND SERVANT (§ 278*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.

In a motorman's action for injuries, evidence aside from the inference arising from the accident itself *held* sufficient to support jury's finding that at the time of the accident his car was not equipped with reasonably safe wheels or trucks.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

3. MASTER AND SERVANT (§ 285*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In a motorman's action for injuries caused by the derailment of his car, where he testified that he had operated other cars around the same curve at a greater rate of speed than the car in question was running at the time, without difficulty and without having such cars leave the track, it was a question for the jury whether the car would have made the curve successfully notwithstanding the rate of speed if there had been no defect in the truck.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1053; Dec. Dig. § 285.*]

McLennan, P. J., and Kruse, J., dissenting.

Appeal from Trial Term, Monroe County.

Action by James F. Moran against the New York State Railways. From a judgment for plaintiff, and an order denying a motion to set aside the verdict and for a new trial, defendant appeals. Affirmed.

Argued before McLENNAN, P. J., and KRUSE, ROBSON, FOOTE, and LAMBERT, JJ.

Willis A. Matson, of Rochester, for appellant.

George D. Reed, of Rochester, for respondent.

FOOTE, J. Plaintiff was an experienced motorman, having been in defendant's employ for 20 years. He was injured when the car he was operating left the track at a sharp curve at the junction of Clarissa street and Mt. Hope avenue in the city of Rochester. After leaving the track, the car ran along the pavement and struck a tree with such force as that a space the width of the tree was cut completely through the front vestibule.

[1] He has recovered a verdict upon the theory that the accident was due to a defective truck under the car. It was defendant's claim

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at the trial that the derailment was caused by plaintiff's negligence in running the car around this curve at a greater rate of speed than its rules permitted. There was evidence from which the jury might have found plaintiff negligent in this respect, but plaintiff's testimony was to the effect that he used the usual means to control the speed of the car such as has always before proved sufficient at this curve. We think the question of plaintiff's negligence in this respect was one of fact for the jury, and that we should not disturb the verdict on that question.

[2] Several months after the accident one of the trucks of the car was found to be defective, in that the frame and pedestal were bent and twisted. This had a tendency to cause the car to leave the rails, and not to take the switches properly. The question in the case was whether this defect existed prior to the accident. It appeared that the accident itself might have produced this condition. The jury found by answering specific questions that the car was not equipped at the time of the accident in a reasonably safe manner as to its wheels or trucks, and that it ran off the track owing to defective and unsafe equipment. Appellant claims that there is no evidence sufficient to support these findings, that the finding that the wheels or trucks were defective is based solely upon inference from the happening of the accident, and that the finding that the accident was due to these defects is a second inference based upon the first.

We think there was sufficient evidence to support the first finding, irrespective of inferences arising from the accident itself. The defective condition of the truck which was found to exist after the accident was of a character likely to cause such an accident, and the jury were instructed to determine whether it was caused by the accident or whether it existed previously.

There was no direct evidence that the truck was not in this defective condition when defendant first placed it in use some 20 days prior to the accident. Defendant's foreman, Cunningham, who assembled this truck and placed it under the car, testified that, when he "put this truck up, it was all in good shape. It went together, the parts, all in good shape," but he did not say that the frame was not bent or the pedestal twisted. There was also evidence of tests made by running the car over several lines before it was put in use, which tests did not indicate any defects in this truck. Representatives of the manufacturers of the truck were witnesses at the trial, but did not testify that the frame was not bent or the pedestal twisted at the time the truck was delivered to defendant. While in use during those 20 days trouble was experienced in operating this car at switches out of proportion, as the jury may have found, to similar trouble experienced on defendant's railway with its other cars. The average number of such troubles was shown to be only two per day on the whole system. This car during this time failed to take switches properly on at least five different occasions, or on an average of once each four days. Plaintiff's witnesses testified that there were seven such occasions, but as to two of them the witnesses were not certain whether they were before or after the acci-

dent. Assuming that they occurred on an average of once in four days before the accident, and that the general average of such occurrences on defendant's whole system was two per day, then, unless defendant had only eight cars in use on its whole system, it appears that this particular car, which was numbered 400, had some defect which interfered with its running over switches as successfully as defendant's other cars. It is true that the evidence does not show the total number of cars operated on defendant's system, but from the number which this car bore and such general facts as appeared in the testimony in reference to defendant's railway system, without reference to the knowledge possessed by the court and jury sitting in the same city in which the system was in operation, we think the jury were justified in finding that there was a defective truck upon this car solely from its performance in operation before the accident, and that such finding does not rest for its support entirely upon inference from the accident itself.

[3] Moreover, plaintiff testifies that he had operated other cars around this same curve at a greater rate of speed than the car in question was running at the time of the accident without difficulty and without having such cars leave the track. The jury were at liberty to conclude from this testimony, if they accepted it as true, that the car in question would have made this curve successfully at the time of the accident, notwithstanding the rate of speed, if there had been no defect in the truck.

If this truck had a bent frame and twisted pedestal at the time defendant received it and placed it under the car, it was a defect which, according to the testimony, reasonable inspection would have disclosed, although ordinary inspection after the truck was put under the car would not. There is no claim, however, that prior to the accident anything had happened to this car which might have produced the bending of this truck frame or the twisting of the pedestal.

We think a question of fact was presented for the jury by all the evidence as to whether there was a bent frame and twisted pedestal on this truck at the time it was installed by defendant under this car, which defendant was negligent in failing to discover by reasonable inspection, and that the verdict of the jury upon this question is not so decidedly against the weight of the evidence as to justify setting it aside upon that ground.

We think the judgment and order appealed from should be affirmed, with costs. All concur, except McLENNAN, P. J., and KRUSE, J., who dissent in an opinion by McLENNAN, P. J.

McLENNAN, P. J. (dissenting). As I understand it, the sole question presented by this appeal is whether or not the defect in the defendant's car, which presumably caused the derailment and the injury to the plaintiff, was of such a character as that by the exercise of reasonable care on the part of the defendant in inspecting such car it ought to have been discovered. It is undisputed that the car left the track at a sharp curve on the defendant's road, that when it left the track it was going with such speed and force as to traverse the dis-

tance of 75 or 80 feet along the pavement and across the street until it struck a tree with such force that the tree was forced through the vestibule to the forward truck of the car, and in such collision the plaintiff sustained the injuries for which he seeks to recover in this action.

It appears that the truck under the car in question was purchased by the defendant from a reliable and representative firm of car builders. Apparently it was shipped to the defendant in parts and was assembled, put together by the defendant, and placed under car No. 400. This was all completed about 20 days prior to the accident. A test of the car thus equipped was then made by the defendant as to the efficiency and condition of the truck for the purposes for which it was intended. The test so made, it is claimed, was inadequate, and not such as would disclose any defects in such truck if any existed. After such test had been made, the car was put in commission to run over the different lines of the defendant. In the operation of such car it was found that occasionally when entering a switch it would leave the track. It is shown that in at least three of the five occasions that it left the switch prior to the accident it was because of the defect in the switches rather than because of the defect in the truck. In the other two instances the cause of its leaving the switch is not disclosed. But, however that may be, there is absolutely no evidence that the plaintiff or any other person connected with the operation of this car informed the defendant or any of its officers that it did not operate properly over the switches or any other part or parts of defendant's tracks prior to the accident. So that the evidence is practically uncontradicted that, so far as the defendant is concerned, none of its officers or agents, or even its employes, except the plaintiff and like employes, knew that the car in question was not capable of being operated in an entirely safe manner. Of course, it is shown as above stated that upon five occasions this car left the track at switch points, but that in no instance had such fact been called to the attention of the defendant.

At the time in question, the car, so far as appears, for the first time left the track at a point other than at the switch, viz., upon a curve, and the injury of which the plaintiff complains resulted. The evidence tends to show that because of such accident the car was badly wrecked, and that its collision with the tree, to which we have referred, would be an ample cause for its condition discovered after such accident. After the accident the car was dismantled, and an inspection was made of it, and it was discovered that the frame of the truck was bent and twisted one-half inch out of true, and it is apparently conceded that, if such condition existed before the accident, it would have been sufficient to have thrown the car off the track at the time in question, and have caused the accident which is the subject of this litigation. But, as it seems to me, it is quite as reasonable to infer from the evidence that such condition of the truck was due to the collision. This would appear to be demonstrated almost beyond a doubt from the fact that, when an attempt was first made to operate the car after being repaired following the collision, it refused to take a switch five

times out of seven, when the switch was concededly in proper order, whereas before the accident, running almost constantly for 20 days, it refused to take the switch only five times, and it is shown that upon at least three of those occasions the fault was due to the switch itself.

In my view of this case, it was purely speculation for the jury to say that the derailment in question was caused by the defect in the alignment of the truck such as was discovered when the car was afterwards dismantled; but, further, it will be remembered, and there is no contradiction in the evidence in this respect, that prior to the accident the car in question never left the track except at switch point, and that at least three of those derailments are explained by the fact that the switch over which it passed was defective, and the cause of the derailment in the other two cases at switch points is not in any manner disclosed by the evidence. So that we have the situation of a truck, or the chief parts of it, obtained by the defendant from a standard and reliable manufacturer, tested, perhaps inadequately, before being put into commission upon the defendant's road, but after such tests as were made had been made, and it was put into regular commission, so far as the defendant knew or had reason to believe, it performed every function which could be required of it. True, upon five occasions during the 20 days it was in commission before this accident it failed to keep the track at switch points, but such failure was not reported to the defendant, and the plaintiff in this case was operating the car upon at least three of those occasions and did not report the same to the defendant. So that the question is presented, Was the defendant under such circumstances negligent because it did not discover prior to the accident the defect in the car truck which concededly existed after the accident, and which, if it existed prior to the accident, would have been adequate to account for such accident?

I conclude that there was no evidence which would justify the jury in finding, as they must necessarily have found, under the charge of the court, that the defendant was guilty of negligence in failing to have discovered prior to the accident the defect in the truck, and that such defect caused the accident which is the subject of this litigation. I think the question of plaintiff's contributory negligence was for the jury, and that, under all the circumstances, the defendant has no cause for complaint as to its determination in that regard. But I am of the opinion that the jury was not warranted in finding that the defective condition found to exist after the accident did exist prior to the accident, and that, even if it did, the defendant was not shown guilty of any negligence in failing to make such an inspection as would have disclosed to it the defect, because no improper performance of the car had been reported to it.

The judgment and order appealed from should be reversed, and a new trial granted, with costs to the appellant to abide the event.

FARNSWORTH v. BORO OIL & GAS CO.

(Supreme Court, Appellate Division, Fourth Department. January 15, 1913.)

Appeal from Special Term, Erie County.

Action by Newton E. Farnsworth against the Boro Oil & Gas Company. From a judgment for plaintiff (76 Misc. Rep. 37, 134 N. Y. Supp. 348), defendant appeals. Affirmed.

Ward J. Wilber, of Gowanda, for appellant.

Fred J. Blackmon, of Buffalo, for respondent.

PER CURIAM. Judgment affirmed, with costs, upon the opinion of Pound, J., delivered at Special Term. All concur, except KRUSE, and LAMBERT, JJ., who dissent in a memorandum by KRUSE, J.

KRUSE, J. (dissenting). Concededly the town board has no authority over the highways of the town, and, beyond the fact that the defendant's pipes have been permitted to remain in the highway, there is nothing to connect the highway commissioner with the consent to use the highway given by the town board to the defendant. If the commissioner of highways, whose consent to the use of the highways is necessary for such purposes, had given his consent, upon which the gas company had acted, and under which it was enjoying certain privileges which it otherwise would not have, upon terms and conditions voluntarily accepted by the gas company, the doctrine of estoppel might apply, although the commissioner of highways had no legal right to exact or require such conditions. That is as far, I think, as the decision goes in the case of Rochester Telephone Company v. Ross, 125 App. Div. 76, 109 N. Y. Supp. 381, relied upon by the plaintiff. But here the gas company obtained nothing from the town board, and the consent does not, as I think, rest upon even a shadow of right.

It is possible that the circumstances may be such that the parties to the action, as between themselves, adopted the terms and conditions of the so-called franchise and made them a part of their contract under which the defendant was to supply gas to the plaintiff; but the case does not seem to have been tried or decided upon that theory, and I hardly think the findings of fact, as they now appear, are sufficient to justify an affirmance upon that theory; nor was the case tried upon the theory that the highway commissioner adopted the action of the town board. There is no finding to that effect, or evidence to warrant such a finding. It does not appear that the highway commissioner knew the terms of the so-called franchise, or that the town board had assumed to act upon that matter, or that he was connected with the matter in any way. He is not a member of the town board.

LIMERICK v. HOLDSWORTH et al.

(Supreme Court, Appellate Division, Second Department. January 28, 1913.)

1. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action for injuries to the driver of a truck, resulting from the breaking of the tongue, evidence that the tongue, made three months before the accident from partly green oak timber, showing sun cracks, but not wormholes, with evidence of wormholes seen after the accident in the break, which could not be seen prior thereto in the course of requisite inspection, was insufficient to show negligence of the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-968, 969, 971, 972, 977; Dec. Dig. § 278.*]

2. TRIAL (§ 251*)—INSTRUCTIONS—APPLICABILITY TO CASE.

In an action for injuries to a servant, resulting from the breaking of the tongue of a truck, where the pleadings raised no issue as to the grain of the wood in the tongue, an instruction submitting the question whether the wood was suitable in that respect was erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

Appeal from Trial Term, Kings County.

Action by Charles A. Limerick against William H. Holdsworth and another. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed, and new trial granted.

See, also, 136 App. Div. 323, 120 N. Y. Supp. 1011.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

Frank V. Johnson, of New York City, for appellants.

Ralph G. Barclay, of Brooklyn, for respondent.

THOMAS, J. Plaintiff, defendant's servant, has recovered damages for injuries received by the upsetting of a truck driven by him, whereby a heavy casting fell upon his leg. While backing the team from a shed, the pole broke, the right wheel turned under the floor of the truck, which tipped over on its left side, and the casting was thrown upon him. Whether the plaintiff backed out straight, and the pole broke, allowing the right front wheels to turn under the truck, as plaintiff contended, or whether the rear wheels of the truck went to the right, so as to throw the right wheel under the truck and cause it to turn over, thereby breaking the pole, as the defendant Percy J. Holdsworth affirmed, was an issue decided by the jury, presumably in respondent's favor.

[1] The single issue tendered on the question of defendants' negligence was whether they furnished a reasonably safe tongue or pole. The plaintiff particularized that the tongue was "defective, rotten, and worn out." The pole had been made about three months before, and there is no evidence of destructive wear. The contest between the parties related to wormholes and sun cracks. The proof is that the pole was fashioned from partly green oak timber, showing sun cracks at the time, but not wormholes; that a stick not wholly sea-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

soned was preferable for making a pole; that the sun cracks, with drying, would and did close up without serious impairment of the strength of the article, and the jury would not be justified in predicating defendants' negligence upon such condition, and it was error to permit them to consider it. There was some evidence of wormholes after the accident, but the contrary appeared when the pole was made three months before, and there was no reliable evidence that what could be seen was sufficient to give the defendants, in the course of requisite inspection, notice that the pole was unreliable. The plaintiff had handled it, or been in close proximity to it, for months. He had often taken it out and replaced it. He had harnessed his horses to it and detached them on many occasions. He never noticed the alleged defects, and, although he had often backed his truck loaded from the weighing shed, no sign of defect had been given or warning received. In brief, he saw nothing wrong about it.

But who testified to the wormholes? Plaintiff's brother, Thomas Limerick, improperly permitted to relate his denunciations to one of the defendants of the insufficiency of the truck, stated that he found wormholes, "something a little bigger than pinheads—a good deal bigger," and when the pole was broken he could rub off sawdust, but he said that it was something he could not see until after the pole broke. It is noticeable that this witness did not testify to cracks on the former trial, and he also testified:

"The only wormholes I saw were on the surface of this break, in a space of about 12 inches."

The witness' testimony is open to the criticism that it was recast to meet the exigencies of the second trial. Another witness for the plaintiff was Mason, who, as he said, had been convicted on two occasions in his earlier years for not very grievous offenses. He testified, with reference to the place where the break was, that it crumbled away and was rotted, and he further stated that he did not "see anything the matter with the pole, excepting on the surface of this break," and that it could not be seen if it had not been broken, which he ascribed to the fact that the pole was dirty. Walsh, who made the pole, about three months before the accident, testified as to the sun cracks and the length of them; that he did not see any wormholes or knots, and that upon a present inspection of the pole he saw but few; that such cracks disappear as the pole grows older, and that the sun cracks have not much effect upon the pole.

One Shadbolt, a truck builder called by the defendant, testified that the pole was a "tough, fibrous piece of oak"; that he could not see any wormholes in it, and that he did not see any indications of weakness about that pole before the pole broke; and that the sun cracks have very little, if any, effect upon the strength of the pole. He further stated that invariably, in making poles, lumber not thoroughly seasoned was used, and that the sun cracks do not indicate that the pole was weak or defective, and that they were an indication of the toughness of the lumber.

The pole has been presented to the court, and I do not observe that

a witness has pointed out the wormholes. In any case, it is not made to appear that such as exist, and that were not latent, would give notice to an experienced inspector that the pole was weakened thereby, while there is ample and uncontradicted evidence that the sun cracks did not have that effect. It would seem, then, that the finding that the defendant was negligent in furnishing a reasonably safe pole is not sustained by the weight of the evidence, nor is there evidence to sustain a finding that there were wormholes discoverable upon external inspection that lessened its strength.

[2] After the trial had been practically finished, the witness Shadbolt was recalled by the defendant for further examination, and, when that had been concluded, the court conducted an examination of the witness with relation to the manner in which the grain of the wood ran, whereby it appears that the break was from the bottom edge of the pole, and ran diagonally through it to the end of the break for the approximate distance of 3 feet 10 inches, and in doing so it followed the grain. The witness, after stating that in 40 years' experience he had not seen a pole in which the grain ran the entire distance of the pole, considered that such a pole, nonexistent in his knowledge, would be stronger for the continuous grain. No such issue had been raised. It is not contemplated by the bill of particulars, it was not litigated upon the trial, yet the court charged the jury to consider "the nature of the break, and just how it runs, and the grain of the wood, and how it runs," and said:

"Perhaps it may not be without the province of the court and the province of the jury to take some account of the question of the grain of the wood. You will consider the way that pole is broken, either from the bottom to the top, or the top to the bottom, as the case may have been. Does that fact, disclosed in the pole itself, that the particular piece of wood of which it was made was of the quality to sustain the strain of a backing team, hitched to a wagon with heavy iron on it? Jurymen are not supposed to banish the knowledge that they have acquired in life when they enter the jury box. Perhaps it is quite within the knowledge of all of you that a team, pulling a wagon, apply very little strain to the pole, and that the pole is intended to guide the wagon; but a team backing applies great strain to the pole, because the strain is communicated from the front part of the harness to the pole, and the power is there applied. It follows that the weight of the wagon has to be pushed by the pole when a team is backing. Perhaps this is a matter within your own knowledge. Whether or not this particular piece of wood, with the grain running in it as it appears to be running, was a piece of wood suitable to be used in a wagon which was to be backed, heavily laden, is a question for you to determine as experts, which you become."

There is no evidence that the grain could have been discovered, or that the cross grain is excessive or unusual; that it is other than what is used by good and prudent men in the business. Above all, it was not the issue that the parties went to the court to litigate, or that they did litigate. Therefore, for the reasons that the sun cracks did not impute negligence to the defense, that the evidence does not show the injurious presence of wormholes discoverable upon requisite inspection, or that, if they visibly existed, they made the pole unsafe, and because the court submitted to the jury an issue not within the pleadings nor litigated, the judgment and order should be reversed, and a new trial granted, costs to abide the event. All concur.

BACON v. HUDSON & M. R. CO.

(Supreme Court, Appellate Division, Second Department. January 28, 1913.)

1. CARRIERS (§ 318*)—PASSENGERS—INJURIES ON PLATFORM—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

In a subway passenger's action for injuries by being pushed from the platform onto the track by the congested traffic, evidence *held* not to sustain a finding that defendant's employes were negligent in not exercising due care to control and restrain the passengers on the platform.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.*]

2. CARRIERS (§ 286*)—PASSENGERS—DUTY OF COMPANY—CONTROL OF PASSENGERS.

A subway company's employes should give attention to prevent passengers congregating on a subway platform from congesting or crowding, so as to endanger the safety of passengers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1142-1148, 1150-1152; Dec. Dig. § 286.*]

3. CARRIERS (§ 318*)—PASSENGERS—INJURIES ON PLATFORM—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

Evidence, in a subway passenger's action for injuries by being crowded off the platform onto the track, *held* not to show negligence in failing to prevent the entrance of more passengers, because of the crowded condition of the platform.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.*]

4. CARRIERS (§ 280*)—PASSENGERS—INJURIES ON PLATFORM—CARE REQUIRED.

In submitting the question whether a subway company was negligent in permitting a congestion of passengers on its station platform, causing one to be pushed onto the track, the instruction should take as the standard of care a man sufficiently skilled in the business to safely conduct it, and willing to direct his efforts to that end; the highest degree of practicable care not being required in protecting passengers on the platform, such as is necessary in transportation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1098-1103, 1105, 1106, 1109, 1117; Dec. Dig. § 280.*]

Appeal from Trial Term, Rockland County.

Action by George E. Bacon against the Hudson & Manhattan Railroad Company. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

Bertrand L. Pettigrew, of New York City, for appellant.

Bruce R. Duncan, of Brooklyn, for respondent.

THOMAS, J. The plaintiff, standing about 6 inches from the edge of the platform in defendant's subway in the Hudson Terminal Building in the city of New York, was jostled by the pushing of passengers as they crowded to take an incoming train, so that he fell to the track and was injured by the train. The court submitted the question whether the defendant was negligent in permitting so many passen-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gers upon the platform. It is quite apparent that the disturbance was caused by the passengers compacting and surging forward to make early entrance to the arriving cars, and not from a general overloading of the platform. It was the customary forward striving for entrance to a train at a busy terminal, with the expectable inconsiderate eagerness that such occasions develop. At such a time guards on the platform should watch the conditions, and by warning, and by physical opposition, if necessary, restrain aggressive persons, and make the entrance orderly, so far as reasonable use of abilities permits. The unrestrained impetuosity of some passengers, and the unordered entrance of the crowd to the trains, noticed commonly at principal stations, obtained when plaintiff was hurt.

[1] The court should have submitted to the jury the question whether the defendant made provision for moderating undue crowding, and whether there was any negligent failure on the part of the platform men to discharge that duty. The plaintiff contends that the collection of persons was unusually large, from the fact that the incoming train was late. The defendant proves that the train was on time, and that the number of passengers was not unusual for the hour when the accident happened. Therefore the sole question, as regards the defendant's negligence, is whether proper care and skill were employed to control the passengers. The jostling and crowding was sudden, and may have arisen so instantly that the harm was done before interference was practicable.

[2] But, knowing the tendency of crowds, it was defendant's duty to be attentive to the persons congregating and their actions, and the jury should judge of the occasion, its demands, and the defendant's fidelity to its duty.

[3] I consider that the question of defendant's negligence cannot rest on failure to bar the entrance of more passengers. The platform was 416 feet long and 21½ feet wide, with tracks on either side for the entrance of trains, and four stairways leading to it. Plaintiff came down the north stairway, and walked some 20 feet north, and stopped at his customary place, some 6 inches from the edge of the platform, so as to be able to enter the first car and get a seat. The dispatcher's booth was some 15 feet north of his position. The plaintiff testifies to a crowd about him, so close to him that, as he says, he "felt people against me on every side"; and he adds:

"As I saw the train approaching, and felt the bodies of men against me, there was a sudden pushing and jostling. * * * I could feel the swaying crowd; then I went off the platform very suddenly."

As to the extent of his observation of the conditions, he says:

"I was only interested in that portion of the platform where I took the train. I looked around about 15 or 20 feet either way. I first noticed the crowding that I speak of just before the train appeared at the south end of the station. * * * I did not change my position in any way when I felt the crowding. I only tried to withstand the pressure. I had noticed a number of people. I had looked around, and saw people standing 4 or 5 feet deep behind me. After the first crowding that I felt, the crowding continued. It was a continuous jostling; people moving. I don't know as it was any different from the ordinary crowds that you get into in the station. I did not feel any ap-

prehension at that time; no. * * * At the last moment it was a sudden pressure. Up to that time I had only felt the usual pressure that I have spoken of."

This and further evidence to the same effect indicates the usual increasing pressure of the people as the train appeared, until its thrust drove him from the platform. But the limited area of the platform occupied is apparent. The witness Regelman was also in the space between the same stairway and the dispatcher's booth, and although he makes a sweeping statement of the entire platform crowded from edge to edge and end to end, yet it appears that he could not look the "whole distance of the platform, one end to the other," and that the space filled with people that he actually saw was between the dispatcher's booth and the staircase, which in his estimate was less than the length of the courtroom, and he adds:

"That space was filled with people—that is, as far as I could see. I think it was about three-quarters the length of this room. I don't know about the people beyond the stairs; I did not look south of the staircase at all."

Such is the plaintiff's evidence to prove a platform over 400 feet long so overcrowded as to demand, in the exercise of proper care, that the defendant should accumulate the incoming passengers above the stairways, with the probable dangers of descent of an unusual gathering at such point. In any case, the evidence does not show a platform in its whole capacity unduly filled, but does permit the inference that those seeking admittance to the train pressed forward to take it with such unrestrained eagerness that the plaintiff was unable to hold himself from falling. He had placed himself, as he usually did, 6 inches between himself and the loss of his foothold, and in view of his age of 74 years his contributory negligence is a matter of serious consideration.

For the purposes of the new trial, some attention may be given to the charge that the defendant was bound to use "a high degree of care for the safety of its passengers to have provided against the happening of such an accident." The adherence to the charge indicates that the court used the term considerably, and as the standard by which the defendant's fulfillment of its duty was to be measured. Whether a condition that may happen in reasonable expectation demands slight care, what is called rather vaguely ordinary care, or something higher than that, or the highest care, depends upon the nature of it. The desirable end is to instruct the jury so that they will know, so far as laymen can be taught on the occasion, what care and skill the defendant should have used.

[4] Hence an efficient practice is in some form of words to ask the jury to call to mind a man sufficiently equipped in knowledge for the carrying on of the business, skilled to make use of his knowledge for the reasonably safe conduct of the undertaking, and disposed to use his abilities for the safety of those to whom he owes some duty of protection, and let them find whether the defendant acted as such a man would under the circumstances. A defendant in such a case as the present is presumed to be a good and diligent business man in its particular vocation, and is bound to the skill and care of such per-

son in receiving and handling passengers on platforms and ways to incoming trains. The duty does not demand pre-eminent care or intensest anxiety; for that, continued, is beyond human capacity and endurance. That it does not require generally even the highest degree of practicable care, as in the actual transportation of passengers, is evident, as the passenger is not deprived in such case of his power of self-protection, which to a large degree is preserved to him. What degree of care the occasion or the exigency requires is for the jury to decide; but it is the care that a good, prudent business man would exercise at the time and place. The platform may be so sparsely filled as to require slight diligence; it may quickly be so packed by an agitating crowd as to require great diligence. So the degree of care may be constantly changing. But primarily the carrier's servants must be attentive, with vigilance increasing as the demand for it increases, and be ready to interpose when safety demands it. This is mere expansion of the primary obligation to be competent for the business in skill and prudence and to exercise both when and to the extent that expectable conditions may require.

How, then, is the word "ordinary" usable? It means the ordinary, usual business men, good in skill and prudence for the adequate conduct of the business, and able and skilled to do what such men are accustomed to do. Business is not and cannot be conducted only by those superlatively expert. There is a degree of competency and qualification that in practice is sufficient. Such persons largely comprise the successful class in every business, and would be recognized by a jury if described as good business men for the ordinary management of a business. Such business men would know that different degrees of care would be required to meet varying conditions, and they would be able to use it, and if one failed he would fall below the class to which he belongs and be culpably negligent. What good business men in their business are accustomed to do would be what he should do.

The judgment and order should be reversed, and a new trial granted; costs to abide the event. All concur.

SCHUELER v. DOOLEY.

(Supreme Court, Appellate Division, Second Department. January 24, 1913.)

APPEAL AND ERROR (§ 564*)—RECORD—SERVICE OF CASE—EXTENT OF TIME.

Where three successive trials of a case resulted in verdicts for defendant, and, after two extensions of the time for service of the case on appeal, plaintiff, just before the expiration of the time given by the last extension, tendered to the stenographer the cost of the minutes of the last trial, which minutes were refused by the stenographer, because of the existence of an unpaid judgment against plaintiff for the costs of the minutes of the first two trials, a further extension of the time to serve the case was properly denied, where the application made no showing of the merits in his proposed appeal, except an allegation that he be-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

believed that the appellate court would reverse the judgment and grant a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501–2506, 2555–2559; Dec. Dig. § 564.*]

Carr and Woodward, JJ., dissenting.

Appeal from Special Term, Queens County.

Action by J. L. Emil Schueler against Mary Louise Dooley. From an order denying a motion for an order extending the time to make and serve a case on appeal to the Appellate Division from a judgment and order, plaintiff appeals. Affirmed.

See, also, 135 N. Y. Supp. 1142.

Argued before HIRSCHBERG, BURR, THOMAS, CARR, and WOODWARD, JJ.

Peter R. Gatens, of New York City, for appellant.

Clarence Edwards, of Elmhurst, for respondent.

HIRSCHBERG, J. The order appealed from denies the plaintiff's application for an extension of time within which to serve his proposed case on appeal. The action has been pending about five years, and has been tried three times. Decisions have been reviewed in this court twice. The action is brought to recover the amount of a deposit made by the plaintiff on an agreement of the defendant to convey certain real estate to the plaintiff; the defendant claiming that the contract has been broken by the plaintiff and his rights to the deposit consequently forfeited. On the first trial, the judgment and order entered in favor of the defendant were reversed on appeal to this court, and a new trial was granted, upon the ground that the issues then determined should have been submitted to the jury. *Schueler v. Dooley*, 138 App. Div. 921, 123 N. Y. Supp. 1141. The second trial resulted in a verdict for the defendant, but on appeal the judgment and order then entered were reversed by a divided court, on the ground of error in the submission of the case to the jury by the trial court. *Schueler v. Dooley*, 149 App. Div. 814, 134 N. Y. Supp. 99.

The third trial resulted in another verdict for the defendant, and judgment was entered against the plaintiff on July 1, 1912, in the sum of \$458.08. Notice of appeal was duly served by the plaintiff on July 12, 1912, and his time to prepare and serve the case on appeal has been extended by the defendant on two occasions; the time ultimately expiring on the 11th day of November, 1912. It appears that the plaintiff was indebted to the court stenographer, and that judgment had been entered in favor of the latter and against the plaintiff for the expense or cost of the minutes of the first two trials, and, just before the final expiration of the time to serve the case on appeal by extension, the plaintiff tendered to the stenographer the cost of the minutes of the last trial, which minutes were refused by the stenographer because of the existence of the unpaid judgment. The plaintiff made no attempt to compel the furnishing of the minutes by mandamus, but moved for an order to extend the time to serve his

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

case, which motion was denied by the making of the order appealed from.

It seems clear that the laches of the plaintiff was sufficient ground for the denial of the motion in question. Aside from that consideration, however, the application was properly denied, because of the failure of the plaintiff to show any merit in his proposed appeal. There is no statement or suggestion in the moving papers of any error committed on the trial. The plaintiff's counsel makes no affidavit indicating a belief in the propriety of the appeal, or the possibility of a termination successful to the plaintiff; and the only affidavit submitted in support of the motion, which affidavit was made by the plaintiff himself, is confined with respect to the question of merit to the allegation "that deponent believes that upon a hearing of the appeal in this case the appellate court will, for the third time, reverse the judgment and grant a new trial to this deponent." Reversals in appellate courts are not the result of habit, but are based upon the commission of serious error in the court below.

In view of the long period of time during which the litigation has been pending, that the plaintiff has failed in each trial, that ample time was furnished him voluntarily in which to enable him to perfect his appeal, that it is not made to appear in any way that additional time would be effective for the purpose required, and that no merit in his appeal has been disclosed, his application was properly denied, and the order should be affirmed.

BURR, J., concurs. THOMAS, J., concurs on the ground that no merit was shown in the appeal. CARR and WOODWARD, JJ., dissent.

KENNEDY v. JOHN N. ROBINS CO.

(Supreme Court, Appellate Division, Second Department. January 24, 1913.)

1. MASTER AND SERVANT (§ 238*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where an experienced laborer, ordered to go to the hold of a ship in dry dock to clean the tops of water tanks, knew that the usual means of access was by grabirons, but he attempted to cross over planks, which he knew consisted of the flooring on the tanks, that had been taken up and temporarily laid aside, he could not recover for injuries caused by the breaking of a plank, in the absence of proof of any act or omission of the employer that could have induced a person of ordinary care to conclude that the employer intended to provide a way by a use of the planks, or proof of any direct or implied invitation to use the planks, or proof that the employer knew or should have known at the time of the giving of the order that the grabirons were obstructed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 743-748; Dec. Dig. § 238.*]

2. MASTER AND SERVANT (§ 107*)—INJURY TO SERVANT—LIABILITY.

Where an employé had no right to assume that a way to his work lay in part over planks, there was no obligation on the employer to make the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

planks reasonably secure as a way, since it is not negligence to omit a precaution applicable only to a situation not in fact existing.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199–202, 212, 254, 255; Dec. Dig. § 107.*]

3. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—ERRONEOUS RULINGS ON EVIDENCE.

The error in excluding an answer of a witness, on objection to the question made subsequent to the answer, while the remedy was by motion to strike out the answer, was harmless, where the witness was subsequently permitted to testify to the same fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140–4151; 4158–4160; Dec. Dig. § 1048.*]

Appeal from Trial Term, Kings County.

Action by Michael Kennedy against the John N. Robins Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

Arthur J. Levine, of New York City, for appellant.

Edward P. Mowton, of New York City, for respondent.

JENKS, P. J. The action is brought for negligence, by servant against master, and the former appeals from the judgment entered upon his dismissal at the close of his evidence. The servant, an experienced laborer, was ordered to go to the hold of a ship, in dry dock at the master's shipyard, to clean the tops of ballast or water tanks. He and his fellows descended a hatch by a ladder from the upper deck to the top of the shaft alley, a sort of tunnel. That top was eight feet above the top of the tanks. Access therefrom to the hold, as the plaintiff well knew, was afforded by certain grabirons fixed to the shaft alley. The plaintiff did not use them, for the reason that he found them covered by planks, but undertook, from necessity, he contends, to cross over those planks, so as to reach and then to use the battens to go down to the tanks. The planks gave way under him, and he fell into the hold, to his injury. There is proof that one of the planks was defective. These planks were the flooring over the tanks, which had been taken up, so that the plaintiff could clean the top of the tanks. There were four stanchions on either side of the shaft alley, about eight feet therefrom, towards the wings of the ship. Two of the planks had been lashed to two of the stanchions, and then had been extended therefrom to the top of the shaft alley, so as to support the other planks, which had been placed thereon, parallel to the shaft alley.

[1] The plaintiff had no reason to assume that there was a way furnished by the master across these planks, for he knew that the usual means of access was by these grabirons; and he knew full well that these planks consisted of the flooring on the tanks, that had been taken up and laid aside but temporarily, for his testimony is:

"I saw a lot of planks that was raised off the tanks and put up there like as a bundle, and put there for us to go under there to clean it."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Further:

"The men that took these up used a part of them to make a platform for the rest of them to get them out of the way."

Again:

"These crosspieces were to hold up the rest of the planks and get them out of the way. They made a platform on which they could put the rest of them."

And plaintiff's witness Gillen testifies:

"These planks, these crosspieces, were a part of the floor planking that had been taken up and lashed there for the purpose of piling these other planks on top of them; and when they would take down the other planks they would take down these crosspieces, and use all these planks back again on top of the tanks, I am sure about that."

There is no proof of act or omission of the master that could have induced a person of ordinary care and prudence to conclude that the master had intended to provide a way across these planks. There is no proof of any direct invitation to make such a use. There is no proof that permits the inference that there was any implied invitation. The planks had been taken up recently from their place as flooring by a gang of carpenters. The plaintiff testifies that this gang were "just getting through" when he went down, and, again, "they were still at work when we went down." There was no proof that the defendant or his representative was at or near this place, and consequently no proof that he knew that any one had attempted to cross over the planks. For aught that appears, the manner of putting aside these planks temporarily happened to cover the grabirons. The plaintiff testifies that there were about 20 or 25 of them. While the proof is not entirely clear, there is an indication that the piling of the planks did not fill up the shaft alley, so as to necessarily cover the grabirons. Thus the plaintiff's witness Maxwell, on cross-examination, says:

"I was standing on the shaft alley; not on the alley itself. That was not covered with planks where I stood."

[2] I think that the plaintiff had no legal justification in assuming that a way to his work lay in part across this lumber, and that there was no legal obligation upon the master to make the planks reasonably secure as a way for the servant. See *Labatt on Master and Servant*, § 28 et seq.; *Felch v. Allen*, 98 Mass. 572. In the words of *Finch, J.*, writing for the court in *Kern v. De C. & D. S. R. Co.*, 125 N. Y. 50, 25 N. E. 1071:

"It was not negligence to omit a precaution applicable only to a situation, which did not in fact exist."

See, too, *White v. Eidlitz*, 19 App. Div. 256, 46 N. Y. Supp. 184; *Preston v. Ocean Steamship Co.*, 33 App. Div. 194, 53 N. Y. Supp. 444; *Young v. Boston & Maine R. R.*, 69 N. H. 356, 41 Atl. 268.

The plaintiff cannot hold the master for a defective way, in that the latter ordered the plaintiff to go down into the hold. There is no proof that when the order was given there was any obstruction of the grabirons; and, if there were, there is not any proof that the

master knew or legally should have known of such obstruction. Indeed, there is not any proof that he ever knew of it. The plaintiff followed upon the heels of the carpenters, who, as I have shown, had either just finished their work or were still about it when the plaintiff came to the shaft alley. There was no coercion put upon the plaintiff. *Sweeney v. Berlin and Jones Envelope Co.*, 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722; *Miller v. Grieme*, 53 App. Div. 276, 65 N. Y. Supp. 812. He testifies that he was neither in a hurry nor rushed.

[3] I think that it was not reversible error to exclude the answer of the witness Devine to the question by the plaintiff whether any one was in the hold directing the carpenters. The objection was subsequent to the answer. It was too late, and the remedy was a motion to strike out the answer. *Link v. Sheldon*, 136 N. Y. 1, 32 N. E. 696. Moreover, the witness was permitted thereafter to answer that:

"There was somebody at the head of that gang of carpenters, that was down in the hold."

And the inquiry was pressed no further. If the plaintiff had attempted to show that the master or his representative had invited plaintiff to cross over the planks, and had been prevented by rulings of the court, another and a serious question would have been presented by the record.

I advise affirmance of the judgment, with costs. All concur.



NEW YORK TELEPHONE CO. v. DE NOYELLES BRICK CO. et al.

(Supreme Court, Appellate Division, Second Department. January 24, 1913.)

1. EMINENT DOMAIN (§ 119*)—USE OF HIGHWAY FOR TELEPHONE AND TELEGRAPH LINES—COMPENSATION TO OWNER—NECESSITY.

An owner of a fee of a highway is entitled to compensation for the use of the highway for a telephone or telegraph line.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 304-314; Dec. Dig. § 119.*]

2. EMINENT DOMAIN (§ 232*)—AWARD OF COMPENSATION—COMMISSIONERS—VIEW.

It is the duty of the commissioners in condemnation proceedings to view the premises, in addition to hearing the parties and their witnesses, to determine the amount of the compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 590, 591; Dec. Dig. § 232.*]

3. EMINENT DOMAIN (§ 262*)—AWARD OF COMPENSATION—EXCESSIVE COMPENSATION.

It is not customary for the court, on appeal from an order confirming the report of commissioners in condemnation proceedings, to interfere with the award on the ground that it is excessive, unless an erroneous theory has prevailed in arriving at the value of the premises and the damages sustained by the portion not taken.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 681-686; Dec. Dig. § 262.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. EMINENT DOMAIN (§ 202*)—COMPENSATION—EVIDENCE—ADMISSIBILITY.

An owner, whose land is sought to be taken under condemnation proceedings, has a right to show the highest utility of the premises, and to point out the adaptability thereof for village lots and the possibilities of the improvement thereof, to show, with the opportunities for improvement, the present market value.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 541; Dec. Dig. § 202.*]

5. EMINENT DOMAIN (§ 262*)—COMPENSATION—EXCESSIVE COMPENSATION.

Where the commissioners in condemnation proceedings viewed the premises, and did not entertain any erroneous theories as to the amount of the compensation, and there was nothing to indicate that the amount awarded was increased by speculative testimony, the award, affirmed by the trial court, would not be disturbed on appeal, merely because of the admission of speculative testimony.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 681-686; Dec. Dig. § 262.*]

Thomas and Carr, JJ., dissenting.

Appeal from Special Term, Rockland County.

Proceedings by the New York Telephone Company against the De Noyelles Brick Company and others to condemn land for a right of way. From an order confirming the report of the commissioners, petitioner appeals. Affirmed.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

Alexander Cameron, of New York City, for appellant.

William McCauley, of Haverstraw, for respondents.

WOODWARD, J. This proceeding was instituted under the Condemnation Law for the purpose of acquiring a right of way for the plaintiff's telephone line over the lands of the respondent the De Noyelles Brick Company in the village and town of Haverstraw. The right of way as originally laid out called for a strip of land 16½ feet in width extending in a southerly direction from the northerly line of the respondent's land to the northerly line of land of Felix McCabe, a distance of something over 3,000 feet. About 10 feet of this proposed strip is within the highway, and about 6½ feet is within the defendant's inclosure, as are also five rectangular pieces of land of small dimensions to be used for anchorage purposes. There is likewise a strip of the same width extending in a southerly direction from the southerly line of the McCabe premises to the southerly line of the respondent's land, a distance of about 1,250 feet, and of this strip about 6½ feet is within the highway, and 10 feet outside of the same and upon the defendant's inclosure.

[1] It is conceded that the fee of the highway is in the defendant, the public having merely an easement for highway purposes, and since the case of *Eels v. A. T. & T. Co.*, 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640, there has been no question of the necessity of compensating the owner of the fee of the highway as a condition of making use of the same for the purposes of a telephone or telegraph line. The plaintiff is already maintaining a line of poles over a considerable

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

part of this property, though it is claimed by the respondent that this is merely as a licensee, and it is now proposed to erect 40 poles, about 5 feet higher than those in use at the present time, and to equip these poles with cross-arms, which are to carry not to exceed 50 wires, with 2 cables, with the necessary anchorages, braces, etc., to constitute what is known as a "trunk line." The easement requires the right to enter upon this strip at all times for the purposes of construction, reconstruction, and repairs. Some slight changes in the location of the highway have been made, so that the original description has been somewhat modified; but this has no bearing upon any question presented here, for we are merely considering the question of damages awarded, and which have been confirmed by the court at Special Term.

[2] The commissioners, as is their duty, have viewed the premises, and have had the parties and their witnesses before them, and the question now before us is whether the damages which they have awarded are so far excessive, under the evidence, as to call upon this court to interfere. The premises in question lie along the Hudson river. The highway is about 50 feet above the river level, and between the river and the highway the defendant maintains and operates an extensive brickyard, extending practically along the full front of the premises involved in this proceeding. To the west of the highway, at a distance of 200 to 400 feet approximately, is a line of railroad, and this railroad is at an elevation of about 50 feet above the highway, the intervening property being rough and uneven, with large holes or depressions, excavated in an effort to find further clay for the use of the brickyards. The plaintiff's proposed telephone line runs along the westerly side of this highway, and takes a portion of the defendant's frontage outside of the highway for the use of the plaintiff. The premises appear to be at the outskirts of the village of Haverstraw, and from the photographs in evidence it would seem that there was little to appeal to the æsthetic sensibilities of proposed purchasers, and yet we have all witnessed some of the wonderful transformations of recent years, and it is difficult to determine from photographs, without much other testimony relating to distances from New York and other matters entering into values of real estate, whether error has been committed in passing upon the damages to result from the construction of a heavy service telephone line in front of this property.

[3] The commissioners have awarded \$2,500, and to this has been added the costs and an additional allowance of 5 per cent. by the order of the court from which this appeal is taken, so that it appears that the plaintiff is called upon to pay over \$2,500 for a right of way of less than one mile. This looks like a large sum for the damages which the defendants will sustain, and yet in a condemnation proceeding, where the owner is entitled to that "just compensation" which the Constitution demands, it is not customary for this court to interfere, unless it appears that an erroneous theory has prevailed in arriving at the value of the premises and the damages to be sustained by the portion not taken.

[4] The point most seriously urged against the award is that the

witnesses for the defendant were permitted to give evidence of the fact that the defendant had some time previously laid out the premises between the highway and the railroad into lots, and that these lots had a certain value per lot, somewhat contingent upon the statement of some of the officers of the defendant company that it was intended to create an artificial lake in the places where the excavations above noted had been made. It is true, of course, that evidence has been held incompetent where it has been sought to show what property might realize in rentals with important improvements made thereon; but this case does not seem to come within the condemnation of that rule. Here the defendants had a right to show the highest utility of the premises—had the right to point out its adaptability for village lots and the possibilities of its improvement, not for the purpose of showing the value of the lots with the improvement made, but to show with the opportunities for improvement the present market value.

[5] Assuming that, strictly speaking, the evidence was open to objection, in that it introduced some element of speculation, still the award does not show any considerable evidence of having been affected by the testimony of the experts. The lowest estimate of any of the experts fixes the damages at approximately \$3,000, and the others range very much higher, while the award is only \$2,500. Assuming, then, that the experts took into consideration the proposed lake—and their testimony merely goes to the length of showing that they had the possibilities of such a lake, as bearing upon the value, in mind—it could hardly have influenced their judgment to the extent of \$500 or more in the matter of damages, and this much approximately has been deducted by the commissioners from the estimate of the lowest of the experts in making their award. The commissioners, viewing the property and charged with the duty of awarding just compensation, are not shown to have entertained any erroneous theories in reference to the matter. There is nothing to indicate that the amount of the award has in any manner been increased by the so-called speculative testimony, and we discover no reason why the order appealed from should not be affirmed.

The order appealed from should be affirmed, with costs.

JENKS, P. J., and RICH, J., concur. THOMAS and CARR, JJ., dissent, on the ground that the award is excessive, and also upon the ground that the evidence of the experts is based upon assumptions of fact not proven.

DAYMON v. WESTCHESTER ST. R. CO.

(Supreme Court, Appellate Division, Second Department. January 24, 1913.)

1. APPEAL AND ERROR (§ 215*)—REVIEW—ESTOPPEL TO ALLEGE ERROR.

In an action for ejection from a street car for failure to pay a second fare demanded, where the court charged at defendant's request that if the defendant charged two fares on the advice of counsel that it had the legal right to do so, and believed in good faith that it was authorized to do so, and the conductor believed that it was his duty to collect a sec-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ond fare, there was no intentional offense, and plaintiff could only recover compensation, and also charged at plaintiff's request, with the consent of defendant, that if the defendant expressly authorized its conductor to eject passengers for refusing to pay a second fare, and in so doing acted with malice, the jury may consider this by way of awarding plaintiff smart money or exemplary damages, the acquiescence of the defendant in the latter charge amounts to a concession that there was some evidence from which the jury might find the facts suggested.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215.*]

2. CARRIERS (§ 382*)—EJECTION OF PASSENGER—DAMAGES.

The fact that a carrier acts on the advice of counsel in ejecting a passenger for refusal to pay a second fare goes only to the mitigation of damages, and not to the right to recover exemplary damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1478, 1483-1491; Dec. Dig. § 382.*]

3. CARRIERS (§ 382*)—EJECTION OF PASSENGER—DAMAGES.

That a conductor, in ejecting a passenger who had paid all that the law required him to pay, acted in good faith and in the honest belief that the passenger was not entitled to further transportation without additional fare, does not affect the right to compensatory damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1478, 1483-1491; Dec. Dig. § 382.*]

4. CARRIERS (§ 382*)—EJECTION OF PASSENGER—DAMAGES.

The right of a passenger, wrongfully ejected for failure to pay a second fare, to compensatory damages, includes compensation for loss of time and the amount the passenger was obliged to pay for passage on another car, and also suitable recompense for injuries to his feelings.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1478, 1483-1491; Dec. Dig. § 382.*]

Jenks, P. J., dissenting.

Appeal from Westchester County Court.

Action by William D. Daymon against the Westchester Street Railroad Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

William Greenough, of New York City, for appellant.

William L. Rumsey, of White Plains, for respondent.

WOODWARD, J. The plaintiff, a real estate dealer, became a passenger upon one of the defendant's cars on the 12th day of August, 1910, intending to travel from Mamaroneck to White Plains. He paid a 5-cent fare, which was the amount lawfully due from him for the continuous trip to White Plains, though at the time the defendant company was insisting that it had a right to exact two fares of 5 cents each from all passengers, under the terms of a franchise which had been superseded by the one in use at the time this action arose. When the plaintiff had proceeded about half way to White Plains, he was approached by the conductor, who demanded a second fare of 5 cents. This the plaintiff refused to pay, and he was ejected from the defendant's car. It appears from the evidence that but little force

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was used, yet there was some force applied to the person of the plaintiff; both the conductor and motorman participating. Plaintiff waited for a second car, became a passenger thereon, and continued his journey to White Plains, having been delayed about 20 minutes. Later in the day he became a passenger on another of the defendant's cars to return to his home in Mamaroneck, and was again ejected from the car for refusing to pay a second fare. This time he walked to his home. This case involves the two causes of action, and the jury has awarded a verdict of \$500; the defendant appealing to this court from the judgment entered upon such verdict.

[1] The learned court charged the jury at the request of defendant's counsel that:

"If the evidence shows that the defendant charged and collected 10 cents for a continuous ride between White Plains and Mamaroneck, in either direction, upon the advice of counsel that it had the legal right to do so, and believing in good faith that it was authorized to charge and collect the 10-cent fare under the expressed terms of the consent granted by the village of Mamaroneck on March 2, 1908, and the evidence also shows that the conductor believed that it was his duty to collect the second fare of 5 cents in accordance with instructions received from the officers of the company, that there was no intentional offense committed and the jury cannot award any sum to the plaintiff, in addition to compensation for his loss of time, the amount which he was obliged to pay for passage upon another car and injury done to his feelings, as punishment for the defendant."

This undoubtedly was as favorable to the defendant as it could expect, being its own request, and subsequently it was modified; the court saying:

"I will charge at the request of plaintiff's counsel, with the consent of the defendant's counsel, that if the jury find that the defendant expressly authorized its conductors to eject passengers for refusing to pay the 10-cent fare between Mamaroneck and White Plains, and vice versa, and if you find that the defendant in directing the passengers so to be ejected acted with malice, that is to say, recklessly or wrongfully without regard to the rights of the plaintiff or the people in general, then you may take into consideration this disregard by way of awarding the plaintiff smart money or exemplary damages. Smart money damages are intended to punish a defendant for doing wrong."

The court then charged several requests made by defendant's counsel, in a measure modifying or limiting the charge as quoted, but without changing its substance in so far as it related to the giving of exemplary damages. The effect of this charge, acquiesced in by the defendant, must be to concede that there was some evidence from which the jury might find the facts suggested. Indeed, it is conceded that the defendant did direct its conductors to eject all passengers who refused to submit to the illegal exaction, and the only justification urged for this disregard of the rights of the public to the service of this public service corporation at the rates fixed by law is the alleged advice of counsel that it had a right to collect double the amount, and that the order of ejectment was made for the purpose of enforcing the collection of 10 cents in the place of the 5-cent fare, which the defendant's predecessor had been accustomed to receive for years.

[2] There is nothing to show that the advice of counsel was given

upon a full statement of all of the facts, and, if it was, it only goes to the mitigation of damages (Moak's Underhill on Torts, 228), not to the rule of law acquiesced in by the defendant, and, if these facts were found by the jury, it was conceded that they might impute that malice which is necessary in the awarding of punitive damages, so that it does not appear that the defendant has any very substantial grounds for this appeal.

[3] The damages for two ejectments, concededly unlawful, has been fixed at \$500, and even on the basis of compensatory damages it would not be difficult to justify the amount of the verdict. There is no question that a man who, in good faith, becomes a passenger upon a car of a public service corporation, and pays all that the law requires him to pay, has a right to be transported free from molestation or annoyance. This right would not be impaired by showing that the conductor acted in good faith, in the honest belief that the plaintiff had no such right, and that he was acting in the strict performance of his duty to the defendant. The act, nevertheless, was unlawful, and, being so, the plaintiff had a right to compensatory damages therefor.

[4] These included, not only compensation for the loss of time and the amount the plaintiff was obliged to pay for passage upon another car, but in addition thereto the injury done to his feelings might be taken into consideration by the jury and a suitable recompense given therefor. *Hamilton v. Third Avenue Railroad Co.*, 53 N. Y. 25, 28; *Gillespie v. Brooklyn Heights R. R. Co.*, 178 N. Y. 347, 360, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503. It is the lawful duty of a passenger to pay the full amount of the fare which the law permits the railroad company to exact, and the ejectment of a passenger, in the presence of his fellow passengers, for a refusal to pay his fare, is in effect an accusation against him of an attempt to avoid his lawful obligations, a humiliation which could not fail to be trying to one of a sensitive disposition, with an inclination to maintain his rights. Just what the measure of damages in such a case should be is difficult to determine. It is left to the judgment of the jury, subject to the power of the court to interfere and set the verdict aside if it is obviously improper, and we do not think this is a case for interference.

The defendant concededly authorized its conductor to eject passengers who refused to submit to an illegal exaction. It was not a mere error in an individual case, as in *Hamilton v. Third Avenue Railroad Co.*, *supra*, but was a general policy of the defendant; and a mistake of law on the part of a corporation cannot be permitted to deprive the public of its rights, or to subject individuals to humiliation and inconvenience merely because they are unwilling to submit to such exactions, and in view of the charge of the court, to which the defendant consented, we ought not to disturb this judgment, even though it should involve some element of exemplary damages.

The judgment and order of the County Court of Westchester County should be affirmed, with costs. All concur, except JENKS, P. J., who reads for reversal.

JENKS, P. J. I dissent. I think that the damages are excessive. The offending of the defendant was a refusal to carry the plaintiff for a 5-cent fare, when the defendant thought it could charge legally a 10-cent fare. Its attitude, as I understand it, was taken on its belief of right, and was neither defiant nor contemptuous. The plaintiff intended by his refusal to make "a test case," and the defendant responded to his invitation by refusal to accept the 5 cents, and, upon the plaintiff's counter refusal to pay 10 cents, by expulsion in a manner which the plaintiff admitted was perfunctory and polite. There is no proof of any personal injury, or any consequent pecuniary loss. The plaintiff did lose a few moments, and was not allowed in one instance to complete his journey. The actual damages were almost negligible. And there was nothing in the act of the defendant which justified the award of smart money in any such substantial sum as is represented by the verdict in this case.

In re WINKLER.

(Supreme Court, Appellate Division, First Department. January 10, 1913.)

1. ATTORNEY AND CLIENT (§ 189*)—COMPENSATION—CONTRACTS FOR COMPENSATION.

Where an agreement of retainer contains no void clause prohibiting the client from settling without the attorney's consent, the attorney's compensation upon a settlement by the client is limited by the agreement, and he cannot recover on quantum meruit more than the stipulated amount.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 407-411; Dec. Dig. § 189.*]

2. ATTORNEY AND CLIENT (§ 189*)—LIEN—LIABILITY OF ADVERSE PARTY.

In an action for conversion of personal property, plaintiff agreed to pay her attorney \$200 and one-third of the sum collected, or, if the chattels were returned to plaintiff, one-third thereof in specific enumerated articles. Defendant set up an innkeeper's lien on the property for \$1,500. Without the attorney's knowledge, the case was settled by plaintiff paying defendant \$850 and accepting a return of the property. *Held*, that plaintiff's attorney could not enforce his attorney's lien against defendant without establishing plaintiff's right to recover in the action and collusion by the parties to deprive him of his fees, since his lien did not attach to the amount paid by plaintiff to defendant, and, if it attached to the chattels, defendant was not required to retain a possession which by such payment had become unlawful, to aid the attorney in enforcing his lien.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 407-411; Dec. Dig. § 189.*]

3. ATTORNEY AND CLIENT (§ 189*)—LIEN—NOTICE.

Where, in an action for conversion of chattels, plaintiff agreed to pay her attorney one-third of the amount recovered, or, if the chattels were returned, one-third thereof in specific enumerated chattels, defendant was charged with notice of the attorney's lien on the cause of action for conversion, but not with notice of his right to specific chattels.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 407-411; Dec. Dig. § 189.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Special Term, New York County.

Summary proceeding under Judiciary Law, § 475, by Max H. Winkler, an attorney and counselor at law, against the Onward Construction Company and another, for a determination and enforcement of his attorney's lien. From an order confirming the referee's report, the defendant named appeals. Modified.

See, also, 146 App. Div. 927, 131 N. Y. Supp. 124.

Argued before INGRAHAM, P. J., and LAUGHLIN, CLARKE, SCOTT, and MILLER, JJ.

M. Mackenzie, of New York City, for appellant.

Frederick H. Sanborn, of New York City, for respondent.

MILLER, J. The respondent was retained by one Sophia Nugent to bring an action against the appellant, the Onward Construction Company, for the conversion of certain chattels, household furniture, personal effects, and the like, of the alleged value of upwards of \$8,000. His agreement with his client provided that he should be paid \$200, and in addition thereto one-third of whatever sum might be collected, or, if the chattels were returned to the plaintiff, one-third thereof in specific articles, which were enumerated in a supplemental agreement. The action was brought, and the defendant interposed an answer, in which it set up as a separate defense that it had an innkeeper's lien for upwards of \$1,500. The action was brought on for trial; but, the plaintiff being unable to prove the value of the chattels, a juror was withdrawn and the case was set for trial on a subsequent date. Meanwhile the case was settled, without the knowledge of the respondent, by the plaintiff paying the defendant the sum of \$850 and accepting a return or surrender of the property.

Thereafter this proceeding was instituted solely against the appellant. On an appeal to this court, the order of reference was modified, so as to direct that said Sophia Nugent be made a party to the proceeding, and so as to provide that the referee take proof as to the value of the property which was the subject of the controversy; the matters relating to the contract of employment of the petitioner by the plaintiff in said action, the nature and extent of his services, and the amount of compensation to which he was entitled for his services. The referee found that the value of the property was \$1,200, that the value of the petitioner's services was \$1,200, and his disbursements \$25, and that the petitioner was entitled to recover upon a quantum meruit by reason of his client having settled the action without his knowledge or consent. The order appealed from adjudges that the petitioner is entitled to a lien to the extent of \$1,200, and adjudges that he recover that sum of the appellant, the Onward Construction Company, together with costs and disbursements, amounting in all to the sum of \$1,617.05.

[1] We think that, in any event, the contract between the petitioner and his client limits the amount for which he is entitled to assert a lien. The learned referee cited *Matter of Snyder*, 190 N. Y. 66, 82 N. E. 742, 14 L. R. A. (N. S.) 1101, 123 Am. St. Rep. 533, 13 Ann. Cas. 441, in support of the conclusion that the petitioner was

entitled to assert a lien for the full value of his services. It was decided in that case that a clause in an agreement of retainer, prohibiting the client from settling without the consent of the attorney, was void as against public policy, and that in the particular contract under consideration the clause fixing the amount of the attorney's compensation at a certain percentage of the recovery was so closely connected with the void clause as to fall with it. We think it necessarily follows that a settlement by the client without the attorney's consent is not a breach of the agreement of retainer, and that, if such agreement does not contain a void clause, prohibiting a settlement, the stipulated method of computing the compensation to be paid the attorney for his services must control, even though the suit is settled without his consent. It follows that the petitioner was entitled to assert a lien only to the extent of \$625.

[2] We are also of the opinion that the provision of the order directing a recovery of the appellant should be eliminated. Plainly, it was not in accordance with the order of reference as resettled by this court, and it was not justified by the facts of this case, even if it is ever proper in a summary proceeding under said section 475 of the Judiciary Law (Consol. Laws 1909, c. 30) to direct a recovery of the adverse party of the sum for which the attorney is adjudged to have a lien on his client's cause of action. Vide *Rochfort v. Metropolitan St. Railway Co.*, 50 App. Div. 261, 63 N. Y. Supp. 1036.

The appellant, the defendant in the action, did not pay any sum in settlement of the action to which the lien might attach, and which, under the authority of *Fischer-Hansen v. Brooklyn Heights R. R. Co.*, 173 N. Y. 492, 66 N. E. 395, it would be estopped to deny that it still had in its hands. It never admitted the plaintiff's cause of action, and it never asserted title to the property which it was charged with converting. It merely asserted a lien upon that property, and, instead of paying money to the plaintiff in settlement of the suit, it received from the plaintiff in satisfaction of its lien a lesser sum than it claimed. Having accepted the sum agreed upon in satisfaction of the lien, it could not refuse to surrender possession of the property without being guilty of conversion. To what, then, did the lien attach? Certainly not to the sum paid by the plaintiff to the defendant to satisfy the lien asserted by the latter, and, if it attached to the chattels, the defendant was not required to retain unlawful possession of them to aid the attorney in the enforcement of his lien.

[3] No doubt, as between the respondent and his client, he was entitled to the specific articles enumerated in the supplemental agreement. But the defendant was not chargeable with notice of that agreement. It was chargeable with notice of lien upon the cause of action asserted by the plaintiff, which was an action to recover a sum of money as damages for conversion. If the appellant made a collusive settlement with the client, to cheat the attorney out of his fees, it could, no doubt, in a proper action or proceeding and upon proper proof, be held accountable to the extent of the attorney's lien on the cause of action asserted in the complaint; and the practice formerly was in such case to set aside the discontinuance and allow the attor-

ney to proceed with the suit for the purpose of establishing the right to recover in the action as it originally stood and to permit a recovery to the extent of the attorney's costs. *Randall v. Van Wagenen*, 115 N. Y. 527, 22 N. E. 361, 12 Am. St. Rep. 828.

Plainly, then, where the adverse party does not admit the cause of action and pays nothing in settlement of it, but merely agrees upon a discontinuance, or where, as here, he accepts satisfaction of a lien asserted by him on chattels which he thereupon surrenders, no longer having even a claim of right to retain them, the attorney, in order to enforce a claim against him, must establish two things: (1) The right of the plaintiff to recover in the action; and (2) that the parties colluded to deprive him of his fees. It is unnecessary for us to determine how the petitioner should proceed to enforce his claim against the appellant, if he have any; but it is sufficient for the purposes of this decision to hold that he has not established in this proceeding the right to recover any sum of the appellant. He has succeeded merely in having the amount of his lien determined, which, of course, will be conclusive upon the parties in any subsequent proceeding or action which he may be advised to bring.

The order should be modified, so as to provide merely that it be adjudged that the petitioner is entitled to a lien upon the cause of action of the plaintiff, Sophia Nugent, in the action instituted in this court, entitled "*Sophia Nugent, Plaintiff, against The Onward Construction Company, Defendant*," to the extent of the sum of \$625, together with the costs and expenses of the reference, and, as thus modified, it should be affirmed, with \$10 costs and disbursements to the appellant, without prejudice to the respondent's right to institute such action or proceeding as he may be advised to enforce his lien. All concur.

DENARO v. PRUDENTIAL INS. CO. OF AMERICA.

(Supreme Court, Appellate Division, Second Department. January 24, 1913.)

1. WITNESSES (§ 211*)—COMPETENCY—PHYSICIAN.

Under Code Civ. Proc. § 834, providing that no physician shall disclose any information acquired in attending a patient which was necessary to enable him to act in that capacity, evidence by a physician in an action on a life policy that, in answer to a question by witness, who was called to treat insured, insured stated that he was in the care of another physician and told his trouble, and that insured was at the time coughing and had bled badly, and said he had been sick for a long time, was not admissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 768, 773; Dec. Dig. § 211.*]

2. WITNESSES (§ 214*)—COMPETENCY—PHYSICIANS.

Under Code Civ. Proc. § 834, prohibiting the disclosure of information acquired by a physician necessary to enable him to act professionally, the fact that disclosures by a patient to his physician were made in the presence of members of the patient's family would not authorize the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

physician to testify thereto; the rule that communications to attorneys, made in the presence of others, are not privileged, not being applicable.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 776; Dec. Dig. § 214.*]

3. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, in an action on a life policy, defended for fraud by insured, one issue was as to fraud in that the applicant and the person examined were not the same, and it appeared that the supposed applicant was examined by the company's physician, proof by defendant that insured had falsely stated that he had not been examined by a physician during three years past would not render harmless the erroneous admission of evidence by insured's physician of statements to him by insured as to the nature and extent of his present and past illness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

4. INSURANCE (§ 646*)—ACTION ON POLICY—FRAUD—PRESUMPTION.

Fraud by insured in applying for a life policy is not presumed, and must be proved.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.*]

Appeal from Trial Term, Kings County.

Action by Marianna Denaro against the Prudential Insurance Company of America. From a judgment for defendant, and an order denying a motion for a new trial, plaintiff appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

William H. Griffin, of New York City, for appellant.

Alfred M. Bailey, of New York City, for respondent.

WOODWARD, J. The complaint sets forth a cause of action on a policy of insurance issued upon the life of one Francesco Denaro, whose mother is the plaintiff in this action. The defendant set up an affirmative defense, alleging fraudulent representations on the part of Francesco Denaro, in that prior to his medical examination, and at the time thereof, he was not in good health; that he had been advised to seek a change of climate for his health; that he had had a serious illness; that he had been attended by a physician during the past three years, all of which facts were known to him; and that the defendant, relying upon the truth of these representations so falsely made by the said Francesco Denaro, was induced to issue and deliver to him its policy of insurance upon his life. It is also asserted by the insurance company that at the time of the medical examination, made by the medical examiner of the defendant, a person other than Francesco Denaro, the applicant for insurance, falsely impersonated him, and was examined for insurance in the defendant company, and signed said application, forging the name of Francesco Denaro thereto. The action was tried before a jury, resulting in a verdict in favor of the defendant, and there would seem to be no question that this verdict is fully supported by the evidence.

[1] The difficulty is that there are material errors in the admission

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of evidence, and, as the verdict is general, we are unable to say that the jury would have found the fraud in this case, had it not been for the evidence which was permitted to go into the record. The defendant, in support of its defense, called three physicians, who testified that they had been called by Francesco Denaro, and that they had treated him professionally, and these physicians severally testified to the fact that he had been ill, and had been treated by them within the time that the insured denied having been so treated in securing his policies, and also that he had been in a hospital, and other matters tending to show that his statements as to his condition were false, and that he must have known them to be false. This evidence was all admitted over the plaintiff's objection that it was incompetent under the provisions of section 834 of the Code of Civil Procedure, and the objections were followed by exceptions to the rulings admitting such testimony. There was, therefore, no waiver of the plaintiff's rights, and there is no suggestion that these physicians did not come within the limitations of the statute.

The learned counsel for the respondent urges, however, that it was not error to permit this testimony of the physicians employed by the deceased, and cites *Patten v. United Life & Accident Insurance Association*, 133 N. Y. 450, 31 N. E. 342, in support of the contention. In that case no objection was made to the admission of the testimony on the ground that it violated section 834 of the Code of Civil Procedure, and the court went no further than to hold in that particular case that it would have been competent to show by the physician under examination upon a commission that he attended the deceased professionally, that the patient was sick, and the number of times and the dates of such attendance. Obviously none of these matters were necessarily excluded by the statute, which provides that a "person duly authorized to practice physic or surgery, or a professional or registered nurse, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity," etc. Section 834, Code of Civil Procedure. The information must be disclosed to the physician in his professional capacity, and be "necessary to enable him to act in that capacity"; and while it may be conceded that the fact of sickness, without disclosing its particular character, comes pretty close to the line, if such sickness is disclosed to the doctor in his professional capacity, and is necessary for his information in dealing with the case, there is clearly no objection to the physician testifying that he did attend a person in his professional capacity, for this is necessary to be shown in order to exclude his testimony as to what information he gathered in the discharge of his professional duties, and if he may testify as to the fact of an original attendance, he may properly state the number of times and the dates of such attendance.

In the case at bar, however, the testimony went much beyond this. One of the physicians, over the specific objection of the plaintiff that it was incompetent under this provision of the Code of Civil Proce-

dure, was permitted to testify to a conversation with the insured, as follows:

"I asked him how long he was sick, and he told me that he was in the care of another physician, called about two days before, Dr. Collaria. He told me what was his trouble. He was coughing, had some bad bleeding, and I examined him. He said that he was sick for a long time before he called me."

[2] A motion was made to strike this testimony out (the right being reserved in the ruling on the original objection), but the motion was denied; the plaintiff excepting. Subsequently two of these physicians were called and testified more in detail, stating that the insured had admitted being infected with syphilis for three years; but it is urged that these communications were made to the physicians in the presence of the insured's father or others near, and that under the rule which prevails in reference to attorneys, where communications are made to them in the presence of third parties, it loses the character of a confidential communication, that this testimony is not objectionable. We do not think, however, that the situations are analogous. Where a client visits his attorney with an opposing party, and they all enter into a general discussion, or the attorney is asked to become a witness to the execution of a paper, etc., there is an obvious intent to make the communication public; but when a physician enters a house for the purpose of attending a patient, he is called upon to make inquiries, not alone of the sick person, but of those who are about him and who are familiar with the facts, and communications necessary for the proper performance of the duties of a physician are not public, because made in the presence of his immediate family or those who are present because of the illness of the person. Of course, the persons who are present are not denied the right to testify. It is only the physician who is bound by the rule; but it is absolute as to him, except in those exceptions provided by the statute. He is forbidden, not to reveal communications from his patient, but "any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity"; and it is of no consequence how the information was acquired, whether by some one telling him, or by observation, or in any other manner. Earl, J., in writing the unanimous opinion of the court in *Renihan v. Dennin*, 103 N. Y. 573, 579, 9 N. E. 320, 322 (57 Am. Rep. 770), distinctly overthrows this contention. He says:

"It is also claimed that the statute should be so construed as only to prohibit the disclosures by a physician of any information of a confidential nature obtained by him from his patient while attending him in a professional capacity. Such was the view of the statute taken by me in my opinion in *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564; but my Brethren were then unwilling to concur with me in that view. When the same question again came before the court in *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281, 36 Am. Rep. 617, I again attempted to enforce the same view upon my Brethren, and again failed, and it was then distinctly held that the statute could not be confined to information of a confidential nature, and that the court was bound to follow and give effect to the plain language, without interpolating the broad exception contended for."

While the contention is plausible, and has been held by one of the most distinguished jurists of the state, it is lacking in authority, and cannot prevail here.

[3] It is suggested, however, that it is sufficient to sustain this judgment that the defendant proved at the trial that Francesco Denaro had stated that he had not been attended by a physician during the past three years, whereas he had been treated by Dr. Bottaro on January 28, 1910, prior to the application on February 2, 1910, and that he knew that fact, and it is urged that this testimony was competent, and that under the holding of this court in *Hoffman v. Metropolitan Life Ins. Co.*, 141 App. Div. 713, 126 N. Y. Supp. 436, that a policy could not be enforced where the insured had stated that he had not been attended by a physician within three years, and had never been in a hospital, where in fact he had been a patient in a hospital for a month, and had been attended by a physician, this judgment should be sustained. In the case relied upon the court pointed out that the "accuracy of these statements was of great importance, since if the answer to these and similar questions indicated freedom from disease, in the case of policies of this character a medical examination of the applicant was dispensed with," and this condition does not appear here, for the supposed applicant was examined by the company's own physician, and one of the elements of fraud is alleged to have been that the person making the application, and the one examined, are not the same person.

[4] The policy provides that in the absence of fraud all statements shall be deemed representations, and not warranties, and it is the universal rule that fraud must be established, and is not to be presumed.

The judgment and order appealed from should be reversed, and a new trial granted; costs to abide the event. All concur.

MYERS v. STEIN et al.

(Supreme Court, Appellate Division, First Department. January 10, 1913.)

1. PLEADING (§ 125*)—SUPERFLUOUS ALLEGATIONS—DENIAL.

Where a member of a mining partnership pledged his interests in the mining property to a trustee to secure certain creditors, an allegation, in a complaint brought by the trustee to subject the property to the payment of the debt secured, that "no proceedings at law or in equity have been taken by the plaintiff for the enforcement of the provisions of the said agreement," was superfluous, as the action affected only personality, and hence a denial of such allegation raised no issue.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 259, 260; Dec. Dig. § 125.*]

2. ABATEMENT AND REVIVAL (§ 8*)—ANOTHER ACTION PENDING.

Where the maker of a note executed a trust instrument by which he pledged his interests in a mining partnership to secure the payment of the note and any other indebtedness owed by the maker to the payee, an action at law by the payee against the maker to recover on the note was not a bar to a subsequent action brought by the trustee to subject the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

maker's interests in the mining property under the terms of the trust instrument.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 30-56, 58-63, 68, 72; Dec. Dig. § 8.*]

3. MINES AND MINERALS (§ 99*)—MINING PARTNERSHIP—SALE OF PROPERTY.

Where a member of a mining partnership, being indebted to a copartner on certain notes, executed a trust agreement by which he pledged his interests in the mining property for the payment of the notes, it was no defense to an action by the trustee in the trust agreement that an advantageous offer to purchase the property was made by a third person, and that the copartner refused to join in the transfer and thus prevented a sale, the proceeds of which would have been more than sufficient to satisfy the indebtedness secured; such copartner not having agreed to sell the property, and it being immaterial as to what his motive was in refusing to sell.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 223, 224; Dec. Dig. § 99.*]

4. PLEADING (§ 120*)—DENIAL.

Where the allegations of the complaint in an action on promissory notes and a collateral agreement are not controverted by general or specific denial, they are not put in issue by statements in the answer merely inconsistent therewith.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 244, 253, 254, 257, 258; Dec. Dig. § 120.*]

5. EVIDENCE (§ 402*)—PAROL EVIDENCE—RULE.

Promissory notes cannot be varied by parol evidence, and consequently, in an action thereon, averments in the answer, merely attempting to change their terms, present no defense.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1799-1806; Dec. Dig. § 402.*]

6. PLEADING (§ 256*)—AMENDMENT—INSUFFICIENT ANSWER.

Where the answer does not deny any of the averments of the complaint, and all of the defenses set up are insufficient in law, no amendment will be permitted.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 761-763; Dec. Dig. § 256.*]

Appeal from Special Term, New York County.

Action by Emanuel J. Myers, as trustee for Alexander Stein and another, against George Wishart and another. From an order denying a motion for judgment on the pleadings, plaintiff appeals. Reversed, and judgment directed for plaintiff.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Gordon S. P. Kleeberg, of New York City, for appellant.
Robert A. Inch, of New York City, for respondents.

DOWLING, J. The complaint herein sets forth that on October 17, 1911, at the city of New York, the defendant Wishart for value received made his certain promissory note in writing, whereby he promised to pay to Alexander Stein on the 17th day of April, 1912, the sum of \$20,000, with interest, and that simultaneously therewith, for a valuable consideration he executed, acknowledged, and delivered to plaintiff an instrument in writing whereby said Wishart undertook

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to secure the payment of certain obligations, and therein and thereby plaintiff was appointed trustee for the benefit of the defendants herein, with the powers and duties therein set forth. Copies of said note and instrument are annexed to the complaint. It is then alleged that on January 20, 1911, Wishart, for value received, made another promissory note in writing, whereby he promised to pay to Alexander Stein the sum of \$20,000, with interest, in one year from said date, and delivered same to Stein, and that no part has been paid. It is further alleged that the first-mentioned note was not paid, and that Stein required plaintiff to take proceedings under the conditions of the note, by which the trustee was given power to realize upon the collateral deposited under the agreement referred to, by proper proceedings at law or in equity; the security being given to secure payment, not only of the note due April 17, 1912, but of any other liability of Wishart to Stein. The complaint further sets forth that plaintiff demanded payment of \$20,000 due under the note and the performance of its conditions, but defendant has failed to comply therewith. There is an allegation (sixth):

"That no proceedings at law or in equity have been taken by the plaintiff for the enforcement of the provisions of the said agreement (Exhibit B)."

Judgment is prayed that the property mentioned in the agreement (consisting of Wishart's right, title, and interest in the mining partnership existing between Thomas Costigan, John Godfrey, and George Wishart in certain mining claims in the Porcupine district of Canada) be foreclosed and sold under the order and direction of the court, and the proceeds applied towards the payment of the obligations of Wishart to Stein secured and provided to be paid by the parties as aforesaid.

[1, 2] The amended answer of Wishart denies but one allegation of the complaint, viz., the "sixth," before quoted, and further sets up another action at law pending between the same parties upon the promissory note dated January 20, 1911, but which action is brought by Alexander Stein against George Wishart. The denial raises no issue. The presence of the allegation in the complaint was superfluous, for this action affects only personalty. In any event, the allegation was nonissuable, and the denial thereof is not sufficient to require a trial of the issue. *Riesgo v. Glengariffe Realty Co.*, 116 App. Div. 415, 101 N. Y. Supp. 832. The other action pending, which is pleaded as a bar to this, is not between the same parties. It is not upon the identical cause of action, nor does it seek, nor can it afford, the same relief.

[3] The amended answer then proceeds to set up a separate and distinct defense by way of offset, upon averments that Stein, being a joint owner with Wishart, Costigan, and Godfrey of the mine in question, a purchaser was obtained therefor who was willing, able, and ready to pay \$165,000 therefor, subsequently raising his offer to \$200,000, in the event of a sale, at which price Wishart would have realized about \$80,000 as his share, but that Stein refused to sell, saying the mine was worth at least \$500,000, by reason of which the

sale was lost, as it required the consent of all the owners to sell the mine, and that Stein "knew that his refusal would prevent said sale"; that the other owners were ready to sell, but that the "willful" refusal of Stein to sell has damaged Wishart in the sum of \$80,000. As there is no allegation that Stein had ever agreed to make this sale, or induced the parties concerned to rely upon any representation of his to their detriment, we fail to see how his assertion of his legal right can furnish the basis of any claim against him. He was one of the owners of the mine. He could sell his interest, or not, as he saw fit. He could refuse to sell, save at what he deemed a proper price. His motive in so doing was immaterial. There is no denial of any of the allegations of the complaint contained in this separate defense, and it is insufficient.

[4] For a further and distinct defense the amended answer then (still without any denials of the allegations of the complaint) sets up that Wishart, Stein, and one Whitney, being the owners of the stock of a Canadian corporation known as the Welch Mine, Limited, agreed to raise the balance of the purchase price of the mine and the money required for its development, and that Stein offered to contribute \$40,000 thereto, provided Wishart and Whitney would deliver to him their respective notes for \$20,000 each, secured by the stock owned by them. It is further alleged:

"Twelfth. That defendant and said Whitney thereupon abandoned their intention to sell their stock, and did each make his note to said Stein for twenty thousand (\$20,000) dollars, and did deliver the same to said Stein upon the expressed condition that said Stein would hold said notes until the sale of the control of said company then in his possession, and that said Stein would thereupon satisfy said notes, with interest, from the proportionate part of the proceeds of said sale, accounting to the defendants and Whitney for any surplus, and would not seek to enforce said notes in any other manner unless after such sale a deficiency should arise. That defendant and said Whitney, at the time of said conditional delivery of said notes, delivered to said Stein all their stock in said corporation as collateral security for said notes."

It is then set forth that:

"Stein bought Whitney's stock from him by the return of his note, but refused to buy Wishart's stock, although requested, and that Stein has not sold the control of the corporation, and therefore has not performed the conditions by which alone, he would be entitled to enforce the note herein."

The allegations of the complaint, not being directly controverted by a general or specific denial, are not put in issue by a statement merely inconsistent with those facts, or from which a denial may be implied or inferred. *Rodgers v. Clement*, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. Rep. 342.

[5] The note is set forth in full as an exhibit annexed to the complaint. It is complete upon its face. It is a note secured by collateral, and the agreement governing the realization thereupon is annexed as well. The note contains a definite date of payment. The defense attempted to be set up does not deny the existence of the indebtedness, does not deny the note was given for value received, does not claim that it was void ab initio, and does not assert that it was to

become void in the happening of certain eventualities. It is simply an attempt to vary the terms of the note and the trust agreement accompanying it, by postponing the time of payment set forth in both instruments, which upon their face appear to constitute a complete agreement. This cannot be done. *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961; *McKeige v. Carroll*, 120 App. Div. 521, 105 N. Y. Supp. 342. The cases cited by respondent do not apply, for there the defense was that the notes sued upon were never to become valid, enforceable obligations until certain contingencies occurred. No such issue is presented here.

[8] Inasmuch as defendant has not attempted, either in his original or amended answer, to deny any of the averments of the complaint, and the defenses which he has sought to interpose are insufficient in law, there seems to be no necessity for giving the defendant leave to plead anew.

The order appealed from will therefore be reversed, with \$10 costs and disbursements, and judgment directed in favor of plaintiff upon the pleadings, with \$10 costs. All concur.

TUSCARORA CLUB OF MILLBROOK v. BROWN.

(Supreme Court, Appellate Division, Third Department. December 30, 1912.)

1. VENDOR AND PURCHASER (§ 230*)—BONA FIDE PURCHASER—NOTICE.

An owner of premises through which a stream flowed conveyed them to his mother to secure obligations to her. After payment of the obligations, she, under his directions, conveyed the premises by deed which reserved to him the right to fish in the stream. A remote grantee claiming under the deed gave a mortgage which described the premises and for a more particular description referred to deeds containing the reservation. *Held* that, whether the clause in the deeds was an exception or a reservation, a purchaser from one acquiring title under a foreclosure by deed referring to the deeds in the chain of title for a description was chargeable with notice of the fishing rights of the owner.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 502-512; Dec. Dig. § 230.*]

2. NOTICE (§ 6*)—CONSTRUCTIVE NOTICE.

Where one is put on inquiry, he is chargeable with the knowledge which he reasonably would have obtained on inquiry.

[Ed. Note.—For other cases, see *Notice*, Cent. Dig. §§ 4-7; Dec. Dig. § 6.*]

3. VENDOR AND PURCHASER (§ 242*)—BONA FIDE PURCHASER—NOTICE.

Where a mother obtained from her son a conveyance of his real estate to secure the payment of his indebtedness to her, she had no title after the payment of the debt, and one claiming title through her must show that she was authorized by the son to convey or that he is a purchaser in good faith without notice, relying on the conveyance.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 603-605; Dec. Dig. § 242.*]

4. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASER—NOTICE—RECORDING ACT.

The recording act is intended solely to protect a purchaser from an apparent owner against a prior deed or mortgage which has not been

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

recorded, and does not apply to a purchaser claiming title under a deed referring to deeds containing reservations in the chain of title, and he is chargeable with notice of such reservations.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 487, 513-539; Dec. Dig. § 231.*]

Appeal from Special Term, Delaware County.

Action by the Tuscarora Club of Millbrook, N. Y., against William H. Brown. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before SMITH, P. J., and KELLOGG, BETTS, HOUGHTON, and LYON, JJ.

Davies, Auerbach, Cornell & Barry, of New York City (Charles W. Hotchkiss, of counsel, and Harold Harper, of New York City, on the brief), for appellant.

Andrew C. Fenton, of Margaretville, for respondent.

JOHN M. KELLOGG, J. The court was justified in finding that: The defendant, the owner of the premises in question, through which the Millbrook stream flowed, on the 15th day of November, 1883, deeded the premises, which were described as 14 acres, to his mother, by an ordinary quitclaim deed, reciting a consideration of \$24. At that time he was living with his mother, became embarrassed, and deeded this land to her, and gave her a bill of sale of all his personal property to secure obligations to her, which obligations were subsequently paid in full. February 24, 1885, after such obligations had been fully paid, she wrote him that she was offered \$25 for the fishing ground, and asked if he wanted to sell it. He replied that he would not sell the fishing ground, but if they wanted the ground, and let him have the fishing, they could have it for \$25, as he did not know that he would ever be back and need it, but he wanted it if he did come back, so that he could fish. If they wanted it, and would do that, he directed her to give them a deed. Pursuant to this direction the mother gave to Mrs. Carroll an ordinary quitclaim deed, which, after the description, contained the clause:

"Reserving the right to William H. Brown, Jr., to fish in said Millbrook stream."

Mrs. Carroll conveyed the premises to one Austin by an ordinary quitclaim deed, which contained the same provision. Austin, October 15, 1887, conveyed the premises to the De Silvas for an expressed consideration of \$25, describing them as 3 acres, the deed containing the same reservation, and on the same day the De Silvas mortgaged the premises to Austin for \$500 under a different description, describing the premises as containing 14 acres, more or less, with a clause:

"For a more particular description reference is had to a deed given by second party and wife to A. Ward De Silva and Joseph De Silva, bearing date September 14, 1887, and also to a deed given by second party and wife to A. Ward De Silva and Joseph M. De Silva, bearing date October 15, 1887; this conveyance being intended to cover the same lands, and all of them, mentioned and described in those two deeds."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

July 23, 1898, the premises were conveyed by a referee in mortgage foreclosure action to one Soop; the premises being described as bounded:

"Southerly by lands of Marcus Shavar, westerly by lands of Francis O'Connor, northerly by the highway leading to the Millbrook stream, easterly by lands in possession of William H. Brown and lands of Edward Cantwell, being about 14 acres of land, be the same more or less. For a more particular description reference is had to a deed given by second party and wife to A. Ward De Silva and Joseph M. De Silva, bearing date September 14, 1887, and also to a deed given by second party and wife to A. Ward De Silva and Joseph M. De Silva, bearing date October 15, 1887; this conveyance being intended to cover the same premises, and all of them, mentioned and described in these two deeds."

Soop conveyed to the National Bank by substantially the same description, except, in referring to the deeds which formally described the property, instead of the erroneous expression, "given by the second party and wife," it named Theopolus G. Austin and wife as the grantors. April 15, 1901, the bank conveyed to the plaintiff under substantially the same description contained in its deed of the premises.

[1] The court found that the reserving clause in the deed was an exception rather than reservation, and retained to the defendant the right to fish in the stream, on the theory that the deed from the defendant's mother was a mere mortgage, which had been satisfied, and that the defendant was the owner; the mother simply holding the naked title and having conveyed it to Mr. Carroll as his agent, and that therefore the deed left the fishing right in the defendant, just as it was prior to the Carroll deed. I do not think it material to consider whether it is a reservation or an exception. Clearly as between the defendant and his mother before the mortgage was paid, and more particularly after its payment, he had the clear right to fish in the stream. He never consented to a conveyance of that right, and it was not conveyed; the deed expressly reserving or excepting it. To fairly locate the land under the plaintiff's deed, a reference was necessary to the Austin deed, which contained this reservation. There was sufficient to put the proposed purchaser upon inquiry as to the defendant's rights. We do not know whether it made inquiry or not, or whether or not the prior grantors in the chain of title from Mrs. Brown made inquiry.

Plaintiff relies upon the acknowledgment, contained in the deed, that the consideration was paid, as its only evidence of good faith, without making any proof that it did not know of the reservation itself, and did not know of the facts and circumstances under which it was made. I think we may fairly assume that it made inquiries and ascertained the facts, but perhaps relied upon the technical rule that a reservation in a deed to a stranger was ineffectual, and therefore the defendant had no fishing rights. But we have seen that the defendant was really the grantor to Mrs. Carroll, and the recital in her deed either notified her of the defendant's rights or put her upon inquiry.

[2] Where a person is put upon inquiry, he must be charged with the knowledge which he reasonably would have obtained, had he made

inquiry; and, if such inquiry had been made, it would have appeared that the defendant owned the property, the mother holding merely the naked paper title, without any beneficial interest therein, and that she was making the conveyance for the defendant, and that therefore the reservation in the deed was in favor of the party really making the deed. If it had distinctly appeared as a matter of fact that the plaintiff never knew of this clause in the prior deeds, and never knew of any reservation of fishing rights, and paid the consideration, believing that it had an unincumbered title, the case might, perhaps, be different. In the absence of such proof I think it is fair to assume that it did know of the clause and made satisfactory inquiry with relation to it. I think, therefore, it bought subject to the defendant's fishing rights.

[3] As the defendant's mother had no title, the plaintiff cannot acquire title through her, except by showing: (1) That she was authorized by the defendant to convey, thus making her conveyance his; or (2) that it is a purchaser in good faith and without notice, relying upon the deed from the defendant to her. The first suggestion is met by the clause in the deed which shows that the defendant never conveyed, or authorized to be conveyed, his fishing rights; and the second suggestion is answered by the fact that the plaintiff either had, or was chargeable with, notice of the defendant's rights.

[4] The recording act has no application to the case. That act is intended solely to protect a purchaser from an apparent owner against a previous deed or mortgage given by him which has not been recorded. The object of such statute is to require instruments to be recorded, and to make the record of them notice to subsequent parties dealing with the grantors. *Raynor v. Wilson*, 6 Hill, 469.

If the deed to the plaintiff had contained literally the same reservation, there could be no doubt about the case. But it contains it only by referring to former deeds for an accurate description of the premises, which were being conveyed by a description otherwise indefinite. Therefore I have stated that possibly the plaintiff might have shown that it had no actual knowledge of the contents of the original deeds making its title; but in the absence of such showing I think it must fairly be charged with knowledge of their contents, when they are so definitely referred to in its deed. In saying that it does not appear that the plaintiff did not know of the reservation in the deed, and that possibly evidence upon that point might have a bearing, the expression carries no suggestion as to the opinion of the court upon that subject, as it is not in the case and has not been considered.

The judgment should therefore be affirmed, with costs. All concur, HOUGHTON, J., in opinion, except SMITH, P. J., not voting.

HOUGHTON, J. (concurring). I think the judgment dismissing the plaintiff's complaint can be sustained only on the theory that the so-called reservation in the deed from defendant's mother to Carroll was in fact an exception and not a reservation. If the words used in the deed, "reserving the right to William H. Brown, Jr., to fish in said Millbrook stream," be regarded as a reservation merely, such

reservation would be void, because, in the first place, the right to fish is legally a part of the land itself, and not something issuing out of it, which is a necessary element of a reservation; and, in the second place, because, even though it be assumed that the defendant was not such a stranger to the deed as to make the reservation void, his acts in permitting his mother to convey as though she was the owner estopped him from asserting that he was not a stranger to the title and that he had some equitable interest in the property which justified a reservation in his behalf.

If the words be treated as a mere reservation, the plaintiff and its grantors had a right to say, from the record and from the language employed, that it was one in behalf of a stranger, and therefore inoperative and void, and hence one which they had the right to ignore, and concerning which they were under no obligation to make inquiry. But from the nature of the thing attempted to be reserved the law compelled the language to be read as an exception rather than a reservation. Millbrook stream was private water, and while the defendant's mother held title to land through which it ran she could have conveyed the right to take fish thereon separate and apart from any conveyance of the land, and when she conveyed the land itself she could except from such conveyance the right to take fish from such stream, thereby retaining in herself that portion of the land conveyed. Proprietors of the soil through which nonnavigable streams flow have the exclusive right of fishing therein, and the right to fish is an interest in the land itself and may pass by grant. *Rockefeller v. Lamora*, 85 App. Div. 254, 83 N. Y. Supp. 289. The right of fishery is not a mere easement in land. It is more than that, and is in the nature of an incorporeal right, and by strict classification is a *profit à prendre* like a right to take coal or ore, or cut grass or timber, without severance or ownership of the land itself, and is within the statute of frauds, and can be granted only by deed. *Jones on Easements*, §§ 57-60; *Washburn's Easements and Servitudes* (3d Ed.) 528-532.

The right to fish being, therefore, an interest in the land itself, and not something growing out of it and created by virtue of the conveyance, the language used in the deed from the defendant's mother to Carroll must necessarily be deemed to create, not a reservation, but an exception, and the plaintiff and its grantors were bound to so construe it. *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191, 209. The plaintiff and its grantors must be assumed to have known that the right of fishery was an interest in land, and that it was not, strictly speaking, a subject of reservation, and that therefore it must be deemed, in order to give the words any effect whatever, an exception out of the premises granted. If, however, there was any doubt as to the intention of the parties that it should be an exception, rather than a reservation, they are presumed to know that extrinsic evidence was competent for the purpose of showing the intention of the parties in using the language employed. *Bridger v. Pierson*, 45 N. Y. 601.

It is true that the defendant's mother, prior to her conveyance to Carroll, had not granted the right to fish to the defendant, and that

the exception in the deed from her did not operate to vest title thereto in him; nor was it shown upon the trial that the mother had subsequently conveyed such title to him. The evidence does show, however, that she made the exception at his request, and that he asserted his right to fish thereunder, and it is fair to assume that he exercised that right under license from her and by her authority and consent. This right for him she excepted from her conveyance, and while the plaintiff has the right to prohibit all others from fishing in the stream, there was expressly withheld from it through the mesne conveyances from the mother the right to prevent the defendant from so doing while he was acting under her, and hence no injunction could issue against him.

It might be added that undoubtedly the mother has no power to convey the right to fish to any other person than the defendant, and that the defendant himself has no right to convey such privilege to others, but can only exercise it himself.

For these reasons, I concur in an affirmance of the judgment.

MARLATT v. ERIE R. CO.

(Supreme Court, Appellate Division, Fourth Department. December 6, 1912.)

EVIDENCE (§ 122*)—ADMISSIBILITY OF EVIDENCE—DECLARATIONS—RES GESTÆ.

In an action by a drover, injured while in the caboose by being thrown against the end of the caboose by a severe jolt, claimed to have been due to the improper use of the air brake, statements of other drovers before the accident as to the manner in which the train was being handled by the engineer were not admissible, since it was not *res gestæ*, occurring before the accident, and the drovers were not in a position on the end of a train to tell how the engineer was using the air brake.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 339-350; Dec. Dig. § 122.*]

Kruse and Robson, JJ., dissenting.

Appeal from Trial Term, Steuben County.

Action by Jonathan R. Marlatt against the Erie Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before McLENNAN, P. J., and KRUSE, ROBSON, FOOTE, and LAMBERT, JJ.

F. A. Robbins, of Hornell, for appellant.

John W. Hollis, of Addison, for respondent.

LAMBERT, J. The action is in negligence, to recover for personal injuries sustained by the plaintiff, while he was riding in a caboose, at the rear end of one of defendant's fast freight trains, near Calicoon, N. Y.

The day preceding the accident, at the station of Greenwood, on the New York & Pennsylvania Railroad, the firm of Scott & Lewis partially loaded a car of live stock, and billed the same over that and the defendant railroad to Jersey City, in the state of New Jersey. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

car was then moved to Canisteo and into defendant's freight yards, where its loading was completed by one Wilson out of stock belonging to him. It was then moved by the defendant on towards its destination as a car shipped by Scott & Lewis.

It appears that both railroads had at least two rates for the carriage of live stock, the one of which was in excess of the other. Both were filed and published, as required by law. The higher rate was charged in such instances, as the carrier assumed entire responsibility for the care of the stock en route, while the lesser involved the furnishing of such care by the shipper. This car was shipped under the low tariff, and as a preliminary thereto the shippers were required to and did execute a printed form of contract, defining the rights and responsibilities of the parties. By such contract the care of the stock was imposed upon the shippers, and, as that involved the sending of an attendant with the stock, provision is therein made for the carrying of such person without charge for transportation. A clause is also included, by which the shippers indemnify the carrier from loss by way of injury to such attendant.

Upon the back of this contract is a printed form of release, to be signed by the attendant, in person. This release is sufficient in form to bar this action, if plaintiff is bound by its provisions.

At the time of this shipment, William Scott, one of the shippers, after signing the contract in the firm name, executed this release, in his own individual name, as the man to be in charge of this stock during its transportation. He did not, however, accompany the car at all. From Greenwood to Canisteo it had no attendant. At Canisteo the plaintiff, previously employed by the shippers and Wilson for such purpose, boarded the train as such attendant. He did not produce, and was not asked to exhibit, any authority for his presence. His oral statement that he was in charge of this stock was accepted as sufficient by the various conductors having the movement of this car in charge. There was minuted, upon the waybill accompanying this car, "Pass man in charge free." This was written on by the agent at Greenwood.

Plaintiff and other drovers occupied the caboose of this train, while same was in motion, attending to the wants of the stock at such times as the train was stopped. As the train approached Calicoon, it was observed that its progress was attended with a series of rough jolts. This was called to the attention of the conductor. It was intended to stop the train at Calicoon, and as it approached this station there was a sudden and severe jolt, sufficient to throw the plaintiff against the end of the caboose and cause the injuries of which he complains.

It first becomes important to determine plaintiff's status upon this train. By his complaint he has chosen to rely upon the contract for the shipment of this stock to establish his standing. He therefore receives no benefit by way of license or permission to ride. He asserts his status to be contractual, and he identifies the contract specifically. He does not claim to have been a party to that contract, in person; but he does assert that, by reason of the contract for his employment by the shippers, he acquires the benefits of their contract.

This contract contemplates the carriage of some attendant, and it is fairly to be said that it contemplates that the attendant may be some other person than the shipper. It does not identify the attendant in any manner. The release upon the back of the contract is clearly intended to be executed by the person actually accompanying the car, and no occasion arises for its use, unless the attendant is a different person than the shipper. The indemnity clause in the contract accomplishes all the purposes of the release, when shipper and attendant are the same person. By the contract and release, such release is made an essential element in the transaction. The lower freight charge is made dependent upon the shipper caring for the stock en route. Such care by the shipper rests upon the free transportation of the attendant; and such free transportation rests, in turn, upon the release from liability. In such manner the entire scheme is worked out, with a result advantageous to both shipper and carrier, and, involving, as it does, the carriage of the attendant upon trains and under circumstances not designed for the carriage of passengers, it cannot be so construed as to make the release a mere incident. It is an important and essential ingredient of the entire transaction.

Primarily, then, since plaintiff chooses to rely upon that contract to establish his standing, he must take the contract in its entirety, and cannot select therefrom such portions as meet his needs, while discarding therefrom such as tend to defeat his recovery. In acquiring the contractual standing of Scott, or of Scott & Lewis, he must **step into their shoes (so to speak)**, as otherwise there could not be said to have been that meeting of the minds of the parties essential to sustain every contract.

To escape this conclusion, the plaintiff has adduced evidence to show that he never had personal knowledge that the release was signed by any one, and further, that both carriers had, upon other occasions, permitted the carriage of live stock and attendants, without requiring the execution of the release. By such evidence it is sought to establish a custom sufficiently in vogue to be deemed a part of the contract, thus effecting a modification of the contract by the elimination of the release therefrom. Without passing upon the sufficiency of this evidence to establish such a custom (and of its sufficiency we have grave doubt), we do not deem this an instance where such a custom could be given the desired effect. Custom is to be resorted to, in the construction of contracts, only in cases of doubt or ambiguity as to their meaning. It is not available to create such doubt or ambiguity. It is true that the carrier might waive such provision made for its benefit, in specific instances; but such waiver in one or a series of instances could not effect its right to insist upon its observance in other instances. To so hold would be to defeat the right of contract of the parties. There is no room for surmise that this release was executed by Scott as the result of fraud or misrepresentation by the carrier or in ignorance of its contents. He says that he was asked to and did execute it. He had been a frequent shipper and was familiar with this form of contract. His assumption of the right to send a different person with this car than the one who had executed the release was unauthorized and unwarranted. The carrier had the right

to accept or reject the attendant offered. That right was a valuable one. Its liabilities for injuries would be greater in some instances than in others. It had a right to say who should go, and in this case it insisted on that right, when it demanded and received this release, signed by Scott. It had such right, independently of any custom or usage that might have obtained in the past. The proof of custom was wholly immaterial.

We do not deem the foregoing to be at variance with those cases cited by respondent as to plaintiff's status upon this train. In *Brewer v. New York, Lake Erie & Western Railroad Co.*, 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. Rep. 647, plaintiff's intestate was an express messenger, and was killed while in the performance of his duties. It appeared that the express company, by which he was employed, had executed a contract with the defendant, whereby it undertook to release the railroad from liability such as was sought to be enforced in that action. This was without the knowledge of the intestate, and he was never asked to execute any release. The railroad chose to rely upon the release of the employer, without requiring the messengers to personally release. It was there held that the release afforded no defense.

In *Coppock v. Long Island Railroad Co.*, 89 Hun, 186, 34 N. Y. Supp. 1039, the plaintiff was a groom, in attendance upon horses in an express car. His employer had executed a contract which purported to relieve the carrier from liability to him. He was in ignorance of such contract, and there was no attempt by the carrier to procure a release from the person in charge. It was relying solely upon the release by the employer of plaintiff.

In *Porter v. New York, Lake Erie & Western Railroad Company*, 59 Hun, 177, 13 N. Y. Supp. 491, the plaintiff was injured while in attendance upon a car load of stock. He was never required to release, although he was designated in the contract by name as the person to accompany the car. His employer had contracted to release the railroad from liability to him.

In each of those cases, the release was held ineffectual as a defense. But it is to be noted that in none of them was there any effort by the carrier to procure a release from the person so being carried. In each the release of the employer was alone sought, and it was held that, without knowledge on the part of the plaintiff that the release was made, it did not affect his status. The situation here presented is different. Here the carrier insisted upon a release from the attendant in person and procured one to be signed. It had then taken all due steps to protect itself, and its liability could not be increased by the unauthorized substitution of another attendant.

There is further reason why this judgment and order must be reversed. The theory of negligence, upon which plaintiff relies, is that the sudden and severe jolt which occasioned the injuries was caused by too abrupt and severe application of the air brakes by the engineer. The rule of care required of defendant was stated by the trial court to be ordinary care and prudence. Such a rule excludes the application of the rule of *res ipsa loquitur*. The burden was therefore upon the plaintiff to show negligent operation of the air brake. To

meet this burden, the evidence goes no further than that the jolt was unusually severe, and the description of the accident. While it might, perhaps, have safely left this question to rest upon plaintiff's evidence, yet the defendant has advanced a theory, as to the cause of this accident, which is fully as reasonable as that of the plaintiff. The engineer testified that when he undertook to apply the air brake, to make the stop at Calicoon, although he only made a slight reduction, the brakes suddenly jumped to emergency without being so applied by him. By this evidence, and that of other witnesses, it was shown that such a result frequently is attendant upon what is known as a sticky triple valve upon some car in the train. The sticking of the valve on the car and its sudden giving way effects a sudden and extreme reduction through the entire air line, almost instantly applying all the brakes and resulting in a sudden and violent stoppage of the train. The jury was instructed that, if this accident resulted from a sticky triple valve, there could be no recovery. Such instructions were correct, as such a valve is not to be discovered by inspection. But the jury was permitted to speculate as to which of the two causes produced the accident. There was not the slightest evidence to lead them in the one direction rather than the other, and therefore the plaintiff did not meet the burden of proof upon this issue.

There was also error in the admission of evidence. Upon the negligence issue, plaintiff was permitted to prove, over the objection and exception of the defendant, conversations between the drovers in the caboose and the conductor of the train relative to the uneven and rough movement of the train preceding the accident. This talk included statements by the drovers, or some of them, to the effect that, if it continued, they would all be killed, while others remarked as to its effect upon the live stock and the injury to be expected. It also included the statement, by the conductor, that such violence must be the result of the improper working of the air brake.

None of this talk can be justified as evidence here, as being a part of the *res gestæ*. It preceded the accident. The statements by the drovers could scarcely be claimed to furnish any evidence of negligence on the part of the defendant. These men were not in a situation to know anything of the manner in which the engineer applied the air brake. The engineer was far ahead of them and at the front end of the train. Nor was their statement permissible as bringing the attention of the conductor to the uneven progress and movement of the train. The fact that they did call it to his attention had been proven prior to the introduction of this conversation in evidence. Such conversations have been held improper to establish any negligence and do not have such a tendency. *Kuperschmidt v. Met. St. Ry. Co.*, 47 Misc. Rep. 352, 94 N. Y. Supp. 17; *Ehrhard v. Met. St. Ry. Co.*, 69 App. Div. 124, 74 N. Y. Supp. 551.

As to the declarations of the conductor, it suffices to say that his employment to act as such did not vest him with authority to make declarations for or against the defendant, upon which negligence might be predicated. This evidence was improper, and its admission was error.

The judgment and order appealed from must be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur, FOOTE, J., in result in separate memorandum, except KRUSE and ROBSON, JJ., who dissent in an opinion by KRUSE, J.

FOOTE, J. (concurring). I concur in result, on the ground that it was error to admit in evidence the declarations of Smith and De Vere, made prior to the accident, as to the manner in which the train was being handled by the engineer.

KRUSE, J. (dissenting). The plaintiff, who was in charge of a car load of live stock, was riding in the caboose of the train, and was thrown from his seat through the negligent operation of the train, as he claims, and hurt. He had been employed by the shippers to take charge of and care for the stock, and was rightfully upon the train. He paid no fare himself, and none was exacted by the conductors. Their authority for passing him was a notation upon the waybill to "pass man in charge free." The stock was being shipped under what is known as the "uniform live stock contract," which contemplates that the shipper shall send a caretaker with the stock, and provides that the caretaker shall be carried without charge other than what is paid for the transportation of the stock, and that the shipper will indemnify the carrier and connecting carriers against claims for personal injuries sustained by the caretaker, whether caused by the negligence of the carriers or otherwise. It also evidently contemplates that the man in charge shall execute an instrument whereby he voluntarily assumes all risk of accident, and releases and discharges the carriers from all claims for personal injury or damage sustained by him, whether caused by the negligence of the carriers or otherwise.

It is contended upon the part of the defendant that under the contract of shipment the defendant is exempted from liability for the injuries so sustained by the plaintiff. That would be so if the plaintiff had been a party to the contract, or had signed the release. But he was neither a shipper nor did he execute the release. The release was executed by William Scott, one of the shippers. The plaintiff had no knowledge of the terms of the contract under which the stock was being shipped or of the release. He did not represent himself to be Scott, and the conductors who passed him did not understand him to be Scott, and he did not deceive the railroad company as to his identity or otherwise. Indeed, the first conductor upon the train knew the plaintiff, and although the notations upon other waybills for passing the man in charge of stock had sometimes, upon previous occasions, designated the man in charge by name, no such designation was made upon the waybill for the stock of which the plaintiff had charge upon this occasion. There is nothing in the evidence showing that the plaintiff, either under the terms of his contract of employment with the shippers or under any arrangement with the railroad company, assumed directly or indirectly the risk of injury to him resulting from the carelessness of the carrier in transporting him upon the train in question.

Furthermore, as will be seen, the release did not assume to bind him or any one else but Scott. And even if it had, I do not think the shippers could do so without his knowledge or consent. *Brewer v. N. Y., Lake Erie & W. R. R. Co.*, 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. Rep. 647. In *Baltimore & Ohio Southwestern Ry. Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, where the railroad company was held not liable for injuries sustained by an express messenger, who had himself voluntarily assumed the risk of accident, the case of *Brewer v. N. Y., Lake Erie & W. R. R. Co.*, supra, was referred to. The doctrine of the *Brewer Case* was not disapproved, but the case was distinguished by the fact that in the *Brewer Case* the messenger had no knowledge or information of the contract between the companies and was not himself a party to the agreement to exempt the railroad company.

Furthermore, it appears that upon other occasions the carriers had permitted caretakers to go with shipments of live stock without executing any release. The trial judge charged, as requested by defendant's counsel, that in the absence of any custom or practice to the contrary Scott alone was entitled to go with the car of stock in question as the caretaker or attendant thereof, but refused to charge that the evidence was insufficient to establish a general practice or custom upon the part of the initial carrier which would operate as a waiver of that part of the agreement or of the rule requiring it to be carried out. It is possible that the evidence was insufficient to establish a general custom to that effect. But, whether it was or not, I think, under the rule of the *Brewer Case*, the plaintiff's right of recovery is not affected thereby.

2. As regards the negligence of the defendant, I think the evidence was sufficient to make that question one of fact. The trial court limited the grounds of negligence to the careless management of the train, and instructed the jury that, if the accident resulted from a sticky air valve, the plaintiff could not recover. An inspection of the train was made before the accident and immediately after, and no sticky air valve was discovered. The jerky and jolting condition of the train before the accident, as well as the fact that the air did not come on suddenly at the time when the train was stopped, and other surrounding circumstances, made it fairly a case for the jury to determine whether the sudden and abrupt stopping of the train was the result of a sticky air valve, as the defendant claims, or the negligent operation of the train by the engineer, as the plaintiff claims; and, the jury having found for the plaintiff upon that question, I think their finding should not be disturbed.

3. As regards the complaints made to the conductor of the operation of the train immediately before the accident, I think they were competent, at least upon the question of notice. There was no suggestion upon the part of the defendant that the evidence should be limited in any way, and, if it was competent for any purpose, it was properly received.

I think the judgment and order should be affirmed, with costs.

ROBSON, J., concurs.

GABRIEL v. GABRIEL et al.

(Supreme Court, Special Term, Kings County. December, 1912.)

1. TRUSTS (§ 20*)—CREATION—DECLARATION.

A will reciting that the testatrix had received all of her property from her deceased husband, and that she devised it in accordance with his intention that the residue should be divided among his children, is not a declaration of trust of all the property received, within Real Property Law (Consol. Laws 1909, c. 50) § 242, providing that trusts may be created by a declaration in writing, for the will failed to show that the testatrix took the property under any express promise to carry out the intention, but showed that the husband's intention was merely that the residue of the property should be distributed among his children.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 25-28; Dec. Dig. § 20.*]

2. JUDGMENT (§§ 948, 952*)—CONCLUSIVENESS—PLEADING.

A former decree between the same parties, involving the same subject-matter, is not conclusive, unless pleaded; and, although the decree be not pleaded, the findings of fact would at least be presumptive evidence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1787-1794, 1806; Dec. Dig. §§ 948, 952.*]

3. DEEDS (§ 70*)—VALIDITY—FRAUD.

Where a deed from a mother to two of her children was drawn by reputable attorneys, the mere fact of the close relationship of the parties and the extreme age of the mother will not warrant its cancellation on the ground of fraud.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 165-182; Dec. Dig. § 70.*]

4. DEEDS (§ 196*)—FRAUD—PRESUMPTION.

Where a mother conveyed land to her son and daughter, the presumption of fraud arising from the conveyance is greatly weakened by the lapse of over 20 years without attack upon the instrument.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587-593, 649; Dec. Dig. § 196.*]

5. LIMITATION OF ACTIONS (§ 100*)—PERIOD OF LIMITATION—FRAUD.

Where defendants, who were the executors of their mother's will, as well as the beneficiaries of a deed executed by her, were in 1893 charged with fraud and undue influence in procuring the will, a grandson of the mother, who was then 20 years old and knew of the fraud, had, under Code Civ. Proc. § 382, subd. 5, only 6 years in which to bring his action to set aside the deed; his time not being extended by Code Civ. Proc. § 386, providing that the time of the disability of infancy is not a part of the time limited for commencing such actions, except that the time limited cannot be extended more than 5 years by any such disability, except infancy, or in any case more than one year after the disability ceases.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.*]

Action by William Gabriel against Barbara Gabriel and others.
Judgment for defendants.

O'Neil & O'Neil, of Brooklyn, for plaintiff.

J. Stewart Ross and Nicholas Dietz, both of Brooklyn, for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CRANE, J. Catherine Gabriel died on the 16th day of December, 1891, at the age of 74 years, leaving the parties to this action or their parents as her surviving heirs and next of kin. She had received certain real and personal property from her husband, who had died the previous year, and on the 7th day of August, 1890, made a will to carry out, as she therein stated, the wishes of her husband to have the remainder of the property go to the children. After the making of this will, and in October of 1890, Catherine Gabriel made a deed of the real property here in litigation to two of her children, Joseph Gabriel and Elizabeth Fritz, to the exclusion of the other children, and in April of 1891 executed to the same parties another deed covering the same premises and for the purpose of making certain corrections therein.

Joseph Gabriel and Elizabeth Fritz were made executors of their mother's will, and in 1893 filed their accounts as such, to which objections were made. The matter was referred to Charles H. Otis, as referee, who thereafter reported, surcharging these two executors with many thousands of dollars, and making findings of fact regarding the physical condition of Catherine Gabriel in 1890 and 1891, and the confidential relationship which existed between her and her two children, Joseph Gabriel and Elizabeth Fritz. This report was confirmed by the surrogate and on appeal.

The plaintiff in this case, William Gabriel, was a grandson of the deceased and a party to the accounting proceedings, and in 1893 was 20 years of age. In 1900, about 9 years after the making of the deeds above mentioned, William Gabriel commenced this action to set aside those deeds on the ground of fraud. Not until December of 1912, or about 13 years thereafter, has this action been brought to trial.

[1] In his first cause of action the plaintiff claims that Catherine Gabriel received the property in question from her husband in trust for her children, and that her will of August, 1890, is the writing required by the statute (section 242, Real Property Law) as evidence thereof. The only suggestion of any trust is to be found in the recitals in this will, which read as follows:

"Whereas, all the estate, real and personal, of which I may die seized or possessed or to which I may be entitled at the time of my decease came to me by virtue of the last will and testament of my deceased husband, Jacob Gabriel; and

"Whereas, it was the intention of my said husband that upon my decease the residue and remainder of his estate should be equally divided and distributed among his children, and that each of his children to whom he had made advances during his lifetime should be charged with the amount of such advances; and

"Whereas, I desire to carry out, as nearly as possible, the wishes of my said husband, I do therefore make disposition of my estate as follows."

It will be noticed that the testatrix does not say that it was the intention of her husband that his estate upon her decease should go to his children, but that the "residue and remainder" should thus be disposed of. This gave the wife the right of disposal in her lifetime. But even then, while there may be some evidence of Joseph Gabriel's intention, there is no evidence that Catherine Gabriel took the be-

quests and legacies under any promise, express or implied, to carry out such an intention. It is quite evident that all the testatrix has stated by the above recitals is that in giving the property to her children she was carrying out the wishes of her husband. No trust was either created or evidenced by the language used. *Amherst College v. Ritch*, 151 N. Y. 282, 323, 45 N. E. 876, 37 L. R. A. 305; *Miller v. Hill*, 64 Misc. Rep. 199, 204, 118 N. Y. Supp. 63.

[2] The next cause of action pressed upon the court for consideration is the claim that Joseph Gabriel and Elizabeth Fritz obtained the deed of October 29, 1890, from Catherine Gabriel through fraud and undue influence. There is no claim of actual fraud, but it is asserted that these two grantees held such a confidential relationship with the deceased that, considering her age and infirm physical and mental condition, there was constructive fraud; i. e., the burden was cast upon these two defendants to show that the transaction was fair, just, and understood.

The plaintiff attempts to prove this constructive fraud by the report of the referee in the Surrogate's Court upon the accounting above referred to, in which it is stated that Catherine Gabriel died on the 16th day of December, 1891, at the age of 74 years; that for upward of a year prior to her death she had suffered from diabetes, from which disease she ultimately died, and for several months prior to her death she was confined to her house, and for a number of weeks to her bed, and unable to move or feed herself without assistance; that during this time she could see but poorly, and in the latter stages of her illness was almost blind; and that Elizabeth Fritz and Joseph Gabriel were in constant attendance upon her and had charge of all business matters in which she was interested.

These findings of the referee, approved by the decree of the surrogate, were binding upon all the parties to the litigation, if they were necessary to the determination. The reading of the record in the Surrogate's Court convinces me that such findings were a part of the issues litigated before the referee, and necessary for part of his conclusions, and would therefore be presumptive evidence, at least, in any subsequent litigation between the same parties, where the same facts were in issue.

The surrogate's decree would not be conclusive upon this court, as it has not been pleaded. *Krekeler v. Ritter*, 62 N. Y. 372. Whether or not it would have been conclusive, if pleaded, in view of such authorities as *Baxter v. Baxter*, 76 Hun, 98, 27 N. Y. Supp. 834, and *Kirk v. McCann*, 117 App. Div. 56, 101 N. Y. Supp. 1093, I need not now determine, but I do consider it competent evidence bearing upon the issue, provided the facts in dispute were the same. The findings of the referee, however, do not cover or refer to the time in question. The deed was made October 29, 1890, while the findings of the referee in their widest scope cover only one year prior to December 16, 1891. No presumptive evidence, therefore, arises from these findings that in October of 1890 the deceased was incapable of making a deed, or so infirm as not to understand the transaction.

[3] Therefore, leaving out of the case all the findings of the ref-

eree, only the relationship of the two grantees and their apparent intimacy with their mother remains, and this is not sufficient to justify the cancellation of the conveyance, in view of the fact that the deed was drawn up in the well-known law office of S. M. & D. E. Meeker, and signed and executed by Catherine Gabriel in the presence of S. M. Meeker, Jr., and acknowledged before him on the 26th day of November, 1890.

[4] Whatever presumption of a fraud may arise from the conveyance of property to a person standing in close and confidential relationship must of necessity be greatly weakened when 22 years have elapsed before the deed is attacked in court. I therefore determine that upon this cause of action the plaintiff has failed to make out a case.

[5] However, even if the plaintiff had established his third cause of action, and I was justified in setting aside this deed as procured by fraud, the statute of limitations would bar such relief. By subdivision 5, § 382, of the Code of Civil Procedure, the plaintiff has 6 years after the discovery of the fraud in which to bring action to set aside a deed. In 1893, when Joseph Gabriel and Elizabeth Fritz were charged with fraud in the accounting proceedings before the surrogate, the plaintiff was 20 years of age, and, if at that time he knew the facts constituting the fraud regarding the conveyance of this real property, he would have had 6 years from 1893 within which to maintain this action. His time would not have been extended by section 396 of the Code of Civil Procedure. *Hyland v. N. Y. C. & H. R. R. Co.*, 24 App. Div. 417, 48 N. Y. Supp. 416; *Matter of Rogers*, 153 N. Y. 316, 47 N. E. 589; *Jagau v. Goetz*, 11 Misc. Rep. 380, 32 N. Y. Supp. 144.

The facts essential to maintain this action I find were known to the plaintiff in 1893, as shown by his testimony and the reasonable inferences to be drawn therefrom. He must have known that his grandmother was an old lady, that Joseph Gabriel and Elizabeth Fritz were her children, that they had obtained from her the deed in question, and that there was a question raised as to its validity. This knowledge was sufficient to set the statute running, so that in 1900, when this action was commenced, the time in which to bring it had expired.

Judgment will be rendered for the defendants.

MUENCH v. TERRY & TENCH CO.

(Supreme Court, Appellate Division, Second Department. January 24, 1913.)

1. MASTER AND SERVANT (§ 252*)—INJURIES—SUFFICIENCY OF NOTICE.

A servant's notice of injury stated that the cause of the injury was a piece of steel which flew into his eye, and the cause of the casualty was defective tools and failure to furnish proper material to prevent the flying of steel, and that the casualty was further caused by "your failure to furnish me with a chisel bar, and in that you had no adequate saw to do the work," and that the saw furnished was worn. *Held*, that the notice

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of injury was insufficient to sustain an action under the Employer's Liability Act of 1902 (Laws 1902, c. 600), failing to state a negligent act of a superintendent, or any defect in the ways, works, or machinery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 808; Dec. Dig. § 252.*]

2. MASTER AND SERVANT (§ 104*)—APPLIANCES—FAILURE TO FURNISH.

If an employer provided chisel bars for use in cutting rivets, which were upon the premises and easily accessible at the time of an accident in cutting rivets, defendant would not be liable for injuries claimed to have been caused by failure to furnish a chisel bar.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 176; Dec. Dig. § 104.*]

Appeal from Trial Term, Westchester County.

Action by George Muench against the Terry & Tench Company. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

E. Clyde Sherwood, of New York City (Charles Capron Marsh, of New York City, on the brief), for appellant.

Thomas J. O'Neill, of New York City (L. F. Fish, of New York City, on the brief), for respondent.

RICH, J. This appeal is by the defendant from a judgment in favor of the plaintiff in an action for negligence. The complaint alleges a cause of action under the common law and also under the Employer's Liability Act (Laws 1902, c. 600).

The action was tried upon the theory that plaintiff was injured as the result of negligence of the foreman, in charge of the work upon which the plaintiff was engaged, in directing plaintiff and another employé of defendant to cut out iron rivets with an improper tool, which needlessly exposed plaintiff to danger. The notice alleges:

"The cause of my injury was a piece of steel which flew into my eye, destroying the sight thereof, and the cause of this casualty was the fact you furnished defective tools and cutters in and in connection with which to work, and failed to furnish proper bagging and other material to prevent the flying of pieces of steel while rivets were being cut; and this casualty was further caused by your failure to furnish me with a chisel bar, and in that you had no adequate saw to do the work, and that the saw that you furnished was worn, so that its teeth would not cut the angle where I was working, and that your not having said saw or chisel bar required me to take a position below the rivet, thus causing the additional hazard and danger of pieces of steel being driven toward my eye and into my eyes."

The defendant objected to the receipt of this notice in evidence, upon the ground of its insufficiency. The objection was overruled and an exception taken.

[1] It will be observed that the notice fails to mention any negligent act on the part of a superintendent, or to suggest any defect in the ways, works, or machinery. Its allegations are confined to matters which go to make up a common-law cause of action for negligence, and it cannot be made the basis of a cause of action under the Em-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ployer's Liability Act of 1902, which was in force when this action was brought. As was said in *Simpson v. Foundation Co.*, 132 App. Div. 375, 116 N. Y. Supp. 878, affirmed 201 N. Y. 479, 95 N. E. 10, Ann. Cas. 1912B, 321:

"The employé is given an enlarged right of action against the master for the negligent act of a superintendent, or for defects in the works, ways, or machinery, and this enlarged right is given on condition that the employé, within 120 days of the accident, shall give the employer notice, not generally, but specifically, of an act of omission or commission on the part of a superintendent, or of a defect in the works, ways, or machinery."

See, also, *Finnigan v. N. Y. Contracting Co.*, 194 N. Y. 244, 87 N. E. 424, 21 L. R. A. (N. S.) 233; *Logerto v. Central Building Co.*, 198 N. Y. 390, 91 N. E. 782; *Welch v. Waterbury & Co.*, 136 App. Div. 315, 120 N. Y. Supp. 1059; *Lewis v. Gehlen*, 136 App. Div. 855, 122 N. Y. Supp. 89; *Beauregard v. New York Tunnel Co.*, 136 App. Div. 834, 121 N. Y. Supp. 865; *Davenport v. Oceanic Amusement Co.*, 132 App. Div. 368, 116 N. Y. Supp. 609; *Kwiatkowski v. Nichols Copper Co.*, 152 App. Div. 663, 137 N. Y. Supp. 586.

The plaintiff contends that his notice is valid under the authority of *Bertolami v. United Engineering & C. Co.*, 198 N. Y. 71, 91 N. E. 267, and several other cases which he cites, all of which are distinguishable from the case under consideration. In the *Bertolami* Case the court placed its decision upon the express ground that, the liability stated in the notice being its failure to inspect, safeguard, and keep safe the place wherein the intestate was working, the omission of duty was of necessity primarily that of a representative who had superintendence over, and control of, the conditions which prevailed when the accident happened, and therefore sufficiently complied with the rule adopted in the *Finnigan* Case. The case was submitted to the jury upon the theory that a recovery might be had under the Employer's Liability Act. The effect of the charge of the learned trial justice was, therefore, that a verdict might be found for the plaintiff upon a cause of action which he was not entitled to enforce, and, although no exception was taken to the charge, the notice was in evidence over defendant's objection and exception. No liability under the statute was shown, and the application of the statutory law gave the plaintiff an advantage to which he was not entitled.

[2] While it may be that the evidence is sufficient to have required the submission of defendant's common-law liability to the jury, we cannot say that the result would have been the same, as defendant offered evidence which tended to show that it had provided chisel bars for the use of its employés, and that they were upon the premises and easily accessible at the time of the accident, which would have relieved the defendant from liability if the jury had believed it. *Davis v. Gas Engine & Power Co.*, 148 App. Div. 791, 133 N. Y. Supp. 247.

The judgment and order must be reversed, and a new trial granted; costs to abide the event. All concur.

LANE et al. v. HUSTACE.

(Supreme Court, Appellate Division, First Department. January 10, 1913.)

1. TRUSTS (§ 242*)—CONSTRUCTION OF TESTAMENTARY TRUST—POWERS OF TRUSTEES—SALE OF LAND.

Testator created a trust for the benefit of a son and his wife, and provided that all trusts might be executed by a majority of the trustees, whether survivors of those first named or thereafter appointed, and that, as soon as the number was reduced to less than three, the surviving trustee or trustees should, with the approval of the cestui, increase their number to not less than three nor more than five. Two of the original trustees and a successor of the third acted until the death of another of the original trustees, and thereafter the remaining two, acting under a testamentary power of sale, contracted to sell real property of the estate to defendant, but before closing the transaction the cestui, who was of age, refused to consent to the appointment of a new trustee. Real Property Law (Consol. Laws 1909, c. 50) § 195, in force when the will was executed, provided that, where a power is vested in several persons, all must unite in its execution, but that, if one or more die, the power may be executed by the survivor or survivors. *Held*, that the direction for the appointment of succeeding trustees was not absolute, but conditional upon the consent of the cestui, and that upon his refusal the direction became inoperative, and left the power of the surviving trustees as if there had been no such direction, so the two surviving trustees could convey title.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 349; Dec. Dig. § 242.*]

2. TRUSTS (§ 242*)—CONSTRUCTION—POWERS OF SURVIVING TRUSTEES.

At common law powers which were coupled with an interest or annexed to the office of the trustee passed, if possible, with the trust, to be exercised by the successors or survivors of the original trustees.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 349; Dec. Dig. § 242.*]

3. TRUSTS (§ 242*)—CONSTRUCTION OF TESTAMENTARY TRUST—APPOINTMENT OF NEW TRUSTEES.

Code Civ. Proc. § 2818, as amended by Laws 1884, c. 408, provided that, where one of two or more testamentary trustees dies, a successor shall not be appointed except where such appointment is necessary to comply with the express terms of the will, or unless the Supreme Court shall consider such appointment to be for the benefit of the cestui, and that the remaining trustee might fully execute the trust. A will, executed after the amendment, creating trusts in real property, provided that all trusts might be executed by a majority of the trustees for the time being, whether survivors of those originally named or trustees thereafter appointed. *Held*, that an intention to limit the powers of the trustees so that they could not be exercised by any number less than three should be clearly expressed, and that in the absence of anything in the scheme of the will which required the concurrent action of three or more trustees, or a showing that any object of the will would be injuriously affected by a failure to increase the number of trustees, the will did not manifest a clear intent to limit the statutory powers of surviving trustees.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 349; Dec. Dig. § 242.*]

Action by Wolcott G. Lane and Lorillard Spencer, 3d, as substituted trustees under the last will and testament of Lorillard Spencer, 1st, deceased, against Francis Hustace. Submission of controversy upon agreed statement of facts. Judgment directed requiring defend-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & *Rep'r Indexes*

ant to specifically perform the contract for the purchase of the premises in question, and to accept from plaintiffs a deed thereof to be duly executed by them as trustees, and to pay the consideration therefor as in said contract provided, without costs.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Perry D. Trafford, of New York City, for plaintiffs.
Harold Swain, of New York City, for defendant.

DOWLING, J. Lorillard Spencer, 1st, died January 30, 1888, leaving a last will and testament, which was duly admitted to probate by the Surrogate's Court of New York county on May 5, 1888. The provisions of the will particularly relevant to the present controversy are as follows:

"Fourteenth: I also provide that all trusts and powers which are hereby conferred upon my executors collectively shall vest in and may be fully exercised by such of them (though it may be less than all) as shall qualify or assume to act as such executors or trustees, and by the survivors and survivor of them. And I further provide that my executors and any trustees appointed by or pursuant to my will shall not be liable for any default to insure any building on my estate, or which may be in their charge as trustees; nor shall they be liable for the defaults of each other, or of any agent they may, with due care, select or employ, but each shall be answerable only for his own bad faith or gross negligence.

"Fifteenth. All powers and trusts hereby given to or reposed in the trustees of any trust hereby created may be executed by a majority of the trustees for the time being, whether such trustees are the survivors of those herein named, or trustees hereafter appointed to execute any such trust. And I further provide that any person who shall at any time be acting as trustee under this, my will, may resign such trust by deed duly executed for that purpose, and upon accounting in respect to the same to the satisfaction of the then remaining trustees of the same trust. And I further direct that so soon as the number of trustees of any trust hereby authorized shall be reduced by death, resignation, or other cause to less than three persons, then, from time to time the surviving or remaining trustees or trustee of the same trusts respectively, shall (with the approval of the cestui que trust, if of full age, but otherwise without necessity of such approval), increase their number to not less than three nor more than five persons, by selecting suitable persons to act as such trustees, and by executing suitable deeds of conveyance and appointment for that purpose, and upon the same trusts in all respects as are expressed in this, my will, in relation to such trust shares or portions respectively."

By the ninth clause of the will a trust was created for the benefit of Lorillard Spencer, 2d, and his wife, Caroline S., with remainder over to their issue.

Letters testamentary were issued to William Augustus Spencer, Charles G. Spencer, and James P. Kernochan, the executors named, who duly qualified as executors and trustees under said will. Testator left him surviving his widow, Sarah J. G. Spencer, and his children, Eleanora L. S. Cenci, William Augustus Spencer, Charles G. Spencer, and Lorillard Spencer, 2d, all of whom were upwards of 25 years of age. Among other property Lorillard Spencer, 1st, died seised of the premises now known as 33 Park Row in the city of New York. Succeeding the original trustees, William Augustus

Spencer, Charles G. Spencer, and Wolcott G. Lane acted as such until the death of Charles G. Spencer on November 17, 1906. Thereafter the succeeding trustees, William Augustus Spencer and Wolcott G. Lane, continued to act without the appointment of any successor to the deceased trustee, and on December 12, 1911, contracted to sell the premises in question to the defendant herein for the sum of \$190,000. In so doing they acted under the power of sale contained in the twelfth clause of said will as follows:

"I also authorize and empower my executors to sell and convey any real estate which may belong to me at the time of my decease (not herein specifically disposed of), whenever they may for any reason deem it necessary to do so, either before such partition, as above provided for, or in order to make or equalize partition, or improve other real estate, or while any such real estate shall belong to any person under the age of twenty-one years, or shall belong to any trust share herein provided for, but the proceeds of the property so sold and the subsequent income thereof shall respectively go and belong to the same person or persons and be subject to the same trusts or powers and the same limitations of estate which, as herein expressed, would apply to such real estate if it were to remain unsold."

Before the time to close title had arrived, Lorillard Spencer, 2d, one of the beneficiaries of the trust under the ninth clause of the will, and receiving more than three-fourths of the income thereof, refused his approval to the appointment of a new trustee. A deed of the premises was then tendered to the purchaser, duly executed by said Spencer and Lane as surviving trustees under the last will and testament of Lorillard Spencer, 1st, for the benefit of Lorillard Spencer, 2d, and Caroline S. Spencer, his wife, and remaindermen, but the purchaser refused to accept it, claiming that the two trustees could not convey a good and marketable title in fee simple in and to the premises described in the contract, inasmuch as section 15 of the will of Lorillard Spencer, 1st (hereinbefore quoted in full), directed that, if the number of trustees of any trust should be reduced to two or less, additional trustees should be appointed. Lorillard Spencer, 2d, died on May 14, 1912. William Augustus Spencer had previously died on April 15, 1912, and thereafter Lorillard Spencer, 3d, was appointed trustee in his place and stead and accepted the trust. But both Caroline S. Spencer and Lorillard Spencer, 3d, have refused and still refuse to give their approval to the appointment of another trustee.

[1] The question submitted for determination therefore is:

"Can Wolcott G. Lane and Lorillard Spencer, 3d, as trustees under the last will and testament of Lorillard Spencer, 1st, deceased, for the benefit of Lorillard Spencer, 3d, Caroline S. Spencer, his wife, and remaindermen, without application to the Supreme Court of the state of New York, pursuant to the provisions of sections 105 and 107 of the Real Property Law, convey a good and marketable title to the premises hereinabove described; no objection to the title being made because of any lease of said premises or any part thereof?"

We are of the opinion that this question must be answered in the affirmative. The direction in the will for the appointment of another trustee is not absolute, but conditional, and the condition cannot be complied with. There is here no unequivocal requirement that there

shall always be three trustees, or a number not less than that, but only a direction that there shall be an increase of the number of trustees to not less than three, conditioned upon the approval of that action by the cestui que trust, if of full age, but otherwise without the necessity of such approval. In other words, the testator has given to the cestui que trust, if of full age, a veto power upon action pursuant to the direction, and has, in effect, made compliance with the direction conditional upon the assent thereto of the adult cestui que trust. Nor was this veto power or condition limited to the personality of the new trustee, but it went by the plain intent of the language used to the power to increase the number at all. It follows that where the condition cannot be complied with because of the refusal of assent by the cestui que trust, and his exercise of his veto power, the direction becomes inoperative and without force, and the situation as to the powers of the surviving trustees is as if there were no direction whatever for any addition to their numbers. Any other construction would lead to a situation where, by refusing to consent to an increase in the trustees to three, the cestui que trust could prevent the exercise of the power of sale conferred by the will, and could leave the trustees without power or authority.

Both at the time of the execution of the will and at present the statutes of this state gave the surviving trustees power to convey real estate. "Where a power is vested in several persons, all must unite in its execution; but if previous to such execution one or more of such persons shall die, the power may be executed by the survivor or survivors." Rev. Stats. pt. 2, ch. 1, tit. 2, § 112 (now Real Property Law [Consol. Laws 1909, c. 50] § 166).

[2] At common law the rule was that those powers which are coupled with an interest or annexed to the office of the trustee will pass, if possible, with the trust to the successors or survivors of the original trustees, and can be exercised by them. 28 A. & Eng. Ency. 988, and cases cited; Underhill on Trusts (7th Ed.) 381; Perry on Trusts, §§ 414, 502, 505.

[3] By the fourteenth clause of the will, as has been seen, the testator gave the right to execute all powers and trusts given to or reposed in the trustees of any trust thereby created to the majority of the trustees for the time being, whether such trustees are the survivors of those therein named or trustees thereafter appointed to execute any such trust. In 1884 (before this will was made) section 2818 of the Code of Civil Procedure was amended (Laws of 1884, c. 408) by adding the following matter:

"Where one of two or more testamentary trustees dies • • • a successor shall not be appointed, except where such appointment is necessary in order to comply with the express terms of the will, or unless • • • the Supreme Court shall be of the opinion that the appointment of a successor would be for the benefit of the cestui que trust. Unless and until a successor is appointed the remaining trustee or trustees may proceed and execute the trust as fully as if such trustee (or trustees) had not died. • • •"

Since it had long been the established policy of the law to permit surviving trustees to exercise the powers given in a will, and it has

been expressly enacted that, even in a case where a successor was to be appointed, the remaining trustees might act until such appointment should be made, it was essential if the testator intended to limit the statutory powers of his trustees so that they could not be exercised by any number less than three that he should say so in the clearest possible terms; but he has, on the contrary, refrained from so saying either directly or by implication. In *Draper v. Montgomery*, 108 App. Div. 63, 95 N. Y. Supp. 904, the testator had appointed three executors, and gave "to them or any two of them" acting as executors or trustees power to sell real estate. Two of them renounced, the third alone qualifying and making the contract to sell real estate. In upholding his right so to do the court said:

"Unquestionably the testator had the right to provide that no deed should be given except by at least two of his trustees. * * * We deem it extremely improbable that the testator intended upon the renunciation of two of his trustees to leave his remaining trustee practically stripped of the power to beneficially execute the trust. There is no clearly indicated intention to make inapplicable the provisions of section 2642 of the Code of Civil Procedure quoted. Without the intention so to do clearly manifested the general rule of law as expressed in this section must prevail."

There is nothing in the scheme of the present will which requires the concurrent action of three or more trustees to secure the results aimed at by testator, nor any end sought to be attained which is injuriously affected by the refusal of the cestui que trust to consent to an increased number of trustees.

Judgment is therefore directed requiring the defendant to specifically perform the contract for the purchase of the premises in question and to accept from plaintiff a deed thereof to be duly executed by Wolcott G. Lane and Lorillard Spencer, 3d, as trustees aforesaid, and further requiring defendant to pay the consideration therefor as in said contract provided, without costs. All concur.

PEOPLE v. VELD.

(Supreme Court, Appellate Division, Second Department. January 28, 1913.)

1. PERJURY (§ 33*)—EVIDENCE—SUFFICIENCY.

Evidence *Aid* to support a conviction of perjury.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 117-124; Dec. Dig. § 33.*]

2. CRIMINAL LAW (§ 438*)—EVIDENCE—PHOTOGRAPHS—ADMISSIBILITY.

On a trial for perjury in the giving by accused of false testimony at the preliminary examination of a third person, charged with assaulting a female in a private office, photographs of the office, not taken on the day of the alleged assault, were admissible to illustrate the location of the furniture of the room, as established by the witnesses for the prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 803; Dec. Dig. § 438.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes

3. CRIMINAL LAW (§ 1137*)—APPEAL—QUESTIONS REVIEWABLE—OBJECTIONS—EXCEPTIONS.

The court on appeal, though authorized in the interests of justice to reverse a conviction for error of the trial court, though no exception was taken at the time, will not reverse a conviction for error in admitting evidence, acquiesced in by accused's counsel at the time of the trial, where counsel possessed experience and ability.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.*]

4. WITNESSES (§ 349*)—TESTIMONY OF ACCUSED—CROSS-EXAMINATION—EXTENT.

The rule that the court may in its discretion subject accused, offering himself as a witness, to cross-examination as to any specific act showing moral turpitude, thereby affecting his credibility, is subject to the qualification that the cross-examination must be directed to acts of accused himself, and not those of third persons amounting merely to accusations against him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1135-1139; Dec. Dig. § 349.*]

5. WITNESSES (§ 277*)—TESTIMONY OF ACCUSED—CROSS-EXAMINATION—EXTENT.

Where accused, occupying the position of probation officer, testified in his own behalf on his trial for perjury, questions whether charges had been made against him in relation to his behavior at the jail, or whether because of supposed misconduct he had been told to keep away from the jail, were not proper subjects of cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-983; Dec. Dig. § 277.*]

6. CRIMINAL LAW (§ 1170½*)—APPEAL—ERRONEOUS ADMISSION OF EVIDENCE.

Where accused gave answers favorable to himself to improper questions on cross-examination, but the prosecuting officer immediately by further questions insinuated that the answers were not true, or were open to suspicion, the error in permitting the cross-examination was prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3155; Dec. Dig. § 1170½.*]

Appeal from Kings County Court.

Hartog Veld was convicted of perjury, and he appeals. Reversed, and new trial ordered.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

J. Grattan MacMahon, of Brooklyn (George R. Holahan, Jr., of Brooklyn, on the brief), for appellant.

Hersey Egginton, Asst. Dist. Atty., of Brooklyn (James C. Cropsey, Dist. Atty., of Brooklyn, on the brief), for the People.

CARR, J. The defendant was convicted of the crime of perjury in the County Court of Kings County. He has appealed from the judgment of conviction.

He was a man of more than ordinary intelligence, 55 years of age, and married, and of previous good repute. At the time of his conviction he held a subordinate public office attached to the Magistrates' Court, in the borough of Brooklyn, and known as "probation officer," and he was likewise a clergyman officiating in some small congrega-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion. He received an indeterminate sentence to the state prison at Sing Sing for the minimum of two years and the maximum of seven. A certificate of reasonable doubt was granted by a Special Term of this court, and the defendant was admitted to bail pending the appeal. An opinion was written at Special Term. It will be seen from an examination of that opinion that the claim of errors at the trial arose from three separate and distinct rulings. The brief of the learned counsel for the appellant discusses each of these alleged errors in detail, but it contains no claim that the evidence in the case did not justify the conviction of the prisoner.

[1] The prisoner was indicted for perjury alleged to have been committed at a preliminary examination held before Magistrate Kempner, in which E. G. Higginbotham, then a City Magistrate, was charged with having committed an assault upon the person of a young girl named Mary Hickey. Miss Hickey had testified that the alleged assault upon her person took place in a private room of the Magistrates' Court, which room was used by Higginbotham, and the general layout of the room was described in her testimony. She testified that there was in that room, on the day of the alleged assault, a couch, the greater part of which stood behind a desk and along a wall, and of which but a small part was visible to any one entering the room or standing in the body of the room. She had gone to the court to complain about her mother, who had fallen into grievously bad habits, and she said that Higginbotham took her into the room, and escorted her behind the desk to the couch, where he bade her to sit down, and that after she had sat down upon the couch he likewise did so, and that in a few moments he kissed her on the mouth, and likewise put his hands under her clothes as far up as the knee, against her protest. The defendant, Veld, was called on this examination as a witness for Higginbotham. He testified that he was present at the time of the alleged assault upon Miss Hickey, that he saw no assault, and that there was no couch whatever in the room located against the wall and behind the desk, and that he was standing in the doorway leading into the room and could see everything that happened, and that as a matter of fact the couch referred to stood out in the room alongside the desk, every part of it being visible to any one about to go into the room. It was alleged that this testimony as to the location of the couch on the day of the alleged assault was untrue and made falsely by the defendant, Veld, and that it was material testimony on the examination then and there taken.

That it was material testimony there can be no controversy, and there is none. It was testified to by the janitor and his assistant that for a very long period antecedent to the date of the alleged assault the couch in question had been located in the room just as described by the complainant, Miss Hickey. Some days after the date of the alleged assault somebody moved the couch out from behind the desk, and placed it alongside the desk, where it became visible to every person coming into the room. The janitor and his assistant swore that they did not move the couch, and that they did not know by whom it was moved, and that their attention to the fact of it having been moved

was called by Magistrate O'Reilly, who desired to know why it had been so moved. Magistrate O'Reilly, who frequently sat in the court in question, gave similar testimony to that of the janitor and his assistant. He likewise testified that, going to the courthouse to sit after the date of the alleged assault, he noticed that the couch had been removed from its customary position, and that he then called that fact to the attention of the janitor, and asked for an explanation, which the janitor was unable to give him. Daniel Quinn, a clerk in said court, testified that at the time of the day of the alleged assault the couch was located behind the desk, and was thereby screened to a large extent from the view of any one going into the room, and that it had been so located for a very long period of time theretofore. The people produced a witness, Wilcox, who testified that he was in company with the defendant, Veld, while the complaint against Higginbotham was undergoing examination, and that Veld admitted to him, and others who were in his company, on a trolley car, that the location of the furniture had been changed since the date of the assault, and that the people were going to useless labor in attempting to have photographs of the interior of the room in question.

Among the witnesses called by the defense was a clerk, Hasenflug, who likewise had testified for Higginbotham on the examination before Kempner; but even he, on cross-examination, admitted that on the date of the alleged assault the couch was located behind the desk, just as the witnesses for the people had testified. The defendant, Veld, took the stand and testified in his own behalf. The manner of his testimony shows that he was acutely intelligent. Towards the close of his examination, there is some testimony on his part tending to show that he was laboring under some misunderstanding as to the date of the alleged assault when he had been examined previously before Magistrate Kempner. If there were no serious errors of law at the trial, the facts should well sustain the conviction. This brings us to a consideration of the alleged erroneous rulings of law made at the trial.

[2] Certain photographs were offered by the people for the purpose of illustrating the location of the furniture in the room as testified to by the witnesses for the people. They had no other purpose than to make a picture of how the room stood in relation to its furniture, according to the story of Miss Hickey and the other witnesses for the people, on the day of the alleged assault. They were not proof of any actual conditions of the location of the furniture on that day, and were not so offered; for concededly they were not taken on the day of the alleged assault. Their only effect was to visualize the testimony offered by the prosecution as to the location of this couch, and which is practically without any contradiction save that of Veld himself; for even the testimony of the defendant's witness Hasenflug, who was a friend of Higginbotham and had testified in his behalf, is in complete harmony on that point with that given by the prosecution. I can see no merit in the objections to the use of the photographs.

[3] It is also urged that it was grave error to read in the evidence at the trial of this case the information which had been sworn to by Miss Hickey, and which formed a part of the preliminary examina-

tion in the charges against Higginbotham. On this trial Veld was represented by counsel of maturity and large experience in the criminal courts. Turning to the record on appeal, we find that the prosecuting officer offered in evidence the entire record of the preliminary examination—

"not for the purpose of indicating that any of the charges therein are true, but for the purpose of showing that such a proceeding was pending in the City Magistrate's Court. * * * and the basis upon which that action proceeded at that time and place."

The court thereupon asked:

"Any objection?"

The record shows that the defendant's counsel answered as follows:

"I think, if your honor please, that we are verbally going into it and I have no objection."

When the prosecuting officer read the information in question, no objection whatever was made to it on behalf of the defendant, Veld, nor was any further objection made thereafter on this point.

It is argued by the appellant that it was error for the people to read in evidence, on the cross-examination of the defendant's witness Hasenflug, extracts from his testimony as a witness on the preliminary examination. Referring to the record, we find the circumstances under which this was done. Here, again, there was no objection whatever made by defendant's counsel to this course of conduct, and the matter so read in evidence is not printed in the record on this appeal, and we have no means of knowing whether it was in any way prejudicial to the defendant, or, if so, whether it went any further than to contradict the evidence of Hasenflug, given on his direct examination; it being conceded that the record so read from was a true transcript of the testimony given by Hasenflug in the preliminary examination against Higginbotham. Now, it is true that we may, in the interests of justice, reverse a conviction for error committed by the trial court, though no exception was taken at the time. Such a course is adopted sometimes in very close cases, where some reasonable doubt may be entertained as to the propriety of the verdict. It would, however, be intolerable if a counsel of experience and ability should stand by in court without objecting to an offer of evidence, and then, after a conviction of his client, should assert that the judgment was vitiated by the admission of said evidence, which, if technically incompetent, was certainly acquiesced in at the time of the trial.

We are now brought to a consideration of what seem to be the more important errors made at the trial, which occurred on the cross-examination of the defendant, Veld. The record shows a cross-examination of the defendant in part as follows:

"Q. Do you know a man named Max Raphael? A. Yes; I know the name, but I don't know the first name. Q. Did you ever take any money from Max Raphael?"

Defendant's Counsel: I object, if your honor please.

"A. Not for myself.

Defendant's Counsel: I object to the question, as his character is not in issue.

"Assistant District Attorney: I think we will have to classify that question with the forty-seventh proposition of Euclid.

"The Court: He has gone on the stand, and taken the double burden of not only being the defendant, but also a witness. I overrule your objection.

"Defendant's Counsel: Exception.

"Q. Did you ever take any money from him for somebody else? A. Yes. Q. For whom? A. For Halperin Bros. Q. Who are they? A. Knitting mills people; they have a knitting mill. Q. Did you give the money to him? A. Yes, sir; I have got receipts from him. Q. How much? A. I think it was \$7. Q. When? A. That was some time ago. This boy had been in their employ and— Q. Do you remember when you gave the money? A. Yes, sir; a day or two after the boy brought it to me he was arrested— Q. Do you remember what that was? A. I don't remember the day. I know the boy was arrested for stealing some ties, and the complaining witness came, and of course— Q. Who authorized you to take any money from him in behalf of Halperin? A. That's part of my duty as probationary officer; seeing how restitution— Q. Did anybody authorize you to do it? A. I think the magistrate said— Q. What magistrate—Higginbotham? A. I am not sure which magistrate was there that day. Q. Did Mr. Halperin authorize you to collect any money for him? A. Yes; Mr. Halperin's brother came. Q. What is his name? A. I don't know the first name. Q. Did you turn over to his brother? A. Yes; and I have receipts for it. Q. Do you know when you did it? A. I don't know the date now. Q. This boy was discharged? A. Yes. Q. Do you know Max Steinberg? A. Max Steinberg; yes, I know him. Q. You took some money from him? A. No, sir. Q. Didn't you take \$5 from Max Steinberg when he was in Raymond street jail? A. No, sir. Q. And give \$2 of it to the dentist? A. No, sir. Q. Did you keep it all? A. I did not get any of the money. Q. You did not get any of the money? A. Not a penny of it. He complained about toothache, and I told the warden. Q. And you went and got a dentist? A. In the warden's office I telephoned for a dentist. Q. And a dentist came, and you took \$5 from Steinberg? A. I beg your pardon; Steinberg gave the dentist \$5. Q. Those charges were preferred against you? A. No, sir; there were no charges preferred against me. Q. Weren't you ordered to keep out of the jail for misconduct in jail down here by the commissioner of corrections? A. No, sir.

"Defendant's Counsel: I object to these things as entirely immaterial.

"The Court: Objection overruled.

"Q. This Steinberg and another man who has been sent to Elmira— A. Steinberg was indicted for arson. Q. Do you know Charles Gutman? A. That is the man referred to; he and Steinberg tried to frame up something. Q. And the charge against you was false? A. Exactly. The late Commissioner Barry exonerated me, and told me to perform my duty as probationary officer. Q. And the charges against you, you say, were false? A. Yes. Q. You have an opinion about that? A. Commissioner Barry told me to go back to my duty, and be there on Saturday, and any day that I did not perform my duty as probationary officer."

[4] It is true that a defendant who offers himself as a witness in his own behalf is subject, in the discretion of the court, to cross-examination as to any specific act of his life which may tend to show moral turpitude and thus affect his credibility as a witness; for, as was said by Finch, J.:

"A party who seeks to testify in his own behalf must take the risk if there are vulnerable joints in his harness." *People ex rel. v. Oyer & Term., County of N. Y.*, 83 N. Y. 461.

But this rule is subject to the qualification that the questions must be directed to acts of the witness himself, and not those of other persons which amount merely to accusations or charges. In *People v. Crapo*, 76 N. Y. 288, 32 Am. Rep. 302, a conviction was reversed be-

cause the defendant, as witness on his own behalf, had been asked whether he had not been arrested on a charge of bigamy, and it was said by the Chief Judge, in writing for the Court of Appeals:

"The discretion which courts possess, to permit questions of particular acts to be put to witnesses for the purpose of impairing credibility, should be exercised with great caution, when an accused person is a witness on his own trial. He goes upon the stand under a cloud; he stands charged with a criminal offense, not only, but he is under the strongest possible temptation to give evidence favorable to himself. His evidence is therefore looked upon with suspicion and distrust, and if in addition to this he may be subjected to a cross-examination upon every incident of his life, or every charge of vice or crime which may have been made against him, and which have no bearing upon the charge for which he is being tried, he may be so prejudiced in the minds of the jury as frequently to induce them to convict, upon evidence which otherwise would be deemed insufficient."

[5, 6] Whether charges had been made against the defendant in relation to some behavior of his at the jail, or whether, because of supposed misconduct, he was told to keep away from the jail, were not proper subjects of inquiry on this trial. It is urged, however, that, as the defendant gave answers to these questions which were favorable to himself, no prejudice resulted, and the error should be disregarded. *Nolan v. Brooklyn City R. R. Co.*, 87 N. Y. 63, 68 (41 Am. Rep. 345). But the record shows that the prosecuting officer immediately, by further questions above set forth, insinuated very plainly that these answers were either not founded on fact, or were open to suspicion. This seems a plain instance of "overtrying a case," in which the prosecuting officer transcended the proper bounds, and in which the trial court failed to exercise a proper discretion. The meanest criminal is entitled to be tried according to the law. When the manner of trial violates the law, then a conviction is reversed, not through sympathy with the defendant, but because the only way in which the law can be preserved is by enforcing it strictly for a defendant as well as against him.

The judgment of conviction of the County Court of Kings County should be reversed, and a new trial ordered. All concur.

MALONEY v. CITY OF NEW YORK et al.

(Supreme Court, Appellate Division, First Department. January 10, 1913.)

1. MUNICIPAL CORPORATIONS (§ 796*)—INJURIES ON STREETS—NEGLIGENCE.

Where the condition of a part of a street next to a railroad track, from which the asphalt was removed for repaving, was obvious, the city was not reasonably bound to erect a barrier along the side of the track to prevent driving on that part of the street.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1655; Dec. Dig. § 796.*]

2. MUNICIPAL CORPORATIONS (§ 806*)—DEFECTS IN STREETS—ASSUMPTION OF RISK.

The driver of a fire engine assumed the risk of being jolted off of his seat by driving over a part of a street from which the asphalt had been

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

removed for repaving, though such part was not barricaded from the other part.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1678, 1682; Dec. Dig. § 806.*]

3. STREET RAILROADS (§ 113*)—ACTION FOR INJURIES ON STREETS—DEFENSES—EVIDENCE.

Evidence that the city had contracted for the paving of a part of a street over which plaintiff was driving when jolted from his wagon, and which was adjacent to the tracks of defendant railroad company, under a contract requiring the contractor to repair the pavement for 15 years, which had not expired, and had rendered a bill to the railroad company for its part of the expense, was admissible as constituting a defense to that company's liability for plaintiff's injuries.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 229-238; Dec. Dig. § 113.*]

Miller and Dowling, JJ., dissenting in part.

Appeal from Trial Term, New York County.

Action by Jane E. W. Maloney, as administratrix, against the City of New York and another. From a judgment for plaintiff, and an order denying motions for a new trial, defendants appeal. Reversed, and new trial granted.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, MILLER, and DOWLING, JJ.

Loyal Leale, of New York City (Terence Farley, of New York City, on the brief), for appellant City of New York.

Charles E. Chalmers, of New York City, for appellant Central Park, N. & E. R. R. Co.

John F. McIntyre, of New York City, for respondent.

LAUGHLIN, J. The decedent, Joseph White, was a member of the fire department of the city of New York, and assigned to duty as driver of engine No. 16, which was housed on East Twenty-Fifth street, between Second and Third avenues, in the borough of Manhattan, and in response to an alarm of fire from the vicinity of Eighteenth street and First avenue at 3:20 p. m. on the 28th day of March, 1910, he was driving a team of three horses attached to the engine east on Twenty-Fifth street to First avenue and southerly on First avenue, and at a point about 40 feet north of Twenty-Third street he was thrown from the engine and was run over and killed. This action was brought to recover the damages sustained by his sisters.

The defendant railroad company owned and operated a double street railway track in First avenue, and at the time of the accident the space between the outer rails of the tracks was paved with granite blocks, and that part of the pavement concededly was in good condition. The street had formerly been paved with bluestone, and thereafter asphalt pavement had been laid over the stone between the outer rails of the railway tracks and the curb on either side of the street. On the 8th day of September, 1909, the city had duly let a contract to the defendants Rafferty Bros., to repave the street with granite block pavement

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on concrete foundation between the outer rails of the tracks and the curbs from the southerly line of Twentieth street to Fifty-Ninth street, with certain exceptions, which do not affect the questions presented for decision. The contractors were required to complete the work within 150 consecutive working days after notice to commence as provided in the contract, exclusive of bad weather and of delay caused by the city. They duly entered upon the work in the month the contract was made, and pursuant to directions, which the contract obligated them to observe, they proceeded to repave the street from Thirty-Fourth street northerly. The old asphalt pavement had been neglected, and in places it was, as described by the engineer in charge of the work, "full of holes and ruts"; and with a view to making it more safe for public travel and preparatory to repaving it, the engineer ordered the contractors to remove the old asphalt pavement and its foundation down to the surface of the old bluestone pavement, between Twenty-Third and Twenty-Fourth streets on the westerly side of the street from the curb to what the engineer termed the "railroad area," meaning thereby within from two to three feet of the westerly rail of the westerly street railway track. This was done at a time variously estimated by the witnesses as from two to six weeks before the accident. Public travel was not excluded from the street, either by barricade, notice, or otherwise; but public travel within the exterior rails of the two street railway tracks was perfectly safe, and the asphalt pavement on the easterly side of the street apparently was in a reasonably safe condition for travel, and on the westerly side it was plainly to be seen, and evident to any driver of a vehicle, that the old asphalt pavement had been removed, leaving the surface of the street on that side six inches or more lower than the corresponding parts of the surface on the easterly side. In removing the old asphalt pavement, the strip thereof left next to the westerly rail was, as already indicated, irregular in width, varying from two to three feet; and its surface was worn and uneven, and at points it was wholly worn away. This was its condition where the accident happened.

Some of the evidence tends to show that there was a depression nearly nine feet in length along the westerly side of the westerly rail where the asphalt had been worn off down to the bluestone pavement, in which there was also a slight depression, and that the wheel of a vehicle going southerly coming into it would rise again gradually onto a strip of asphalt, and then pass into another similar, but shorter and more shallow, depression. The decedent had driven through this block to a fire after the asphalt pavement had been so removed and shortly before the accident, and several times within a few months prior to the accident. It may fairly be presumed that he knew the condition of the street. He might have driven down Second avenue, and that route would have been the same length. As he drove down First avenue, another vehicle was traveling southerly on the south-bound track ahead of him, and it did not afford him room to pass without turning out of his course. He turned first to the left onto the north-bound track, and then after passing the vehicle, to the right

again, and in so doing the right wheels crossed to the right of the westerly rail, and as he straightened his course down the avenue, the off horse and right wheels remained westerly of the westerly rail. He was driving at a speed of about nine miles an hour. The other firemen attached to engine No. 16 were riding on the rear of the engine, and could not see the decedent, who was seated in front. The evidence tends to show that the right wheels passed into one or both of the depressions I have described, and that the jolt or jar incident thereto precipitated the decedent to the street on the right-hand side, and that he was run over by the engine. If a vehicle passed at right angles from the railway tracks westerly at the point where the larger of these depressions was, the evidence tends to show that there would have been a drop of from eight inches to a foot from the surface of the rail to the lowest point in the depression; but a witness for the plaintiff, who was a fellow fireman with the decedent, measured it and found it to be only eight inches. The wheels of the engine did not pass over the rail and into the depression. At the time of the accident the course of the engine was parallel with the rails of the track, and the depth of the depression as the wheels thus entered it was some inches less than the depth measured from the surface of the rail. A wagon had broken down at this point about one week before this accident.

[1] The action was brought against the city, the street railroad company, and the contractors. The complaint was dismissed as to the contractors, and a verdict was rendered against the other two defendants. The evidence was sufficient to charge both appellants with notice of the condition of the pavement. The city was proceeding with due diligence to have the street repaved. It was under no obligation to repair the pavement outside the railway tracks, where it was about to lay a new pavement. The real question in the case, so far as the city is concerned, is whether it was negligent in not cutting off travel from this part of the street altogether. Part of the street, however, was perfectly safe, and therefore negligence cannot be predicated against its leaving the street easterly of the westerly street railroad track open for travel. It would not be reasonable to require the city to erect a barrier along the westerly side of the railroad track to prevent driving off the track to the west as did the decedent. The conditions there were as obvious to a driver under ordinary circumstances and in broad daylight as if notices had been posted. I deem it doubtful whether the evidence was sufficient to present a question of fact with respect to the city's negligence; but, if so, I think the verdict is against the weight of the evidence on that point.

[2] I would not attribute negligence to the decedent in driving in the manner or at the speed shown by the evidence; but I think that in so doing he assumed the risk of being jolted off the engine. It may well be that he relied on a safety strap which was designed to prevent drivers being thrown from their seats. Ordinarily the safety strap remained hooked at one end, and the driver, on taking his seat, passed it around his waist and hooked it at the other end. The record does not show whether this strap was thus secured. It merely

appears that such a strap, apparently unbroken, was found near the scene of the accident.

[3] The street railroad company offered in evidence the contract made August 30, 1897, by the city with the Warren-Scharf Asphalt Paving Company for paving this street, between the curbs and the outer rails of the street railway tracks, with asphalt, together with the specifications and bond to keep and maintain the pavement in proper repair for a period of 15 years, which had not expired, and offered to prove that the city had rendered a bill to it for its proportionate share of the expense, and that the city had made another contract for the performance of work which the asphalt contractor failed to perform. This evidence was excluded, on the ground that it had not been pleaded. Counsel for plaintiff, after interposing this objection, withdrew it, and consented that the answer might be amended without terms, and offered to discontinue the action as against the railroad; but the court, on objection taken by other defendants, allowed neither the amendment nor discontinuance. The learned counsel for the railroad company contends, upon the authority of *Roemer v. Striker*, 142 N. Y. 134, 36 N. E. 808, that under its denial of negligence, and of duty to keep the pavement in repair, this evidence was admissible; but it is contended on behalf of plaintiff, on the authority of *Donohue v. Syracuse & East Side Ry. Co.*, 11 App. Div. 525, 42 N. Y. Supp. 808, that it was necessary for the railroad company to plead that the city had, in effect, by the contract lawfully assumed the railroad company's duty under the statute (section 98, Railroad Law [Laws 1890, c. 565], and chapter 475, Laws of 1895), and that the railroad, having been lawfully precluded from keeping this part of the street in repair, and having become liable to the city for reimbursement, if it had not in fact already paid the bill, could not be held liable therefor.

I am of opinion that the court erred in denying the motion to amend the answer and in excluding the evidence, which might have constituted a complete defense. See *Binninger v. City of New York & Brooklyn Heights Ry. Co.*, 177 N. Y. 199, 69 N. E. 390.

It follows that the judgment and order should be reversed on both appeals, and a new trial granted, with costs to appellants to abide the event.

INGRAHAM, P. J., and McLAUGHLIN, J., concur.

MILLER and DOWLING, JJ. We concur in the opinion of Mr. Justice LAUGHLIN as to the defendant railroad company; but dissent, and vote to affirm the judgment against the city.

LIPSTEIN v. PROVIDENT LOAN SOCIETY OF NEW YORK.

(Supreme Court, Appellate Division, Second Department. January 24, 1913.)

1. MASTER AND SERVANT (§ 107*)—INJURIES TO SERVANT—APPLIANCES AND PLACES FOR WORK—"PLANT."

Under Consol. Laws 1909, c. 31 (Laws 1909, c. 36) §§ 200-204, as amended by Laws 1910, c. 352, providing that, when personal injury is caused to an employé, who is himself in the exercise of due care, by any defect in the ways, works, machinery, or "plant" of the employer, the employé shall have the same right of compensation or remedy as if he had not been employed, the word "plant" includes anything (as distinguished from persons) animate or inanimate, whether fixed or movable, that is regularly used in the conduct of the business of an employer, and that is neither ways, works, nor machinery, and without which, or something of a similar character, the business could not be carried on in the usual and ordinary manner.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5400, 5401; vol. 8, p. 7755.]

2. STATUTES (§ 215*)—CONSTRUCTION—GENERAL RULES—STATUTES IN PARI MATERIA.

In determining the meaning of a word used in a statute, the court is warranted in considering the scope and purpose of the act, its history, other statutes in pari materia, and judicial construction of similar statutes in other jurisdictions.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 291; Dec. Dig. § 215.*]

3. STATUTES (§ 226*)—CONSTRUCTION—STATUTES ADOPTED FROM OTHER JURISDICTIONS.

When the Legislature enacts a statute which is a transcript of an English act that has received a known and settled construction by the courts of that country, such construction is deemed to be within the intent of the lawmaking power.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307; Dec. Dig. § 226.*]

4. MASTER AND SERVANT (§ 107*)—INJURIES TO SERVANT—APPLIANCES AND PLACES FOR WORK—STATUTORY PROVISION.

A ladder furnished to an employé for the purpose of reaching electric light globes, which he was required to clean, constituted a part of the employer's plant, within Consol. Laws 1909, c. 31 (Laws 1909, c. 36) §§ 200-204, as amended by Laws 1910, c. 352, defining the liability of an employer for injuries from defects in the ways, works, machinery, or plant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.*]

5. MASTER AND SERVANT (§ 107*)—INJURIES TO SERVANT—APPLIANCES—"DEFECT."

That a ladder furnished to an employé to be used on a tiled floor, which was slippery at times, had nothing to fasten it or prevent it from slipping, was a "defect," within Consol. Laws, c. 31 (Laws 1909, c. 36) §§ 200-204, as amended by Laws 1910, c. 352, defining the liability of an employer for injuries to an employé from any defect in the plant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1931-1933.]

Woodward and Hirschberg, J.J., dissenting.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, Kings County.

Action by Samuel Lipstein against the Provident Loan Society of New York. From a judgment dismissing the complaint, and an order denying a new trial, plaintiff appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, CARR, and WOODWARD, JJ.

Sydney W. Stern, of New York City, for appellant.

Henry L. de Forest, of New York City, for respondent.

BURR, J. This action is brought under the provisions of the Labor Law relating to the liability of employers carrying on business for injuries sustained by persons in their employ. Consolidated Laws, c. 31 (Laws of 1909, c. 36), §§ 200-204, as amended by Laws of 1910, c. 352. This act provides that:

"When personal injury is caused to an employé who is himself in the exercise of due care and diligence at the time: (1) By reason of any defect in the condition of the ways, works, machinery, or plant, connected with or used in the business of the employer which arose from or had not been discovered or remedied owing to the negligence of the employer, * * * the employé * * * shall have the same right of compensation and remedies against the employer as if the employé had not been an employé of nor in the service of the employer nor engaged in his work."

[1] The decision of this case requires us to construe the meaning of the word "plant" therein contained. In its primary meaning, this word relates to growth of a vegetable character, and there is involved in it the idea, not only of attachment to the soil, but some degree of permanency. When used in connection with a manufacturing, mercantile, or industrial establishment, it has a wider significance. It has been defined to be:

"Fixtures, machinery, tools, apparatus, appliances, etc., necessary to carry on any trade or mechanical business, or any mechanical operation or process." Century Dictionary, title "Plant."

"The whole machinery and apparatus employed in carrying on a trade or mechanical business." Webster's Dictionary, *Id.*

"A set of machines, tools, etc., necessary to conduct a mechanical business." Standard Dictionary, *Id.*

A still wider signification, determined by the context in the contract in which it was employed, may be found in *Rooney v. Thomson* (Sup.) 84 N. Y. Supp. 263, where "plant" was held to mean "discoveries" in connection with the electrical treatment of disease and appliances adapted to the use thereof.

[2] In determining its present meaning, we are warranted in considering the scope and purpose of the act, its history, other statutes in pari materia, and judicial construction of similar statutes in other jurisdictions. Endlich on Interpretation of Statutes, §§ 58, 59, 365-371. One purpose of the statute in question is to secure greater safety to employes—first, affirmatively, by imposing additional obligations upon employers; and, second, negatively, by withdrawing from their protection certain previously existing defenses. Laws of 1902, c. 600, entitled "An act to extend and regulate the liability of employers to

make compensation for personal injuries suffered by employes"; *Bellegarde v. Union Bag & Paper Co.*, 90 App. Div. 577, 86 N. Y. Supp. 72, affirmed 181 N. Y. 519, 73 N. E. 1119; *Gmaehle v. Rosenberg*, 178 N. Y. 147, 70 N. E. 411; *Griffiths v. Dudley*, Law Reports, 9 Queen's Bench Division, 387; *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667; *Quigley v. Lehigh Valley R. R. Co.*, 80 N. J. Law, 486, 79 Atl. 458.

[3] Our statute in its present form closely follows the language of the English act respecting employers' liability. St. 43 and 44 Vict. c. 42, September 7, 1880. When the Legislature of this state enacts a statute which is a transcript of an English act that has received a known and settled construction by the courts of that country, such construction may be fairly deemed to be within the mind and intent of the lawmaking power. Endlich on Interpretation of Statutes, § 371; *Ryalls v. Mechanics' Mills*, *supra*. In the *Ryalls Case* Justice Holmes, referring to the decisions construing the English act, said:

"This was the state of comment upon and construction of the English statute when the Massachusetts act was passed, copying its words very closely. We cannot deal with the latter quite on the same footing as if the Legislature had framed it in their own language, used for the first time. We must assume that they were content with the expounded meaning of the words which they adopted."

But although in its present form the words employed to describe the subject-matter of "defects" follows the language of the English act, such was not the case when our statute was first adopted. Laws of 1902, c. 600. The defects therein referred to were those occurring in "the ways, works or machinery." The word "plant" at that time appearing in the English act was omitted, and, we must presume, intentionally. When, however, that word was added to our statute by the amendment of 1910 (*supra*), doubtless the Legislature intended to enlarge its scope. Decisions of our own state construing the former provisions thereof must now be read in the light of that intention. At the same time we should consider also the provisions of other statutes of this state in *pari materia*, and particularly the statute relating to the liability of railroad corporations to their employes. By the latter act, first adopted in 1906 (Laws of 1906, c. 657) and re-enacted in 1910 (Consolidated Laws, c. 49 [Laws of 1910, c. 481], § 64), the "defects" referred to are those existing in the condition of the—

"ways, works, machinery, plants, tools or implements, or of any car, train, locomotive or attachment thereto."

If the addition of the word "plant" to the Labor Law by an amendment which went into effect September 1, 1910, was to enlarge the scope of the former act, the omission of the words "tools or implements," which had been a part of the Railroad Law for a period of four years, and which was re-enacted by a statute to take effect June 14, 1910, may be taken as some indication of an intent to make the Labor Law somewhat less comprehensive than the Railroad Law.

Seeking, now, for such light as may come from judicial construction of similar statutes in other jurisdictions, we naturally turn to some of those cases relating to the English act, which may be termed the par-

ent statute. In *Cripps v. Judge*, Law Reports, 13 Queen's Bench Division, 583, in 1884, the Court of Appeal held that a ladder used by a firm of builders in connection with the construction of a house, was part of its plant. In 1886, in *Weblin v. Ballard*, Law Reports, 17 Queen's Bench Division, 122, the Divisional Court of the Queen's Bench, on appeal from the Brentford County Court, held to the same effect. In the succeeding year, in *Yarmouth v. France*, Law Reports, 19 Queen's Bench Division, 647, Lord Esher, Master of the Rolls, speaking for a majority of the court, not only held that a horse constituted a part of the plant of defendants, who were wharfingers and warehousemen, and who used horses and trolleys to transport goods from their warehouse to the consignees thereof, but also gave this general definition of the word:

"The materials or instruments which the employer must use for the purpose of carrying on his business, and without which he could not carry it on at all."

In the same case, Lord Lindley said:

"There is no definition of plant in the act; but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business—not his stock in trade, which he buys or makes for sale, but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business."

Although there was a dissent in that case, it did not involve the construction of the word "plant." In 1898, in *Carter v. Clarke*, 14 Times Law Reports, 172, Mr. Justice Day of the Queen's Bench Division, on appeal from the Lewes County Court, held that a vessel used by defendants to transport coal from Cardiff to Newhaven, they being under a contract to supply coal to the London, Brighton & South Coast Railway Company, was part of its plant.

If we turn now to similar statutes in sister states, and the judicial construction thereof, we consider first the language of the Alabama statute, which conforms to ours in the use of the words "ways, works, machinery or plant." Code Ala. 1896, § 1749; Code Ala. 1907, § 3910. In *Georgia Pacific Ry. Co. v. Brooks*, 84 Ala. 138, 4 South. 289, it was held that a hammer used to spike a rail to a cross-tie was not "machinery" within the meaning of the statute. The court seems not to have considered whether it may not have constituted a part of the plant, stating in substance that it was conceded that it was not part of the ways, works, or plant. This is a concession which may not have been wisely made so far as the latter term is concerned. In *Birmingham Furnace & Mfg. Co. v. Gross*, 97 Ala. 220, 12 South. 36, it was held that furnishing a ladder to be temporarily used for the purpose of making a repair to the lever arm of a damper near the top of the tall chimney of a blast furnace, instead of constructing a platform upon which to stand for that purpose, did not constitute a defect in the ways, works, machinery, or plant of defendant. In *Clements v. Ala. Great So. R. R. Co.*, 127 Ala. 166, 28 South. 643, defendant was held not to be liable for furnishing a steel bar to be used in prizing up a rail upon its track, and which was alleged to be defective, because dull and blunt at the end, instead of being sharp. But the question whether this con-

stituted a part of defendant's plant, or whether its condition constituted a defect therein, seems not to have been considered in the opinion, which went upon the ground that such bar was not "machinery in the meaning of the statute." The soundness of some of these decisions seems to have been questioned in *Sloss-Sheffield Steel & Iron Co. v. Mobley*, 139 Ala. 425, 36 South. 181, and the suggestion is there made that:

"There may be a distinction between tools and appliances used in the repair of the ways, works, or machinery, and the tools, implements, and appliances used in the regular prosecution of the business of the employer."

Finally, in *Going v. Ala. Steel & Wire Co.*, 141 Ala. 537, 37 South. 784, it was held that a flat stick regularly used to prevent the shifting of a belt from a loose to a fixed pulley on the shaft was part of defendant's plant, and that a failure to have the same properly notched, so that it would not slip out of place, was a defect therein.

The New Jersey act (Public Laws 1909, c. 83) employs the words "place, ways, works, machinery or plant"; but we have been unable to find any decision of the highest court of that state construing the word "plant."

The Pennsylvania act of June 10, 1907 (P. L. 523), makes use of the words "works, plant and machinery." In *Toward v. Meadow Lands Coal Co.*, 229 Pa. 553, 79 Atl. 129, plaintiff's intestate was killed by being thrown from a car in a mine because a mule had strayed upon the track and came in collision therewith. In that case it was held that failure to equip a mule hole in a mine with a hitching post to which a mule might be tied, or with some bar or gate by which he could be kept within it, was a "defect," within the meaning of the words used in the statute, for which defendant was liable.

We have not considered the decisions under the Massachusetts act (Rev. Laws, c. 106, § 71), nor of the Colorado act (Revised Statutes of Colorado 1908, p. 596), for the reason that the words employed are "ways, works or machinery," and the word "plant" is omitted therefrom. We have not considered the provisions of the Indiana act (3 Burns' Annotated Statutes [1908] § 8017), for the reason that it adds to the words "ways, works, machinery or plant" the words "tools."

Applying, therefore, the various tests above suggested, we conclude that anything (as distinguished from persons), animate or inanimate, and whether fixed or movable, that is regularly used in the conduct of the business of an employer, and that is neither ways, works, nor machinery, and without which, or something of a similar character, such business could not be carried on in the usual and ordinary manner, may be deemed to be a portion of the plant connected with such business. Whether under the Railroad Law above referred to the use of the words "tools and appliances" may be held to include a tool temporarily used in connection with an emergency arising in the conduct of the business, we need not now determine. We think it would be extending the word "plant," as used in the Labor Law, beyond the fair meaning thereof to include therein an appliance thus used.

[4] In the case at bar the complaint was dismissed upon the opening of plaintiff's counsel, which is made a part of the record upon ap-

peal. If plaintiff's evidence sustained the statements therein contained, the jury might have found the following as facts: Defendant was engaged in carrying on the business of a pawnbroker in a large building at the corner of Rockaway and Pitkin avenues in the borough of Brooklyn. The ceiling of the principal room where defendant received its customers was about 30 feet above the floor. Suspended from the ceiling were about 12 lighting fixtures, consisting of electric bulbs inclosed in globes. These globes were about 12 feet from the floor. Plaintiff was employed by defendant as a caretaker or porter, and it was part of his duty at regular intervals to clean these lighting fixtures and the globes thereof, and certain other wire fixtures about the same distance above the floor. The floor of this room was covered with tiling and was at times slippery. To enable plaintiff to reach these fixtures, defendant furnished him with one-half of an extension ladder (the whole of which was about 25 feet in length), and instructed him to use this when engaged in the discharge of his duties. There was nothing at either end of the ladder to fasten the same or to prevent it from slipping. On several previous occasions the foot of the ladder had slipped upon the smooth tiled floor while plaintiff was using it. He had informed defendant's general manager of these occurrences, and complained to him of the danger of the use of such ladder, and asked to be furnished with a step ladder. On some of these occasions the manager replied that he "would see about it," and on one occasion plaintiff was told that he, the manager, would "see that he got another ladder." On December 24, 1910, plaintiff placed the ladder in a careful manner against the wall for the purpose of cleaning one of the fixtures in the manner in which he had been theretofore instructed. When he was about halfway up the ladder, without fault on his part, it slipped and he was thrown down and injured. We think this ladder was part of the plant used and employed in defendant's business. Keeping its premises in a clean condition, so as to attract its customers, and its lighting apparatus efficient for the use of its employes, might be found to be essential to the conduct thereof.

[5] There was also a defect in the plant within the meaning of the act under consideration. That the ladder did not break—that it was sound—viewed as an implement apart from the manner of its use, is not conclusive upon this question. In *Heske v. Samuelson*, Law Reports, 12 Queen's Bench Division, 30, Lord Chief Justice Coleridge said:

"The question is whether the fact that the machine was unfit for the purpose for which it was applied, constitutes a 'defect in its condition' within St. 43 & 44 Vict. c. 42. The question must really answer itself. If it was not in a proper condition for the purpose for which it was applied, there was a defect in its condition within the meaning of the act."

And in the same case Sir James Fitzjames Stephen said:

"Could it be said that, if a windlass fit only for raising a bucket is used to draw up a number of men, there is no defect in the condition of the machinery. The condition of the machine must be a condition with relation to the purpose for which it is applied."

See, also, *Weblin v. Ballard*, *supra*.

The judgment and order appealed from must be reversed, and a new trial granted; costs to abide the event.

JENKS, P. J., and CARR, J., concur. HIRSCHBERG, J., dissents.

WOODWARD, J. I dissent. While I agree with the views of Mr. Justice BURR as to what constitutes the plant, I do not wish to vote that there is a liability on the part of a master for every defect, real or fanciful, which may be suggested after the accident has happened; and in this case, if there was no defect in the ladder as designed, if it was a perfect ladder of its kind, because it slipped on a slippery tile floor does not necessarily render the defendant liable, or present a question of fact for the jury.

McKEON v. PROCTOR & GAMBLE MFG. CO.

(Supreme Court, Appellate Division, Second Department. January 24, 1918.)

1. MASTER AND SERVANT (§ 107*)—INJURIES TO SERVANT—APPLIANCES—"PLANT."

Chain tongs, which broke, causing an injury to a servant, are a part of the employer's "plant."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5400, 5401; vol. 8, p. 7755.]

2. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—DEFECTS IN APPLIANCES—STATUTORY PROVISIONS.

Under Labor Law (Laws 1909, c. 36 [Consol. Laws 1909, c. 31]), § 200, as amended by Laws 1910, c. 352, making a master liable for injuries from negligence in not discovering or remedying a defect in the plant, evidence that chain tongs were somewhat worn, but that the employé using them, who had 18 years' experience, believed them sufficient to do the work, was insufficient to show negligence of the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

3. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In an action for injuries to an employé from the breaking of chain tongs, where there is a conflict of evidence whether it was proper to use chain tongs as plaintiff used them, the modification by the court of defendant's requested charge that no negligence can be based on the worn condition of the tongs, if they were reasonably safe for use by hand, if the jury find that is the manner in which the tongs were to be used properly, by adding, "provided it was improper or unusual to use them as plaintiff did use them," is error; the fact that it may have been usual to use them as plaintiff did being no justification for improper use.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.*]

Hirschberg and Rich, JJ., dissenting.

Appeal from Trial Term, Richmond County.

Action by John McKeon against the Proctor & Gamble Manufacturing Company. From a judgment (76 Misc. Rep. 599, 135 N. Y. Supp.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

291) for plaintiff, and an order denying a motion to set aside the verdict, made upon the minutes, defendant appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, WOODWARD, and RICH, JJ.

Walter Lester Glenney, of New York City (Bertrand L. Pettigrew, of New York City, and Bertram G. Eadie, of New Brighton, on the brief), for appellant.

Don R. Almy, of New York City, for respondent.

BURR, J. [1] We agree with the opinion of Mr. Justice Benedict, at Trial Term, that under the circumstances here disclosed the chain tongs which broke may be deemed a part of defendant's plant. *Lipstein v. Provident Loan Society of New York*, 139 N. Y. Supp. 799, decided herewith.

[2] But under the circumstances here disclosed the liability, if any, of defendant for a defect in the condition of the plant arises out of its negligence in not discovering or remedying such defect. Labor Law (Consolidated Laws, c. 31 [Laws of 1909, c. 36]) § 200, as amended by Laws of 1910, c. 352. While the evidence in this case discloses that the chain tongs were somewhat worn, and the result proved that they were insufficient for the use to which they were put, we think that the evidence wholly fails to establish that the defect was of such a character that defendant could be charged with negligence in not discovering or remedying it. A thing may be worn, but yet not sufficiently worn to charge an employer with negligence in permitting the same to be used. The plaintiff in this case, with his 18 years of experience, was fully as competent as any other person to determine whether the worn character of the tongs was such as to make it unsafe to use the same. But his own evidence upon that point is that, although he noticed the worn link, which subsequently broke, he still believed that the tongs were entirely sufficient to do the work for which he employed them. Why would not the master be justified in supposing the same thing?

[3] We also think that there was error in the court's ruling upon a request to charge submitted by defendant. There was a conflict of evidence as to whether it was proper to use chain tongs in the manner in which plaintiff did use them. The defendant requested the court to charge:

"That no negligence on defendant's part may be based upon the worn condition of the tongs which broke, if they were reasonably safe and adequate for use by hand, if the jury find that is the manner in which the tongs were to be used properly."

The court refused to charge in that form, but did charge with the addition of the words:

"Provided it was improper or unusual to use them as plaintiff did use them."

If the only way in which the tongs should have been used was by hand, any other use would be improper, and the mere fact that it may

have been usual to use them in a different way, and in the way that plaintiff did use them, would not justify this improper use. A wrong thing cannot be made right because it is customary. Certainly this would be so, unless the master knew of the unusual and improper use, and assented to it; and the modification of the request to charge, which introduced the "usual" element, omitted this necessary qualification.

Judgment and order reversed, and new trial granted; costs to abide the event.

JENKS, P. J., and WOODWARD, J., concur. HIRSCHBERG, J., votes to affirm, upon the opinion of Mr. Justice Benedict at Trial Term, with whom RICH, J., concurs.

BACHMANN-BECHTEL BREWING CO. v. GEHL

(Supreme Court, Appellate Division, Second Department. January 24, 1913.)

1. REPLEVIN (§ 57*)—PLEADING—COMPLAINT.

Liquor Tax Law (Consol. Laws 1909, c. 34) § 26, authorizes the holder of a liquor tax certificate to sell and transfer it to any person not forbidden to traffic in liquors; section 21 enumerates the things which disqualify a person from engaging in the liquor traffic; and section 22 declares certain persons incompetent to engage in such traffic. Laws 1911, c. 407, amending section 26, recognizes the transfer of a certificate as collateral security as a purpose not within the section; and Laws 1912, c. 263, provides for registration and proof of the assignment of certificates as collateral security. Plaintiff advanced money to defendant to enable him to procure a certificate, for which defendant gave his note and assigned the certificate as collateral security. *Held*, in replevin for the certificate, that the cause of action did not rest upon the liquor tax law, but upon the assignment, and that the complaint need not allege that plaintiff was "not forbidden to traffic in liquors."

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 200-210; Dec. Dig. § 57.*]

2. PROPERTY (§ 2*)—SUBJECTS OF.

A liquor tax certificate, which has a value given to it by the statute, whereby it may be surrendered and a portion of the money refunded, or a new certificate issued for business elsewhere, or whereby the assignee may do business at the place for which the certificate was issued, represents property, and is itself personal property.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 2; Dec. Dig. § 2.*]

3. CHATTEL MORTGAGES (§ 11*)—PROPERTY SUBJECT TO MORTGAGE—LIQUOR TAX CERTIFICATE—"CHATTEL."

A liquor tax certificate is not a "chattel," within the chattel mortgage law.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 47-53; Dec. Dig. § 11.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1093-1098; vol. 8, p. 7600.]

*For other cases see same topic & § NUMBERS in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. CHATTEL MORTGAGES (§ 230*)—CRIMINAL RESPONSIBILITY—FRAUDULENTLY SECRETING PERSONAL PROPERTY.

A liquor tax certificate is not a chattel, within Pen. Code, § 571, which makes it a misdemeanor to sell, assign, or secrete any mortgaged personal property.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 480-493; Dec. Dig. § 230.*]

5. TROVER AND CONVERSION (§ 2*)—SUBJECTS OF CONVERSION—CHOSES IN ACTION.

An action in trover may be maintained for choses in action.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 3-20; Dec. Dig. § 2.*]

6. REPLEVIN (§ 4*)—PROPERTY SUBJECT TO REPLEVIN—IN GENERAL.

Documents may be replevied, if they have value, as deeds, record books of corporations, certificates of stock, verified claims against an estate, notes and bills of exchange, bonds, and certificates of deposit; but a canceled check, which is a mere voucher, without pecuniary value, may not be replevied.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 4-10, 21-26; Dec. Dig. § 4.*]

7. REPLEVIN (§ 4*)—PROPERTY SUBJECT—STATUTE—LIQUOR TAX CERTIFICATE.
Under the law providing for the replevin of chattels, a liquor tax certificate may be replevied.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 4-10, 21-26; Dec. Dig. § 4.*]

Appeal from Special Term, Kings County.

Action by the Bachmann-Bechtel Brewing Company against Rudolph Gehl. From an interlocutory judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed, and demurrer overruled.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

Arthur B. Hyman, of New York City (Isaac Loewenthal, of New York City, on the brief), for appellant.

Gustav Gunkel, of New York City, for respondent.

THOMAS, J. The appeal is from an order sustaining a demurrer to complaint in an action to replevin a liquor tax certificate assigned to plaintiff. The questions are: (1) May such an action be sustained? (2) If so, should the complaint allege that plaintiff is "not forbidden to traffic in liquors" (section 26, Liquor Tax Law)?

[1] The plaintiff advanced \$1,200 to the defendant to enable him to procure the certificate, for which the latter gave his note and assigned the certificate as collateral security. The Liquor Tax Law (section 26) provides, in effect, that the person to whom the certificate is issued may transfer it, save where it is issued under subdivisions 3, 5, or 6 of section 8, to any person "not forbidden to traffic in liquors under this chapter, nor under the subdivision of section 8 under which such certificate was issued," and that the transferee may carry on the business upon the premises described in the certificate, if such traffic is not prohibited therein, as if he were the original applicant, upon filing a new application and bond, and the presentation of the certificate to the officer issuing it, who shall stamp on its face consent to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes.

transfer, provided, however, that no transfer shall be made except in accordance with the chapter, nor by any holder who shall have been convicted, etc. If, now, section 8 with its varied limitations be read, and there be ascertained the things existing or that may happen to disqualify a person from trafficking in liquors as enumerated in section 21, and the persons by section 22 made incompetent to engage in the business, it can be understood what and how many things the transferee must negative by pleading and proof as a condition precedent to recovery if the demurrer upon the first ground be sustained.

It will be observed that the statute qualifies the certificate holder to sell, as well as the transferee to buy; and it would be, as I deem it, a strange rule that the vendor, having transferred and keeping the consideration, and at the same time converting the certificate, could compel the buyer to plead and prove the qualifications of the parties by showing affirmatively that the vendor and vendee had committed none of the criminal acts and fallen under none of the many disabilities mentioned in the several sections. The cause of action does not rest on the statute, but on the defendant's assignment. There is no general prohibition against vending the certificate, as in the cases of prohibiting a nonresident corporation or a plumber from doing business in the state without public sanction; but rather there is a general grant of power to the owner to sell to any and all persons, provided they be not or do not become disqualified to take and to hold the certificate. So that, if the defendant could be heard at all to object to a transferee whose money he has, he must show, if he would, how the transferee is excluded. But the section has no relevancy to the case at bar. It is obvious that it simply enables the holder of the certificate to transfer it for the purpose of substituting the transferee in his place of business with the consent of the proper official. The complaint here shows that the certificate was transferred as collateral security, a purpose quite distinct from the other, and in its nature not contemplated by section 26. The original section makes this plain, but the amendment by chapter 407 of the Laws of 1911 recognizes the transfer of a certificate as collateral security as a purpose not within the objects to be effected by the section. Moreover, the transfer of certificates as collateral security is recognized by statute, and provision made for registering the assignment and proving the fact. Chapter 263, Laws of 1912. This objection to the complaint is not well taken.

[2] The next and important question is whether the certificate is the subject of replevin. The certificate itself is an official document in statutory form, stating that a person named has paid a sum of money for an excise tax for trafficking in liquors for a stated period. The certificate has a value given to it by the statute, whereby it may be surrendered, and a portion of the money paid be refunded, or a new certificate issued for business elsewhere, or the assignee may be permitted to do business at the place for which the certificate was issued. The certificate represents property, and is itself property, somewhat as a warehouseman's receipt is personal property. This quality has been judicially declared. *Matter of Cullinan* (Kray Certificate) 82 App. Div. 445, 81 N. Y. Supp. 567; *Matter of Lyman*, 160 N. Y.

96, 54 N. E. 577; *Matter of Livingston*, 24 App. Div. 51, 48 N. Y. Supp. 989; *Niles v. Mathusa*, 162 N. Y. 546-549, 57 N. E. 184. But is it such personal property as may be replevined? In *Anchor Brewing Co. v. Burns*, 32 App. Div. 272, 52 N. Y. Supp. 1005, the action was by a mortgagee to recover a certificate not existing when the mortgage was made, but a renewal thereof, also attempted to be mortgaged, but in fact, assigned to another. The court decided: (1) That the mortgage did not cover the certificate not in existence; (2) that the lien by mortgage would not give required title; (3) that the certificate was not a chattel, and there is probably a suggestion that replevin would not lie.

[3, 4] That the certificate is not a chattel, within the chattel mortgage law, has been decided. *Niles v. Mathusa*, supra; *Koehler & Son Co. v. Flebbe*, 21 App. Div. 210, 47 N. Y. Supp. 369. The court, in *Anchor Brewing Co. v. Burns*, supra, conceived that the certificate was only a piece of paper of no advantage to the plaintiff. That may have been so in that instance, but it is a valuable piece of paper under the present law. That the Liquor Tax Law has imparted to certificates the quality of property is beyond question. In *People v. Durante*, 19 App. Div. 292, 45 N. Y. Supp. 1073, the decision was that a certificate was such property as could be the subject of a chattel mortgage within the meaning of Penal Code, § 571; and in *Koehler & Son Co. v. Flebbe*, supra, it was decided that it was not. In *Niles v. Mathusa*, supra, there was final disposition of that question by decision that the certificate was not a chattel for the purposes of that act, although "undoubtedly personal property." If, now, a thing must be such a chattel as may be mortgaged to be the subject of an action in replevin, this action cannot be maintained.

[5, 6] It is a reasonable contention that a valueless piece of paper is not the subject of replevin. That view was presented in *Flannigan v. Goggins*, 71 Wis. 28, 36 N. W. 846, where the action was to replevin a deed, and so it was considered that a paid and canceled check, become a mere voucher and without pecuniary value, was not the subject of replevin. *Barnett v. Selling*, 70 N. Y. 492, 496. It does not aid respondent's position to classify the certificates as choses in action, inasmuch as action in trover may be maintained for them. *Murray v. Burling*, 10 Johns. 172. But many documents differing in nature may be replevined, if they have value, as deeds (*Wilson v. Rybolt*, 17 Ind. 391, 79 Am. Dec. 486, where it was held that deeds fell under the statutory words "personal goods"; *Simmons v. Curtis*, 43 Minn. 539, 45 N. W. 1135), record books of corporations (*Southern Plank Road Co. v. Hixon*, 5 Ind. 165; *Sawyer v. Baldwin*, 11 Pick. [Mass.] 492), certificates of stock (*Smith v. Downey*, 8 Ind. App. 179, 34 N. E. 823, 35 N. E. 568, 52 Am. St. Rep. 467; *McAllister v. Kuhn*, 96 U. S. 87, 24 L. Ed. 615, where the action was for conversion), a verified claim against an estate (*Willis v. Marks*, 29 Or. 493, 45 Pac. 293), promissory notes (*Masson v. Bovet*, 1 Denio, 69, 75, 43 Am. Dec. 651; *Boughton v. Bruce*, 20 Wend. 234), checks (*Haas v. Altieri*, 2 Misc. Rep. 252, 21 N. Y. Supp. 950), bills of exchange (*Smith v. Eals*, 81 Iowa, 235, 237, 46 N. W. 1110, 25 Am. St. Rep.

486), bonds (*Sager v. Blain*, 44 N. Y. 445), and certificates of deposit (*Robinson v. Stewart*, 97 Mich. 454, 56 N. W. 853).

[7] The statute at one time provided for the replevin of "beasts, or goods, or chattels of any person" (1 Revised Laws, 91), but all things so described have been carried into our present statute under the word "chattel," and the courts have brought under this statutory term things such as are usually defined choses in action—things dissimilar in nature and use from beasts, goods, and chattels. Why should a certificate of stock be regarded as a chattel and a liquor tax certificate not? It will not be asserted that a note negotiable may be replevined, and that a note nonnegotiable may not be. A nonnegotiable instrument is as useless in a thief's hands as a liquor tax certificate, and would probably cause the owner less damages. A liquor tax certificate is legally known as personal property, is capable of assignment, commonly used as proper collateral for loans, and is recognized as transferable as collateral security by the decisions and statute, and provision by statute made for the registration of the transfer and proving the same. If the plaintiff may not protect his property rights by recovering the possession of the certificate, the value of which ebbs day by day, how may he be protected then? In *Matter of Lyman*, 160 N. Y. 96, 54 N. E. 577, it was said:

"The holder may invoke the general rules of law for the protection of property in any proceeding having for its object the forfeiture or destruction of the right which the certificate confers."

That sentence means little, if the assignor may consume the res.

The interlocutory judgment should be reversed, with costs, and the demurrer overruled, with costs. All concur.

SEXTON v. FENSTERER et al.

(Supreme Court, Appellate Division, First Department. January 10, 1913.)

1. BILLS AND NOTES (§ 121*)—PARTIES—PRINCIPAL, SURETY, AND GUARANTOR.

Under an arrangement whereby a drawer of drafts in Germany agreed to put New York bankers in funds 15 days before each draft was due, and they requested a Berlin correspondent to pay the drafts and to charge them on a general account, guaranteeing the correspondent against loss therefrom, the correspondent, on acceptance of a draft as between itself and the holder, became bound as a principal debtor, but as between itself and the drawer the drawer was the principal debtor.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 255, 256; Dec. Dig. § 121.*]

2. GUARANTY (§ 74*)—DISCHARGE OF GUARANTOR—PAYMENT.

Defendant, doing business in New York and in Germany, guaranteed to put K. & Co., New York bankers, in funds to meet his drafts on a German bank 15 days before each was due. K. & Co. then requested the German bank to pay the drafts and charge them on general account, guaranteeing it against loss. K. & Co. failed at a time when the German bank had accepted drafts not due for more than 15 days and before defendant as drawer had put them in funds. The defendant provided the German bank with money to meet the drafts. *Held*, in an action by the trustee

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in bankruptcy of K. & Co., that defendant thereby performed his obligation to K. & Co. and thereafter owed them nothing upon his guaranty.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 84; Dec. Dig. § 74.*]

3. SUBROGATION (§ 1*)—NATURE AND THEORY OF RIGHT.

Subrogation is based on the facts of each particular case, and is generally applied where one person is compelled for his own protection, or that of some interest which he represents, to pay a debt for which another is primarily liable.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6721-6727; vol. 8, p. 7807.]

4. SUBROGATION (§ 7*)—SURETIES—SUBROGATION TO RIGHTS OF CREDITORS.

A surety, who pays the debt of his principal, is subrogated to all the securities, liens, and equities held by the creditor against the principal, and entitled to enforce them against the principal in a court of equity.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 17, 18, 21-29, 38, 77, 83, 92; Dec. Dig. § 7.*]

5. BILLS AND NOTES (§ 75*)—ACCOMMODATION ACCEPTOR—NATURE OF LIABILITY.

An accommodation acceptor of a bill, as between himself and the drawer, in equity occupies the position of a surety.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 136; Dec. Dig. § 75.*]

6. SUBROGATION (§ 7*)—SURETIES—SUBROGATION TO RIGHTS OF CREDITORS.

A surety for the drawer of a bill, on payment, is subrogated to the rights of the holder.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 17, 18, 21-29, 38, 77, 83, 92; Dec. Dig. § 7.*]

7. SUBROGATION (§ 7*)—SURETIES—SUBROGATION OF PRIOR SURETY.

A prior surety, compelled to pay a debt, will be subrogated to the rights of the creditor against the subsequent surety.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 17, 18, 21-29, 38, 77, 83, 92; Dec. Dig. § 7.*]

8. PRINCIPAL AND SURETY (§ 147*)—RIGHTS OF CREDITOR—RECOURSE TO INDEMNITY TO SURETY.

A creditor, whose debt is due, is subrogated to the benefit of securities and indemnities furnished by the principal to the surety, since the securities in the hands of the sureties having been appropriated by the debtor to pay the debt, and constitute a trust which equity will enforce for the benefit of the creditor.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 402-412; Dec. Dig. § 147.*]

9. PRINCIPAL AND SURETY (§ 147*)—PARTIES TO BILLS AND NOTES—ACCEPTOR.

Where defendant guaranteed to put bankers in funds 15 days before the time his drafts should become due, and they guaranteed a foreign correspondent against loss on the payment of such drafts, the correspondent, on acceptance of such drafts, was subrogated to the securities and guaranties of the drawer held by the bankers, including defendant's guaranty of funds, so that defendant's voluntary payment to the correspondent of drafts which it had accepted, but not charged to the bankers, amounted to a discharge both of his bankers' obligation to the correspondent and his guaranty to his bankers.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 402-412; Dec. Dig. § 147.*]

McLaughlin, J., dissenting.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'y Indexes

Action by Lawrence E. Sexton, as trustee in bankruptcy, etc., of Kessler & Co. against Gabriel Fensterer and Francis H. Ruhe, copartners as Fensterer & Ruhe. Verdict was directed for the defendants, and plaintiff took exceptions, which were ordered to be heard in the first instance by the Appellate Division. Exceptions overruled, and judgments ordered for defendants on the verdict.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, MILLER, and DOWLING, JJ.

Wallace Macfarlane, of New York City, for plaintiff.

Francis H. Kinnicutt, of New York City, for defendants.

INGRAHAM, P. J. There was no substantial dispute as to the facts. At the end of the trial both parties moved for the direction of a verdict. The court denied the plaintiff's motion for the direction of a verdict in favor of the plaintiff, and granted a motion directing a verdict for the defendants, to which the plaintiff excepted, and ordered the exceptions to be heard in the first instance by this court.

Kessler & Co., the bankrupts, were bankers doing business in the city of New York, and the defendants were engaged in business in New York and Germany. Mr. Gabriel Fensterer, one of the defendants, was in Germany and carried on business there in connection with the business carried on by his firm in New York; the business of the defendants' firm being transacted in New York by Mr. Ruhe, the other member of the copartnership. There was a firm of Leffler, Thiele & Co., with whom the defendants had business transactions in Germany. The bankrupts failed on October 30, 1907, and on that day made a general assignment for the benefit of creditors. On November 8, 1907, a petition in involuntary bankruptcy was filed against the bankrupts, and they were subsequently adjudicated bankrupts, and the plaintiff was appointed trustee. There was also a firm doing business in Berlin, in the empire of Germany, under the firm name of Delbruck, Leo & Co. For a number of years prior to April, 1906, there had been what was called a credit arrangement between the bankrupts and the defendants, which had for its object the giving of defendants credit in Germany in their financial transactions there, and on April 9, 1906, to continue this arrangement, the defendants wrote to the bankrupts, requesting the bankrupts to issue—

"a credit to us for the firm of Leffler, Thiele & Co., No. 47 Murray St., drawn to the favor of Mr. G. Fensterer, of Berlin, Germany. We, the undersigned firm, guarantee the payment of any drafts drawn by our Mr. G. Fensterer in Europe under this letter of credit. The letter of credit to be issued to the above-named firm, Leffler, Thiele & Co., to be M20,000 per month and to be in force until canceled."

In consequence of this application the bankrupts wrote to Messrs. Delbruck, Leo & Co., on April 10th, as follows:

,"By these respects we ask you to kindly pay, as heretofore, the 90 days' sight drafts of Mr. Gabriel Fensterer, Berlin, for account of Messrs. Leffler, Thiele & Co., New York, and to debit us therefor each time under advice to us. The drafts of said gentleman may read M20,000 per month, and this credit is to remain in force until cancellation on our part."

And Delbruck, Leo & Co., under date of April 21, 1906, acknowledged the receipt of this letter, and noted that the bankrupts—"accredit with us until further notice Mr. Gabriel Fensterer, of Berlin, on account of Lefler, Thiele & Co., of New York, to the amount of 20,000 marks monthly, to be drawn in drafts at 90 days after sight."

On April 23, 1906, Mr. Gabriel Fensterer wrote Delbruck, Leo & Co., at Berlin, stating that he had been informed by his firm in New York that a credit of 20,000 marks per month had been opened in his favor by that firm through the New York banking concern of Messrs. Kessler & Co., and that he would, as on former occasions, dispose of this amount by drawing his drafts at 90 days' sight, these drafts to be covered in New York as in former cases through his New York firm in accordance with the arrangement made with the New York firm of Kessler & Co. In reply to such letter Delbruck, Leo & Co. confirmed the arrangement that Kessler & Co., in New York, had opened with them in Mr. Fensterer's favor, on account of Lefler, Thiele & Co., a credit of 20,000 marks monthly, which is to be disposed of by drafts at 90 days after sight until recalled. The arrangement was thus completed, and the manner of transacting this business seems to have been that Mr. Fensterer, in Germany, drew drafts at 90 days' sight on Delbruck, Leo & Co.; that Delbruck, Leo & Co. accepted these drafts, information of which was transmitted to the bankrupts in New York, for which the defendants paid to the bankrupts 15 days before the drafts became due to the amount required to meet the drafts in Germany; and this sum was then transmitted by the bankrupts to Delbruck, Leo & Co. to provide for the payment of the drafts. Thus before the drafts became payable the defendants had provided the money through the bankrupt firm to meet the payments in Berlin. All the drafts that had become payable prior to the time of the bankrupts' failure had been provided for under this arrangement, but there were outstanding at the time of the bankrupts' failure a number of drafts drawn by Mr. Fensterer on Delbruck, Leo & Co., and accepted by them, but which were not then due. No funds had ever been received from the bankrupt firm to cover these outstanding acceptances of Delbruck, Leo & Co. Kessler & Co., the guarantors, having failed, Delbruck, Leo & Co. entered into negotiations with one of the defendants, Gabriel Fensterer, who had drawn the drafts, and demanded of Gabriel Fensterer the payment of the drafts drawn by him, and which had been accepted by Delbruck, Leo & Co., whereupon Mr. Gabriel Fensterer himself, in the name of the defendants, provided the funds with which these drafts were paid, and, having been paid, no claim was made against the bankrupts on account of these acceptances. During all this time Mr. G. Fensterer was the agent of Lefler, Thiele & Co. in Germany, buying goods for them, and the funds obtained by Gabriel Fensterer for the discounting of these notes were expended in making purchases for the account of Lefler, Thiele & Co.

[1, 2] It thus appears that, in the arrangement between the defendants and the bankrupt firm of Kessler & Co., the defendants guaranteed the payment of any drafts drawn by "our Mr. G. Fensterer" in Europe, and upon that guaranty Kessler & Co. requested Delbruck,

Leo & Co. to pay the 90-day sight drafts of Mr. G. Fensterer, and to debit Kessler & Co. therefor. Under this guaranty no obligation of defendants existed until Delbruck, Leo & Co. had paid the drafts drawn by G. Fensterer. So far as appears by the arrangement, there was no agreement that Delbruck, Leo & Co. should accept these drafts, although undoubtedly such an acceptance was contemplated as necessary to carry out the arrangement which was made; but under the guaranty the obligation to pay arose upon payment, not upon acceptance. The actual method adopted by the parties was for the defendants to furnish Kessler & Co. in New York with money to pay the maturing drafts 15 days before the due day, to enable Kessler & Co. to transmit that money to Delbruck, Leo & Co. in time to meet the drafts when due. Thus at the time of Kessler & Co.'s failure the outstanding drafts which are involved in this action had not become due, nor had there arisen any obligation on behalf of the defendants to furnish Kessler & Co. money to pay the drafts, as they were all due more than 15 days after the bankrupts' failure, and therefore the defendants had not furnished Kessler & Co. the money to pay the drafts, nor had Kessler & Co. furnished Delbruck, Leo & Co. the money to meet them when due.

The situation that then existed, therefore, was that one of the defendants had drawn its draft upon Delbruck, Leo & Co. which was payable 90 days after sight, which draft Delbruck, Leo & Co. had accepted, and thus became bound as principal debtors to the holders of the draft. But, as between Delbruck, Leo & Co. and the defendants, the drawer of the draft, one of the defendants, was the principal debtor. If Delbruck, Leo & Co. had paid these drafts, they could have quite clearly recovered from the drawer of the drafts, one of the defendants, the amounts that they had paid. It is true that Kessler & Co. had undertaken that, if Delbruck, Leo & Co. had paid the drafts, they could debit Kessler & Co. with the amount of the payments, and defendants had guaranteed to Kessler & Co. that these drafts would be paid—clearly meaning, I think, they would be paid by the drawer of the draft, who was a member of the defendant's firm. The object was, not to protect the holders of the accepted drafts, but to protect Delbruck, Leo & Co. from having to pay drafts drawn by G. Fensterer, in case G. Fensterer did not furnish the funds necessary to pay the drafts. In other words, Kessler & Co. guaranteed Delbruck, Leo & Co. against any loss by payment of the drafts, and the defendants guaranteed Kessler & Co. from any loss in consequence of their guaranty to Delbruck, Leo & Co. Under this arrangement, as I view it, the principal debtor remained G. Fensterer or the defendants and no obligation ever existed as against Kessler & Co. or the defendants until Delbruck, Leo & Co. had actually paid the drafts. If this is the correct situation it seems to me entirely clear that the principal debtor, G. Fensterer or the defendants, not only had the right, but they were bound, to provide funds to meet these drafts, accepted by Delbruck, Leo & Co., before they became due, and if they performed that obligation no liability of Kessler & Co. existed, and there was nothing due by the defendants to Kessler & Co. under their guaranty.

Assuming that Kessler & Co. had not failed, but had continued business after October 30, 1907, and that Mr. G. Fensterer, in Berlin, had taken up the accepted drafts before they became due, certainly Kessler & Co. would have had no claim against these defendants for the repayment of these drafts. They would never have been debited in their account with Delbruck, Leo & Co. with the amount of the drafts which the drawer had actually paid, and Kessler & Co. could have had no claim against the defendants under their guarantee. The failure of Kessler & Co. did not, it seems to me, at all change this situation. After the failure G. Fensterer, the drawer of the drafts accepted by Delbruck, Leo & Co., did just what he might have done at any time. He paid the drafts when they became due, and this was just what the drawer of the drafts did after Kessler & Co. had failed. The moment these accepted drafts were paid by defendants, Delbruck, Leo & Co. had no possible claim against Kessler & Co. no claim that Delbruck, Leo & Co. could have proved in bankruptcy, and no obligation then existed, or ever had existed, by which Kessler & Co. became liable to Delbruck, Leo & Co. But, even assuming that Delbruck, Leo & Co., by reason of their failure, or for any other reason, had failed to provide the necessary funds to meet the accepted drafts, I think it clear that Delbruck, Leo & Co. could have at once sued the drawer of the drafts and disregarded the guaranty of Kessler & Co. It is true that Kessler & Co. had guaranteed Delbruck, Leo & Co. on the payment of the drafts, and had authorized Delbruck, Leo & Co. to debit Kessler & Co. with the amount necessary to pay them; but, as before stated, the drawer of the drafts was, as between the parties to the instruments, the principal debtor; Kessler & Co. standing only in the place of the guarantor. Assuming Delbruck, Leo & Co., the guarantors, to have failed, holding a guaranty of the payment of the drafts executed by the defendants, it seems to me quite clear that, upon the doctrine of equitable subrogation, Delbruck, Leo & Co. would have been entitled to enforce the guaranty as against these defendants.

[3, 4] It is a general principle that subrogation is a form of equity jurisprudence. It is founded on the facts and circumstances of each particular case and on the principle of natural justice. It is applied where one person is compelled for his own protection, or that of some interest which he represents, to pay a debt for which another is primarily liable. Am. & Eng. Enc. of Law (2d Ed.) vol. 27, p. 203. And it is also a general rule that a surety who pays the debt of his principal will be subrogated to all the securities, liens, equities, rights, remedies, and priorities held by the creditor against the principal, and entitled to enforce them against the latter in a court of equity or of equitable jurisdiction.

[5, 6] And in the case of an accommodation acceptor of a bill:

"As between himself and the drawer he in equity occupies the position of a surety, and on payment of the bill is entitled to be subrogated to the rights of the holder." Id. 231.

[7] And the rule is also stated at page 225:

"On the other hand the weight of authority is that where the prior surety is compelled to pay the debt he will be subrogated to the right of the creditor against the subsequent surety."

[8] And in 37 Cyc. 437, it is said:

"A creditor whose debt is due is subrogated to the benefit of securities and indemnities furnished by the principal to the surety. * * * The rule extends to guarantors and indorsers, and where a third person for a present consideration guarantees the payment of an existing debt, and the debtor executes to him a mortgage conditioned for a payment of the indebtedness to the creditor and an indemnification of the guarantor, the creditor by substitution is entitled to the benefit of the security."

See *M. & M. Bank v. Cummings*, 149 N. Y. 360, 44 N. E. 173, and *National Bank of Newburgh v. Bigler*, 83 N. Y. 51, where, in speaking of this doctrine of equitable subrogation, it is said:

"Its true basis is not to be found in the different and varying circumstances of the cases, but in the equitable consideration, common to them all, that the securities in the hands of the sureties have been appropriated by the debtor for the payment of the debt, and constitute a trust for its better security, which equity will enforce for the benefit of the creditor."

[9] These principles of equitable subrogation are too familiar to require further authority. It is applied in favor of the creditor, where for any reason equitable considerations require the application of the security or guaranties of a debtor to be applied to the discharge of the indebtedness; and applying this principle to this case it seems to me that Delbruck, Leo & Co. having at the request of Kessler & Co. assumed liability by accepting the paper of Gabriel Fensterer, became subrogated to the right to all securities and guaranties held by Kessler & Co. to secure the payment of that indebtedness. Kessler & Co. had guaranteed the payment of the notes drawn on Delbruck, Leo & Co. by Gabriel Fensterer, and these defendants had guaranteed Kessler & Co. against the payment of those notes. Whatever security, therefore, Kessler & Co. had to protect themselves as against any obligation which it had assumed to Delbruck, Leo & Co., the latter, as the creditor, had the right to enforce for its protection upon the failure of Kessler & Co. and its consequent inability to comply with its obligation. And by virtue of this equitable subrogation Delbruck, Leo & Co. had the right to enforce the defendants' guaranty to Kessler & Co., and thus the voluntary payment of that obligation by the defendant to Delbruck, Leo & Co. was a discharge of its obligation to that firm as the acceptor of these notes, and was therefore a satisfaction of any obligation that existed between the defendant and Kessler & Co.

It follows, therefore, that upon no aspect was there any obligation ever existing in favor of Kessler & Co. or its assignee in bankruptcy against the defendant, and the court was quite right in directing a verdict for the defendants.

The exceptions are therefore overruled, and judgment ordered for the defendants on the verdict, with costs.

LAUGHLIN, MILLER, and DOWLING, JJ., concur.

McLAUGHLIN, J. (dissenting). The defendants agreed with Kessler & Co. that, if they would procure the acceptance in Germany of drafts drawn for the benefit of Leffler, Thiele & Co., they would pay

to Kessler & Co. the amount of each draft prior to the time the same fell due, and in addition certain commissions. The drafts were to be drawn by Gabriel Fensterer, acting as the agent of Leffler, Thiele & Co. In pursuance of this agreement Kessler & Co. procured the drafts here under consideration to be accepted by Delbruck, Leo & Co. Prior to the acceptance, Delbruck, Leo & Co. agreed with Kessler & Co.—not with the defendants—to accept and pay the drafts for the account and to the debit of Kessler & Co., and it was under this arrangement that the drafts were accepted and in each instance charged to Kessler & Co. The defendants made no contract, either express or implied, with Delbruck, Leo & Co., and were not known in the transactions, so far as appears, until after Kessler & Co. became bankrupts. In each instance, as soon as Delbruck, Leo & Co. accepted a draft, they charged the amount of it, not to the defendants, but to Kessler & Co., plus their commissions, and, on receiving a remittance from them, credited same in general account. When a draft was paid, Delbruck, Leo & Co. charged interest to Kessler & Co. on the amount of the acceptance, and credited Kessler & Co. with interest on their remittances, and all the items were settled in general account between Delbruck, Leo & Co. and Kessler & Co. every six months. Whenever a draft was accepted, Delbruck, Leo & Co. wrote a letter to Kessler & Co., advising them that the draft had been drawn "for your account," and that they had accepted it "to your debit for payment on account ordinario"—that is, general account. Kessler & Co., on receiving from Delbruck, Leo & Co. advice of an acceptance, credited it with the amount, and immediately notified the defendants of the acceptance, stating the amount of the draft, the due date, and concluding with the words, "Note that the same is to be covered"—that is, paid to us—"by you 15 days before maturity."

The correspondence and the acts of the parties prior to the failure of Kessler & Co. indicate, as it seems to me, an intention on the part of all the parties that Kessler & Co. alone should be liable to Delbruck, Leo & Co. The fact that the drafts were drawn by Gabriel Fensterer, one of the defendants, does not seem to me to be of importance, because the record shows, and I do not understand that the fact is disputed, that in drawing the drafts he acted, not for the defendants, but as the agent of Leffler, Thiele & Co. Nor does the fact that the defendants in their letter to Kessler & Co. said they would "guarantee the payment of any drafts" change the situation. The real question is: What did the parties intend? Such intention must be ascertained from the correspondence, read in the light of what they did. *Herryford v. Davis*, 102 U. S. 235, 26 L. Ed. 160, quoted with approval in *People v. Gluck*, 188 N. Y. 167, 80 N. E. 1022; *Hargraves Mills v. Gordon*, 137 App. Div. 695, 122 N. Y. Supp. 245, affirmed 203 N. Y. 568, 96 N. E. 1116. When thus ascertained, it seems to me to show that Delbruck, Leo & Co. was to accept the drafts drawn solely on Kessler & Co.'s credit, and not upon the credit of the defendants, or Leffler, Thiele & Co., or, in the case of the other draft, of the Block Light Company. If this were the intention, then Delbruck, Leo & Co. had a claim against the bankrupt's estate, and it, in

turn, had a claim against the defendants. The defendants could not satisfy that claim by paying the same to Delbruck, Leo & Co. To hold otherwise is to permit Delbruck, Leo & Co. to get its pay in full, while the other creditors will receive only such dividend as the bankrupt's estate may yield. Defendants could not extinguish an indebtedness to the bankrupt by paying the amount of it to one of the latter's creditors, to whom they were in no way obligated. Such payment would constitute a preference under the statute. *Nat. Bank of Newport v. Nat. Herkimer Bank*, 225 U. S. 178, 32 Sup. Ct. 633, 56 L. Ed. 1042; *In re Sanderson* (D. C.) 149 Fed. 273; *Western Tie & Lumber Co. v. Brown*, 129 Fed. 728, 64 C. C. A. 256.

For these reasons, I am unable to concur in the prevailing opinion. I am of the opinion that the exceptions should be sustained, and a new trial ordered.

PEOPLE v. BIHLER.

(Supreme Court, Appellate Division, First Department. January 10, 1913.)

1. CRIMINAL LAW (§ 178*)—FORMER JEOPARDY.

The inadvertent noting by the court, on the back of an indictment for libel, of the granting of a motion to dismiss, which motion was made with reference to an indictment for larceny against the same person, was not a valid dismissal of the indictment for libel so as to bar a prosecution therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 326-329; Dec. Dig. § 178.*]

2. LIBEL AND SLANDER (§ 146*)—LIBEL—CRIMINAL RESPONSIBILITY—PLACE OF "PUBLICATION."

A libelous letter is published both in the place where it is posted in the mail and in the place to which it is addressed, the postmark being prima facie evidence that the letter was in the post office on the date of the postmark, so that the publication of a libelous letter addressed to one in Switzerland was complete when deposited in the post office in New York City with postage prepaid for its transmission to Switzerland.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 405; Dec. Dig. § 146.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5841-5846.]

3. CRIMINAL LAW (§ 97*)—LOCALITY OF OFFENSE—PLACE OF PUBLICATION OF LIBEL.

Under Pen. Code, § 16, making one punishable within the state for any crime committed in whole or in part therein, one who wrote and deposited in the post office in New York City a criminal libel addressed to another in a foreign country would be guilty of libel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 177-189, 191; Dec. Dig. § 97.*]

Appeal from Court of General Sessions, New York County.

Charles Bihler was convicted of libel, and appeals. Affirmed.

See, also, 152 App. Div. 884, 136 N. Y. Supp. 1143.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, MILLER, and DOWLING, JJ.

William N. Cohen, of New York City, for appellant.

Robert S. Johnstone, of New York City, for the People.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DOWLING, J. Charles Bihler, the defendant, had been in the employ of Fenkart & Co., manufacturers of embroideries and laces, at St. Gall, Switzerland, from February, 1900, until the spring, 1901, when he was sent to their place of business in the city of New York, where he remained until February, 1906, when the relation of employer and employé between them ceased. He then became interested in another concern, but in December, 1906, returned to his former firm as manager of the New York office, remaining in such capacity until July 1, 1908. During this latter hiring there was discussion of a proposed partnership between Fenkart, Bihler, and one Wild, as the result of which Bihler had articles of partnership drawn up which did not meet with Fenkart's views, and he refused to sign same, by reason of which Bihler became incensed against Fenkart, and verbally and in writing gave utterance to threats indicating his purpose to see that harm came to Fenkart in revenge for his failure to execute the proposed articles. While the defendant was in this frame of mind, the events which are the subject of the charge against him occurred, and were followed by his statement to Ernest A. Bodenmann that he had "fixed" Fenkart so that he could not help himself any more, and that he would soon hear such developments that nothing could save him from going into bankruptcy.

Defendant had been in Switzerland, at St. Gall, in April, 1907, during the course of the negotiations for the new partnership, and while there had been introduced by Fenkart to his bankers, the Toggenburger Bank and the Credit Anstalt (formerly the Handel's Bank), whereof Leo Brittaeur was the representative. The third bank with which Fenkart did business at the time in question was that of Messrs. Wegelin & Co. On Saturday, November 27, 1907, defendant, who was then connected with the Bodenmann Manufacturing Company with offices at Weehawken, N. J., requested Lillian Stoeffler, a stenographer in his employ, to come to the office of the company on Sunday morning (the next day) to write some personal letters for him, and to furnish herself with plain paper and envelopes. When she arrived there, about 11 o'clock on that morning, she found the defendant waiting, who asked her if she had plain paper and envelopes, to which she replied that she had brought the plain paper, and would procure the envelopes, which she did; thereupon the defendant handed her the draft of a letter, identified by the witness as being in his handwriting, and requested her to make three copies thereof, which she did and returned them to the defendant, who said that he would attach the slips himself that were referred to in the letters, and that he would mail them himself, and that he did not want anybody to have any copies. At the time that defendant handed her the draft letter he also handed her three names to which the envelopes were to be addressed, viz., Wegelin & Co., St. Gall, Switzerland, Toggenburger Bank, St. Gall, Switzerland, and Leo Brittaeur, St. Gall, Switzerland. The witness identified the letters and envelopes produced upon the trial as those which she typewrote; the letters being copies of the draft in the defendant's handwriting handed by him to her, and the envelopes being the ones addressed by her to the three parties named.

The letter was the libel for the publication of which the defendant was convicted. The witness was corroborated by Ernest A. Bodenmann, who saw defendant hand the stenographer the draft letter, heard him ask her to make three copies of it, and to direct three envelopes, saw her typewriting the letters and deliver them when completed with the envelopes to defendant, and heard defendant tell her not to make copies thereof, as he wanted no one to have a copy, but that he would attend to the slips and the mailing himself. In the latter part of November, 1907, at 543 Broadway in the city of New York, Catherine Hand, employed by Fenkart & Co. at that place, was approached by defendant, who asked her if she had any plain writing paper. She stated that she had, and produced a sheet which she delivered to the defendant, inquiring if it would do, to which he replied in the affirmative. The defendant then directed her to write the name "Fenkart & Co." three times on that sheet of paper, and indicated the space to be left between the names. She typewrote the name as directed, and handed the paper with the name thrice written thereon to the defendant, asking at the same time if he wanted her to do anything with it, to which he answered that he would attend to that himself. The witness identified the slips produced by the prosecution as being the slips typewritten by her. We therefore have the proof of the passage into the possession of the defendant of three complete sets of paper, as follows: First, the libelous letter; second, the slip containing the name of Fenkart & Co.; third, an envelope directed, respectively, to each of the three parties to whom the libel was sent. The letter which the defendant was at such great pains to concoct, and the object of whose attack was sought to be concealed by the method followed in its preparation, was as follows; the only difference in the three copies being in the name of the person to whom it was directed:

"Messrs. Wegelin & Co., Bankers, St. Gall, Switzerland.

"Dear Sirs: We wish to inform you for your own benefit that the firm as per attached slip, is in a bad financial condition, they owe their bankers (commission house) nearly \$250,000, who hold a lien on their entire stock, everything tangible is assigned to their bankers, and while the contraction in values of late has taken also some proportions in the commodity they deal in and manufacture, their equity here is next to nothing.

"There are also an attachment suit and several other litigations hanging over them, which may at any moment come off, and which they will very likely lose (you undoubtedly know what results law suits here usually lead to) so that you stand a good show of seeing another Johannes Rohner case very shortly; we understand that this party is making statements to his bankers in St. Gall regarding his financial standing in New York entirely at variance with the facts.

"If this illumination of facts will be of any benefit to you we shall be pleased.

Yours,

Friends."

To this letter there was attached a slip containing the words: "Fenkart & Co."

The next time that the letters were heard of was on December 4, 1907, at which time the three envelopes, letters, and slips had reached St. Gall, Switzerland, and had passed into the custody of the persons to whom they were directed, and were seen there by Charles Fenkart.

At that time each envelope bore the postmarks "New York, N. Y., 1907—Sta. E.—Nov. 25—11 P. M.," and "St. Gallen, 3, xiii, 07, 12, Brf. Exp." Each of the envelopes also had upon it a canceled 5-cent United States postage stamp. It was shown by the officials of the Post Office Department that each letter had been through the usual and proper channels from its deposit in a letter box in the territory of station E, and that the various marks thereon indicated its transmission through the mails in the ordinary manner. We thus have the completion of the transaction by the appearance, in the possession of those to whom the libels are intended to be mailed, after their actual transmission through the mails of the libels prepared under defendant's direction and passed into his custody. There has been no attempt made to explain the way in which these libels passed out of the custody of defendant, nor any attempt to break the force of the testimony which points irresistibly to the defendant's having carried out his statement to witnesses that he would attend to the mailing of the letters and slips himself. We are unable to see how the jury could have reached any other conclusion upon this evidence than that of the defendant's guilt.

[1] The questions urged upon this appeal are: First, that the defendant was entitled as a matter of law to the dismissal of the indictment against him because it had once been dismissed by a judge of the Court of General Sessions; second, that the crime of publishing a libel in the county of New York was not established; third, that the facts proved established that the libel was published in St. Gall, Switzerland. The defendant's first contention is based upon the following facts: The defendant was under two indictments, the one in question for libel numbered 68,429, and one for grand larceny in the first degree numbered 65,082. On January 21, 1909, application was made to the judge presiding in Part I of the Court of General Sessions for the dismissal of the grand larceny indictment. The application was granted, and an order to that effect made by the court and entered in the minutes. The grand larceny indictment was thereupon sent for to the clerk's office, but by mistake the libel indictment was sent up instead, and the clerk inadvertently wrote upon it the memorandum "P. I. Jan. 21/09, On Motion of District Attorney Indictment Dismissed," which the judge initialed. It was immediately discovered, however, that the wrong indictment had been sent from the clerk's office, and the correct one was thereupon sent for and the proper memorandum indorsed thereupon and initialed by the judge. The memorandum which had been written on the libel indictment by mistake was crossed out by drawing ink lines through it, and the initials of the judge erased with his knowledge and approval. There was no attempt made to controvert these facts. The only indictment for the dismissal of which an order had been made was that for grand larceny to which the motion had been directed. No motion was ever made to dismiss the indictment for libel nor was any order to that effect ever made. The indictment for libel was not before the court for consideration in any way. Under these conditions it must be apparent that a mere inadvertence or mis-

take unconsciously made by the court in initialling upon the back of an indictment the granting of a motion to dismiss, which had not been made with reference to it but to a different and existing indictment against the same person, cannot be made use of as a valid dismissal. No order was ever made dismissing the indictment for libel, and it still remained in full force and effect when the present trial took place.

The second and third propositions may be discussed together. It is the contention of the appellant that there was no publication of the libel in question until the letters reached Switzerland and were opened there; in other words, that no part of the crime was committed within the state of New York, and that therefore the offense is not cognizable here. At the time of the commission of the offense in question, the provisions of the Penal Code relative to libel, so far as they are involved in the present appeal, were as follows:

"Sec. 242. A malicious publication, by writing, printing, picture, effigy, sign or otherwise than by mere speech, which exposes any living person, or the memory of any person deceased, to hatred, contempt, ridicule or obloquy, or which causes, or tends to cause any person to be shunned or avoided, or which has a tendency to injure any person, corporation or association of persons, in his or their business or occupation, is a libel.

"Sec. 243. A person who publishes a libel is guilty of a misdemeanor."

"Sec. 245. To sustain a charge of publishing a libel, it is not necessary that the matter complained of should have been seen by another. It is enough that the defendant knowingly displayed it, or parted with its immediate custody, under circumstances which exposed it to be seen or understood by another person than himself."

Section 16 of the Penal Code as then existing was as follows:

"The following persons are liable to punishment within the state: 1. A person who commits within the state any crime in whole or in part."

Section 683 of the Penal Code provided as follows:

"In the various cases in which the sending of a letter is made criminal by this Code, the offense is deemed complete from the time when such letter is deposited in any post office or other place, or delivered to any person, with intent that it shall be forwarded. And the party may be indicted and tried in any county wherein such letter is so deposited or delivered, or in which it is received by the person to whom it is addressed."

The foregoing provisions are to be found in the present Penal Law numbered, respectively, sections 1340, 1341, 1930, and 550.

[2] The rule with regard to the place of publication of a libel is thus stated in *Odgers on Libel and Slander* (5th Ed.) p. 728:

"It is, however, necessary in a criminal case to further prove that the prisoner published the libel in the county in which the venue is laid. However, if the defendant write a libelous letter and cause it to be posted, that letter is published both in the county where it is posted, and in the county to which it is addressed, if it be opened there."

He further lays down the rule that:

"The postmark is sufficient prima facie evidence that the letter was in the post office on the date of the mark." *Id.* p. 728; *Wigmore on Evid.* §§ 95, 151; *Lawson on Presumpt. Evid.* p. 69.

So the same author further says on page 675:

"If the defendant wrote a libel, which is in some way subsequently published, this is *prima facie* at all events a publication by the defendant. Per Holt, C. J., in *R. v. Beere*, 12 Mod. 221; 1 Ld. Raym. 414. A letter is published as soon as it is posted, provided it ever reaches the party to whom it is addressed, and this will be presumed if there is no evidence to the contrary. Thus, if a letter in the handwriting of the defendant be produced in court with the seal broken and the proper postmarks outside, that is sufficient *prima facie* evidence of publication."

The leading case cited is that of *The King v. Sir Francis Burdette*, Bart. 4 B. & Ald. 95. There the libel in question was written and posted in Leicestershire and delivered in the county of Middlesex, and, while there was no proof nor trace of a seal or postmark on the open envelope, it was held by the justices, with one expressing doubt, that a delivery at the post office at Leicestershire of a sealed letter inclosing a libel was a publication of a libel in Leicestershire, and it was further held that, where the defendant wrote and composed a libel in Leicestershire with the intent to publish it in Middlesex, he might be indicted for a misdemeanor in either county. Best, J., in answering the contention that there was no evidence that the libel was published in the county of Leicestershire, said:

"It must be borne in mind that the question is not whether the evidence was as ought to have satisfied a jury of the fact of publication in Leicestershire, but whether any facts were proved, which raised a presumption of publication in that county. If there were any such fact, I could not deal with them otherwise than I did. I am of opinion that there was evidence in this case, on the part of the prosecution, which raised a strong presumption that the libel was published in Leicestershire; and, no attempt having been made to rebut such presumption, it became in my mind conclusive proof of that fact. [Page 121.] * * * So in the case of a libel publication is nothing more than doing the last act for the accomplishment of the mischief intended by it. The moment a man delivers a libel from his hands, his control over it is gone. He has shot his arrow, and it does not depend upon him whether it hits the mark or not. There is an end of the locus penitentie, his offense is complete, all that depends upon him is consummated, and from that moment upon every principle of common sense he is liable to be called upon to answer for his act. Suppose a man wraps up a newspaper and sends it into another county by a boy; who is the publisher? The boy, who perhaps cannot read, or is ignorant of its contents, or the man who has put it up in the envelope? The boy who carries it is merely an innocent instrument. There can be no other publisher but the person who sent it, and he publishes it when he delivers it to the boy. If the sending of a letter by the post be not a publication in the county from whence it is sent, how is the libeler to be punished who sends his libel by the post to some foreign country for circulation? The libeler will not go to the foreign country that he may be punished there. If the sending it from England be not publication (as is contended at the Bar), can it be insisted, when the libel is completed by publication, that such a libeler can nowhere be punished? [Pages 123, 127.]"

The learned justice discussed the subject at considerable length, and pointed out that the theory of the common law, of which the civil law was strongly confirmatory, was that "publication" means "the act of delivering, which precedes the manifestation of the contents," and he refers to several cases which supported his conclusion that "the putting of a letter into the post is a sufficient publication." Pages

127, 128. Holroyd, J., also held that, as soon as a manuscript of a libel had passed out of the defendant's possession and control, it was deemed to be published, so far as the defendant was concerned. He stated:

"But whether it was sent away or parted with by the defendant in Leicestershire, open or sealed, makes, in my opinion, no difference with respect to the question whether it was in point of law published by him in that county or not, so far as to give the jury of that county jurisdiction over that fact. In 5 Co. Rep. 128a, it is laid down, that a scandalous libel may be published traditionally, when the libel, or any copy of it, is delivered over to scandalize the party. So that the mere delivering over or parting with the libel with that intent is deemed a publishing. It is an uttering of the libel, and that I take to be the sense in which the word publishing is used in law. Though in common parlance that word may be confined in its meaning to making the contents known to the public, yet its meaning is not so limited in law." Page 143.

He also discusses the matter at considerable length, and points out emphatically that the mere parting with the libel by which the defendant loses his power of control over it is an uttering and publication thereof; that the act of another person afterwards in reading the libel does not alter the defendant's criminality or the nature of his act in the county where he parted with it with criminal intent. Abbott, C. J., was of the same opinion. He also held that the publication of a libel did not mean an actual communication of the contents of the paper, but that a libel might be published by delivery, and that the parting with the letter by the defendant in the county of Leicestershire constituted a publication.

This case was cited with approval by Coleridge, L. C. J., in *R. v. Holmes*, 15 Cox C. C. 343, where he said:

"* * * It was held in *Rex v. Burdett*, 4 B. & Ald. 95, and other cases that the delivery at the post office of a sealed letter inclosing a libel is a publication of the libel at the place of posting." Page 344.

In *United States v. Smith* (D. C.) 173 Fed. 227, 232, it was held where the defendants printed copies of a newspaper containing an alleged libelous article in the city of Indianapolis, and deposited them in the United States post office there, to be transmitted by mail to subscribers in Washington, the jurisdiction was in Indianapolis, Ind., for there the publication took place and was complete. That was a specific question presented in the case, and the court held as indicated, further stating:

"Where people print a newspaper here, and deposit it in the post office here, for circulation throughout other states, territories, counties, and districts, there is one publication, and that is here."

In *Mills v. State*, 18 Neb. 575, 26 N. W. 354, it was held that a libelous charge made by the defendant against a person contained in a letter written and mailed in the state of Nebraska to a person in West Virginia was sufficient to render the defendant liable in the state of Nebraska for the offense. This is not an unconsidered holding, for the court stated that were it not for error in another respect, an affirmance of the judgment would result.

In *Youmans v. Smith*, 153 N. Y. 214, 218, 47 N. E. 265, 266, the court said:

"Printing a libel is regarded as a publication when possession of the printed matter is delivered with the expectation that it will be read by some third person, provided that result actually follows."

In 18 Am. & Eng. Ency. of Law (2d Ed.) p. 1015, it is stated in defining what constitutes a publication that:

"The general rule is that any communication by one person to another or others of defamatory matter concerning a third person, or the doing of any act intended to result, or which would naturally result in the exposure of the contents of the libel to any person other than the author, is a publication within the meaning of the term as used in the law of libel and slander." Page 1015.

"A person who sells or delivers libelous matter to another or others or parts with the possession and custody of the same under circumstances which expose it to be read or seen by another or others is chargeable with the publication thereof. * * * 1d. p. 1014.

"The sending to one person of a private letter containing matters defamatory of another, constitutes a publication, and it has been held that the mere depositing of a letter containing such matter in the post office would be a publication of it, though it never came to the hands of him for whom it was intended, if it came to those of anyone else, because a wrongdoer is answerable for all the consequences of his acts." 1d. p. 1015.

It will be found that *Rex v. Burdett* has received general acceptance as stating the common law on the question of what constitutes publication of a libel. Among other cases in which it was expressly followed is *Giles v. State*, 6 Ga. 276. In the draft of the Penal Code prepared by Commissioners David Dudley Field, William Curtis Noyes, and Alexander W. Bradford, dated March, 1864, and submitted for public examination and suggestion prior to revision by the commissioners, the following section was proposed:

"313. To sustain a charge of publishing a libel it is not needful that the words complained of should have been read by any person. It is enough that the accused knowingly parted with the immediate custody of the libel under circumstances which exposed it to be read by any other persons than himself."

The note to this section gives as the authority for its provisions *Giles v. State*, in which the case of *Rex v. Burdett* was expressly approved and followed.

When thereafter, under date of December, 1864, the commissioners submitted their proposed Penal Code to the consideration of the Legislature, section 313 remained unchanged save for the substitution of "another" for "any person" in the first sentence. Section 245 of the Penal Code is in the precise language of the last proposed section 313. So that the real basis of the present Code provision as to the publication of a libel is *Rex v. Burdett*, and, as we view it, that publication was complete when the libel was deposited in the post office in New York City, directed to a third person, and with the postage prepaid for its transmission to him.

[3] Even if this were not so, we think the provisions of section 16 of the Penal Code would have been sufficient upon the facts in this case to have justified the defendant's conviction, for, if it were held that the whole of the act of publishing the libel had not been com-

pleted when the same was deposited in the mail, it certainly was committed in part by such deposit, for the mailing of the letter was the first step in the process of publication and an essential step therein, without which publication would not have been possible. Nor is there anything inconsistent with our scheme of statutory enactment in the punishment within this state of an offense committed here in part. By section 16 of the Penal Code (based on section 15 of the Field Penal Code as reported in 1864), all persons were liable to punishment within the state, if, first, they commit within the state any crime in whole or in part; second, if they commit without the state any offense which, if committed within the state, would be larceny under its laws, and they are found with any of the stolen property within the state; third, if, being without the state, they cause, procure, aid, or abet another to commit crime within the state; fourth, if, being without the state, they abduct or kidnap any person by force or fraud contrary to the laws of the state where the act was committed, and bring, send, or convey such person within the limits of the state and he is afterwards found therein; and, fifth, if being without the state and with intent to cause within the state a result contrary to the laws of this state they do an act which in its usual course results in an effect contrary to its laws. These last four subdivisions are, in effect, enactments provided for in proposed section 12 of the Graham Draft Code of Criminal Procedure reported to the Legislature December 31, 1849, which reads as follows:

"When the commission of a public offense commenced without this state is consummated within the boundaries thereof the defendant is liable to punishment therefor in this state, although he were out of the state at the time of the commission of the offense charged, provided he consummated the offense through the intervention of an innocent or guilty agent within this state, or by any other means proceeding directly from himself; and in such case, the jurisdiction is in the county in which the offense is consummated."

And so, in the proposed Field Code, the revisers expressly declared that the jurisdiction of the state over offenses planned or in part committed outside its boundaries ought to be inserted in the Code unless elsewhere enacted. Thus we have as a result of consistent legislative enactment jurisdiction, first, over offenses commenced outside the state where the results or victim of the acts specified are brought within the state, and also over offenses initiated outside the boundaries of the state and consummated within its boundaries by agents of the instigating party; and, second, over offenses commenced within the state and completed elsewhere.

We have examined the whole record, from which it clearly appears that the defendant had a fair and impartial trial at which his rights were adequately protected by his counsel; that no reasonable doubt could exist as to his guilt of the offense with which he was charged; that the letter complained of was clearly libelous; and that, when he deposited the libelous matter in the mail for transmission to third parties with an intent that it should be seen by them, his guilt was complete.

The judgment appealed from will therefore be affirmed. All concur.

PEOPLE ex rel. DOMENS v. WARDEN OR KEEPERS OF CITY PRISON.

(Supreme Court, Appellate Division, Second Department. January 24, 1913.)

1. CRIMINAL LAW (§ 231*)—RIGHT TO EXAMINE WITNESSES.

A person arrested for a misdemeanor was not entitled to a discharge on *habeas corpus* on the ground that he was held for trial without being confronted with or having an opportunity to cross-examine the complaining witness, in violation of Code Cr. Proc. §§ 194, 195, giving the defendant a right to cross-examine the witnesses against him on an examination before a magistrate if they be in the county, and requiring that witnesses be examined in his presence, where it appeared that the complaining witness was not within the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 412, 479-481; Dec. Dig. § 231.*]

2. CRIMINAL LAW (§ 233*)—EVIDENCE—DEPOSITION.

A deposition upon which a warrant was issued for the arrest of the defendant could not be used against him at his trial, where he had no opportunity to cross-examine such witness at the preliminary examination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 480; Dec. Dig. § 233.*]

Appeal from Special Term, Kings County.

Habeas corpus by the People, on the relation of George R. Domens, against the Warden or Keepers of the City Prison, City of New York. From an order sustaining the writ, and discharging the relator, defendant appeals. Reversed, writ dismissed, and relator remanded.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

Hersey Egginton, Asst. Dist. Atty., of Brooklyn (James C. Cropsey, Dist. Atty., of Brooklyn, and Harry G. Anderson, Asst. Dist. Atty., of New York City, on the brief), for appellant.

Jacob Eilperin, of Brooklyn, for respondent.

CARR, J. [1] The relator in this proceeding was arrested under a warrant issued by a city magistrate of the city of New York, in the borough of Brooklyn, on the charge of a misdemeanor. There is no question on this appeal as to the sufficiency of the deposition on which the warrant was issued. On the relator's arrest, he was arraigned before a city magistrate, and appeared by counsel and demanded an examination, pursuant to chapter 7 of the Code of Criminal Procedure. It further appears from the record that the hearing of the examination was adjourned four times, in order to enable the people to produce one of the witnesses, who had made a deposition upon which the warrant was issued, and which was necessary to sustain the issuance of the warrant. It likewise appeared that on the various days of the adjournment this witness could not be found within the county of Kings, in which the proceeding was being had, nor within the state.

On the last adjourned date it was admitted by counsel for the relator in open court that the witness in question was and had been during

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the time in question absent from the state of New York, and sojourning or resident in the state of Pennsylvania. On the failure of the prosecution to produce this witness for cross-examination by the relator, his counsel demanded the discharge of the prisoner. The magistrate denied the motion, and, on the strength of the depositions before him, held the prisoner for trial in the Court of Special Sessions. He fixed bail in the meantime at the sum of \$500, making the commitment accordingly. The relator was thereupon committed to the City Prison, subject to being discharged upon bail as fixed by the city magistrate, to await the trial of the charge against him in the Court of Special Sessions, as is provided for by statute covering such matters in the city of New York. A writ of habeas corpus was sued out by the relator, and the learned court at Special Term in Kings county sustained said writ, and discharged the relator from custody, assigning reasons specified in the order as follows:

"Upon the ground that the magistrate held the relator for trial, without confronting him with his accuser or affording him an opportunity to cross-examine the witnesses produced against him."

Sections 194 and 195 of the Code of Criminal Procedure provide as follows:

"Sec. 194. Depositions, to be Read on Examination, and Witnesses Examined.—At the examination, the magistrate must, in the first place, read to the defendant the depositions of the witnesses examined on the taking of the information, and if the defendant request it, or elects to have the examination, must summon for cross-examination the witnesses so examined. If they be in the county. He must also issue subpoenas for additional witnesses required by the prosecutor or defendant.

"Sec. 195. Examination of Witnesses to be in Presence of Defendant, and Witnesses to be Cross-Examined in His Behalf.—The witnesses must be examined in the presence of the defendant, and may be cross-examined in his behalf."

Both of these sections must be read together, and it is evident that the "witnesses" mentioned in section 195 are the "additional witnesses" mentioned in section 194. The question then resolves itself into whether a committing magistrate may hold a prisoner for trial if the people fail for any reason to produce for cross-examination, on the demand of the prisoner, the person examined on the taking of the information upon which the warrant was issued. The duty of summoning into court for cross-examination a person who made a deposition is imposed expressly by statute upon the magistrate, if the prisoner so demand; but this duty is not an absolute one, for it exists only, as section 194 specifically provides, where such witness is in the county in which the proceeding is being prosecuted. Here it was conceded that the necessary witness, who had made the deposition, was not only not within the county, but not within the state.

Was the magistrate obliged, under such circumstances, to discharge the prisoner? We think not, for the depositions taken before him were sufficient on their face to show the commission of a crime of which there was probable cause to believe the defendant guilty. Accordingly, the magistrate had the right to hold the prisoner for trial, provided the circumstances made it impossible to produce the depos-

ing witness for cross-examination by the prisoner. The proceeding of arraignment and examination is wholly statutory. The prisoner is entitled to the full benefit of the statute under its express terms, but here the statute was not violated. He was not afforded an opportunity of cross-examination, not through any neglect or refusal of his right by the magistrate, but because the existing circumstances had deprived the magistrate of the physical and legal power to compel the attendance of the witness, for he was not within the state.

The record before us on appeal shows that the counsel for the relator, on the hearing before the magistrate, demanded the discharge of his client, on the ground that the failure to produce the complaining witness for cross-examination deprived the prisoner of the constitutional right to be confronted with his accuser. Whether this right is provided for by our Constitution as arising from the Bill of Rights, and as such is to be implied in the provisions of our Constitution, it is not necessary to discuss here, because, as has been held uniformly, such right exists only on the trial of the criminal charge. And in this state it is subject to the qualification that if, in a preliminary examination before the indictment or trial, the prisoner has been confronted with his accuser and has had an opportunity to cross-examine him through counsel, then the testimony of the accuser, so taken in the preliminary examination, may be used at the trial, provided such witness should thereafter die or be beyond the jurisdiction of the court at the time of the trial. *People v. Fish*, 125 N. Y. 136, 26 N. E. 319.

[2] At a trial of this relator before the Court of Special Sessions, the depositions taken on the issuance of the warrant in this proceeding could not be used as evidence against the defendant, because of the failure to afford him an opportunity to cross-examine, at the preliminary examination, the witness in question. On this appeal the relator has submitted no brief, but in the oral argument of his counsel he insisted most strongly that the provisions of the Code of Criminal Procedure itself gave no power to the magistrate to commit for trial unless there had been an opportunity to the prisoner to cross-examine the person who had been previously examined on the taking of the information. In this view we do not concur. Under the circumstances of this case, as hereinbefore stated, there was no illegal refusal of the right to cross-examination. The difficulty arose from a legal and physical impossibility on the part of the court to summon the missing witness and to produce him in court for the purpose of such cross-examination. If this situation should continue, then it will not work to the disadvantage of the prisoner if he be brought to trial.

The order should be reversed, the writ dismissed, and the relator remanded to custody under the terms of the commitment of the magistrate. All concur.

PEOPLE v. POLLAK.

(Supreme Court, Appellate Division, Second Department. January 24, 1913.)

1. RECEIVING STOLEN GOODS (§ 2*)—LARCENY BY CHILDREN—"LARCENY"—"RECEIVING STOLEN GOODS"—"JUVENILE DELINQUENCY."

Under Penal Law (Consol. Laws 1909, c. 40) § 1308, punishing one receiving stolen property knowing the same to have been stolen, and section 1309 making it unnecessary to aver in the indictment or prove that the person who stole the property had been convicted or was amenable to justice, and section 1290, defining larceny as the taking from the possession of the owner or any other person any property with intent to defraud the true owner, and section 2186 providing that a child between the ages of 7 and 16 years of age who shall commit any act, which, if committed by an adult, would be a crime, shall be deemed guilty of juvenile delinquency only, one receiving goods from a child under 16 years of age who appropriated the same in a manner to constitute larceny if appropriated by one over the age of 16 years, with knowledge of the wrongful act of the child, is guilty of receiving stolen goods.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 4; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 5, pp. 3991-4003; vol. 7, p. 5997.]

2. INDICTMENT AND INFORMATION (§ 191½*)—OFFENSES INCLUDED.

The crimes of larceny and receiving stolen goods are separate and distinct, and one indicted for criminally receiving stolen goods may not be convicted on proof showing that he was a principal in the larceny itself.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 191½.*]

3. RECEIVING STOLEN GOODS (§ 2*)—ACTS CONSTITUTING.

One inciting boys under 16 years of age to a vicious course of general conduct, and holding himself out to them as willing to purchase any silk which they may procure in any manner, is not a principal in a specific larceny by the boys of silk, so as to destroy the character of his act as a criminal receiver of the stolen silk.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 4; Dec. Dig. § 2.*]

Appeal from Orange County Court.

Lewis Pollak was convicted of criminally receiving stolen goods, and from a judgment of conviction and from an order entered in the clerk's office on the day of the conviction denying a new trial he appeals. Affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and WOODWARD, JJ.

Henry Hirschberg, of New York City, for appellant.

J. D. Wilson, Jr., Asst. Dist. Atty., of Newburgh (Thomas C. Rogers, Dist. Atty., of Middletown, on the brief), for the People.

CARR, J. The defendant was convicted by the County Court of Orange county of the crime of criminally receiving stolen goods. He was sentenced to an indeterminate term of imprisonment in Elmira Reformatory, and on a certificate of reasonable doubt he was admitted to bail in the sum of \$2,500 pending the hearing and determination of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the appeal. From such judgment of conviction he has appealed to this court.

It appeared on the trial that the goods which he had received had been taken unlawfully, and under circumstances which would generally constitute a larceny, from the silk mill of Harrison & Gore at Newburgh by two boys who were about the age of 15 years.

[1] The defendant's counsel, at the close of the people's evidence and again at the close of the whole case, moved for the dismissal of the indictment against his client and for his discharge, on the specific ground that the boys who took the property in question were under the age of 16 years, and hence that their act did not constitute a crime, and that, therefore, the defendant could not have been guilty of receiving stolen goods. The offense for which the defendant was indicted and tried is defined in section 1308 of the Penal Law (Consol. Laws 1909, c. 40) as follows:

"Sec. 1308. Buying or receiving stolen or wrongfully acquired property.

"A person, who buys or receives any stolen property, or any property which has been wrongfully appropriated in such a manner as to constitute larceny according to this article, knowing the same to have been stolen or so dealt with, or who corruptly, for any money, property, reward, or promise or agreement for the same, conceals, withholds, or aids in concealing or withholding any property, knowing the same to have been stolen, or appropriated wrongfully in such a manner as to constitute larceny under the provisions of this article, if such misappropriation has been committed within the state, whether such property were so stolen or misappropriated within or without the state, * * * is guilty of criminally receiving such property, and is punishable, by imprisonment, in a state prison for not more than five years, or in a county jail for not more than six months, or by a fine of not more than two hundred and fifty dollars, or by both such fine and imprisonment."

This section of the Penal Law appears in article 122 thereof. Section 1290, likewise appearing in article 122, defines generally the offense of larceny, as follows:

"Larceny defined. A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person:

"1. Takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind; or,

"2. Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement, or by competent authority, to hold or take such possession, custody, or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof,

"Steals such property, and is guilty of larceny.

"Hereafter it shall not be a defense to a prosecution for larceny, or for an attempt or for conspiracy to commit the same, or for being accessory thereto, that the purpose for which the owner was induced by color or aid of fraudulent or false representation or pretense, or of any false token or writing, to part with his property or the possession thereof was illegal, immoral or unworthy."

Had these two boys who took the property in question been over the age of 16 years, they should have been guilty of larceny as defined in section 1290 as aforesaid. In article 196 of the Code there is a section numbered 2186, which is entitled, "Sentence of minors to imprisonment." This section provides in part as follows:

"A child of more than seven and less than sixteen years of age, who shall commit any act or omission which, if committed by an adult, would be a crime not punishable by death or life imprisonment, shall not be deemed guilty of any crime, but of juvenile delinquency only, but any other person concerned therein, whether as principal or accessory shall be punishable as a principal or accessory in the same manner as if such child were over sixteen years of age at the time the crime was committed."

The strict question involved in this appeal is whether the crime of receiving stolen goods as defined in section 1308 of the Penal Code can be committed, unless the person or persons who unlawfully took away the goods from the true owner was or were guilty of the commission of the crime of larceny under the provisions of the Penal Law.

As before stated, the crime of receiving stolen goods is defined by section 1308 of the statute. Section 1309 provides as follows:

"It is not necessary to aver, in an indictment for an offense specified in the last section, nor to prove upon the trial thereof, that the principal who stole the property has been convicted, or is amenable to justice."

This section, as well as all the other sections of the Penal Law under consideration herein, were but re-enactments of the provisions of the former Penal Code, as amended, save that section 2186 of the Penal Law assumed its present form by an amendment made to it by chapter 478 of the Laws of 1909, which took effect September 1, 1909. Before this amendment of 1909, section 2186 of the Penal Law provided that:

"The commission by a child under the age of sixteen years, of a crime, not capital or punishable by life imprisonment, which if committed by an adult would be a felony, renders such child guilty of a misdemeanor only, but any other person concerned therein, whether as principal or accessory, who otherwise would be punishable as a principal in the felony, shall be punishable as a principal in the same manner as if such child were over sixteen years of age at the time the crime was committed." Re-enacted from section 699 of the Penal Code.

As the statute stood before the amendment of 1909, the taking of the goods by these boys would have constituted the statutory crime of larceny in the grade of a misdemeanor, and a subsequent receiving of such goods, knowing them to have been stolen, would clearly constitute the crime of criminally receiving stolen goods. How far has such situation been changed by the amendment of 1909? As the defendant was not indicted nor convicted as a principal or accessory in the unlawful taking, we shall leave that subject out of the inquiry for the time being. The amendment to the statute was devised and enacted in the progress of a philanthropic and humanitarian purpose for the protection of young children from the consequences of acts which are deemed in such children, not innocent, but less harmful than in those of greater age, and the common punishments of which were believed

to be destructive of a chance for reform and a better life thereafter. Thus the amendment to the law was intended, apparently, for the benefit of the child alone, and not for that of any other person. The act of the child was made to fall below the degree of a statutory crime so far as he alone was concerned, but it did not cease to be an offense of which the criminal law would take cognizance. Such act was made the subject of a new classification, in which it became known as "juvenile delinquency," and this offense, though excluded expressly from the degree of statutory crime, was in its nature quasi criminal, whatever words were used to characterize it. It would seem, therefore, that unless section 1308, which defines the crime of criminally receiving stolen goods, implies necessarily that the goods should have been taken originally under circumstances which rendered the taker guilty of the crime of larceny, the receiver may be guilty of violation of said section though the original takers were under the age of 16 years.

In England it has been held that one could not be convicted of criminally receiving stolen goods where the goods had been taken from a husband by an adulterous, but undivorced, wife, and given to her paramour. *Regina v. Kenny*, 13 Cox C. C. 397. The expressed ground of this decision was that at common law, because of the legal fiction of the unity of person of husband and wife, the wife could not be guilty of stealing the husband's goods, and that, when the goods had been received by the defendant, they had not been stolen within the meaning of the penal statute. Under the English statute, the crime of receiving stolen goods was defined as arising under circumstances in which the original stealing or taking or disposing amounted to a felony or a misdemeanor on the part of the original taker. Larceny Act of 1861, §§ 91, 95; 2 Russell on Crimes (7th Ed.) 1465 et seq. Our statute (section 1308, Penal Law) refers expressly to "stolen property, or any property which has been wrongfully appropriated in such manner as to constitute larceny according to this article," and again, in the same section, it refers to "any property, * * * stolen, or appropriated wrongfully in such a manner as to constitute larceny under the provisions of this article" (i. e., article 122), "if such misappropriation has been committed within the state, whether such property were so stolen or misappropriated within or without the state."

It is argued that property cannot become "stolen property" within the meaning of this section unless some one "steals" it. Then it is further argued that, as the statute makes stealing generally constitute the crime of larceny, there can be no stealing unless it be a larceny, and thus where there is no specific statutory larceny there is no "stealing," and nothing "stolen." The argument is ingenious, but is it sound? This point has not been the subject of any prior precedent in this state. The English authority above cited held that a wife could not steal from her husband because he and she were united in person by fiction of law. For such an act she could not be proceeded against criminally or quasi criminally. Such is not the situation here. There was no unity of person between the true owner and the boys who took away the property and from whom the defendant had received it criminally. According to the provisions of article 122 of the Penal Law, their act

would have constituted a larceny, were it not for the provisions of section 2186 of said statute as amended in 1909. This latter section did not change the act from a stealing into an innocent act. It simply converted an act which was formerly a crime into an offense which, as to them alone, was classified as to name and penalty as "juvenile delinquency," but it did not render the property which they had taken any the less "stolen property" within the meaning of section 1308 of the statute. In other words, where the culprit is under the age of 16 years, his stealing does not become a larceny, but it, likewise, does not change its essential character and cease to be a stealing. The only result is that in such a case stealing constitutes an act of "juvenile delinquency," and not a statutory crime. In a proceeding against such a person for "juvenile delinquency" under such circumstances, it would seem necessary to give the same proofs as if he were proceeded against for a crime. The statute was not intended to make such culprits wholly irresponsible for such acts, as are children under seven years of age, or lunatics and idiots. Penal Law, §§ 816, 1120. Responsibility was preserved, but the name of the offense and the character and method of penalty were changed.

[2] It is contended, further, by the appellant that, under the proofs taken at the trial, his offense, if any, was not of having received criminally stolen goods, but of being a principal in the original wrongful taking, and hence a principal in the crime of larceny. The crimes of larceny and of criminally receiving stolen goods are separate and distinct crimes. Under an indictment for criminally receiving stolen goods, a defendant may not be convicted on proofs which establish that he was a principal in the larceny itself, and a conviction so obtained should be reversed. *People v. Brien*, 53 Hun, 496, 635, 6 N. Y. Supp. 198.

[3] In the case at bar the record does not establish that the defendant was present at, or incited, abetted, or counseled the commission of any specific crime. His conduct with these boys was in the nature of an incitement to a vicious course of general conduct on their part, but the fact that he held himself out to them as willing to purchase any silk which they might get, however they got it, did not so clearly make him such a principal in a specific crime as to destroy the character of his act as a criminal receiver of stolen property, as was the case in *People v. Brien*, ut supra, where a specific act of larceny was designed, counseled, and directly abetted by the alleged receiver.

I recommend that the judgment of conviction be affirmed. All concur.

UNION NAT. BANK OF FRANKLINVILLE v. DEAN et al.

(Supreme Court, Appellate Division, Fourth Department. January 8, 1913.)

1. EVIDENCE (§ 445*)—PAROL EVIDENCE—DISSOLUTION OF PARTNERSHIP.

Though a partnership agreement be written, its dissolution may be shown by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2052-2065; Dec. Dig. § 445.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PARTNERSHIP (§ 296*)—INDIVIDUAL LIABILITY—EVIDENCE OF DISSOLUTION.

Since one receiving a firm note could recover thereon against a partner unless there had been an actual dissolution of the firm, though the indorsee believed there had been a dissolution before the note's execution, in an action to charge defendant on a note signed by a firm of which he was a member, parol evidence as to dissolution was admissible for determining whether the firm was dissolved before the note was made.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 662, 663, 666-678; Dec. Dig. § 296.*]

3. PARTNERSHIP (§ 296*)—INDIVIDUAL LIABILITY—ACTIONS—JURY QUESTION—NOTICE OF DISSOLUTION.

In an action to charge defendant with liability on a note which purported to be signed by a firm of which defendant was formerly a member, evidence *add* to make it a jury question whether plaintiff had notice of the firm's dissolution when it received the note.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 662, 663, 666-678; Dec. Dig. § 296.*]

4. PARTNERSHIP (§ 291*)—DISSOLUTION—NOTICE.

Constructive notice of the dissolution of a partnership is sufficient as to persons not having previously dealt with it, but actual notice must be given to persons who had dealt with it.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 637-660; Dec. Dig. § 291.*]

5. PARTNERSHIP (§ 290*)—DISSOLUTION—NOTICE—SUFFICIENCY.

No formal notice of the dissolution of a partnership need be served to relieve the partners from individual liability; knowledge of facts leading one to believe that it had been dissolved being sufficient.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 651, 653, 656; Dec. Dig. § 290.*]

6. PARTNERSHIP (§ 292*)—DISSOLUTION—RIGHTS OF PARTNERS—EXECUTION OF NOTICE.

After the dissolution of a firm, neither partner could bind the other by the execution of a firm note to one having actual constructive knowledge of dissolution.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 661; Dec. Dig. § 292.*]

7. BANKS AND BANKING (§ 116*)—NOTICE TO OFFICERS—SUFFICIENCY AS TO BANK.

Notice of the dissolution of a firm, received by the officers and directors of a bank receiving its note, would constitute notice thereof to the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 282-287; Dec. Dig. § 116.*]

8. EVIDENCE (§ 181*)—BEST EVIDENCE.

Evidence as to the contents of books in plaintiff's possession after the commencement of the action was not admissible, where no sufficient reason was shown why plaintiff could not have produced them at trial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 600; Dec. Dig. § 181.*]

9. EVIDENCE (§ 182*)—BOOKS—IDENTIFICATION.

An identification of books, concerning which witness testified, as those of the "D. & S. Manufacturing Co.," by the label on the books and by the fact that they contained entries against Messrs. D. & S., officers of the corporation, was insufficient to identify the books, as those of the D. & S. Manufacturing Co., where the books were in the possession of strangers to them when the witness saw them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 601-604; Dec. Dig. § 182.*]

*See *McQuinn v. McQuinn*, 139 N.Y. 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

10. LIMITATION OF ACTIONS (§ 155*)—PAYMENTS.

Payments of principal or interest upon an indebtedness must have been made with the debtor's knowledge and acquiescence in order to remove the bar of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 623-630; Dec. Dig. § 155.*]

Appeal from Trial Term, Cattaraugus County.

Action by the Union National Bank of Franklinville against Danford W. Dean, impleaded with another. From a judgment for plaintiff, and an order denying a new trial, defendant Dean appeals. Reversed, and new trial granted.

The action was commenced on the 15th day of October, 1901, by service of the summons upon the defendant Dean. The defendant Spring not having been served, and he having died during the pendency of the action, and no substitution of his representatives having been made, the trial proceeded against Dean practically as sole defendant; he alone having interposed a defense. The action was brought to recover the amount of two promissory notes, with interest, alleged to have been made by Dean & Spring as copartners, signed by the firm name, "Dean & Spring, by S. A. Spring," made payable to R. S. Litchfield, cashier, or order, and delivered to the Farmers' National Bank of Franklinville, N. Y. One of such notes was dated May 1, 1899, was for \$1,475, and was made payable at said bank six months after date, with interest. The other note was dated June 1, 1899, was for \$700, and was payable 12 months after date at said bank, also with interest. It is alleged, and is not disputed, that the name of the Farmers' National Bank of Franklinville, N. Y., was changed to that of the plaintiff, and that it is entitled to all the rights of the original holder and payee of said notes.

The defendant Dean by his answer denies, in substance, that at the times when the notes in question were executed and delivered the firm of Dean & Spring was in existence, or that Spring had any authority to bind the defendant Dean, by signing to the notes in question the name of Dean & Spring, and, in substance, that the copartnership of Dean & Spring had been dissolved, to the knowledge of the plaintiff, before it obtained and discounted the notes in question. The defendant Dean also interposed the defense of the statute of limitations.

Argued before McLENNAN, P. J., and KRUSE, ROBSON, FOOTE, and LAMBERT, JJ.

William W. Waring, of Franklinville, for appellant.

George E. Spring, of Franklinville, for respondent.

McLENNAN, P. J. In the year 1882 the defendants, Danford W. Dean and S. Arthur Spring, formed a copartnership under the name of Dean & Spring, for the purpose of conducting a lumber yard and planing mill at Franklinville, N. Y., and engaging in the business of contracting and building there and elsewhere. Dean attended to the operation of the mill and looking after outside contracts, which took him away from Franklinville a considerable portion of the time during the building season. Spring had charge of the office, kept the books, and looked after the financial affairs of the copartnership. They commenced to do business as copartners with the Farmers' National Bank soon after it started in business. In about the month of September, 1888, Dean & Spring sold out their entire business and plant to the Dean & Spring Manufacturing Company, a corporation or-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ganized for the purpose of taking over such business and plant. The copartnership retained only a few contracts in the course of completion and the outstanding book accounts. The copartnership owed some debts, and Spring had charge of collecting the money due the partnership and applying it on the debts. The unfinished contracts were all completed during or before the month of December, 1888, practically 10 years before the notes in suit were executed and delivered.

Evidence was given on the part of the plaintiff to show that these notes were originally given by the partnership to the bank, and were unpaid at the time of the sale of the partnership business to the corporation, and were thereafter renewed from time to time by Spring, who assumed to sign the name of Dean & Spring to such renewals; the notes in suit being the last of such renewals. Plaintiff also gave evidence that, when the notes became due from time to time from 1888 to 1899, the interest was charged on the books of the bank to the Dean & Spring Manufacturing Company, and vouchers therefor mailed to that corporation, and that on the books of the Dean & Spring Manufacturing Company one-half of such interest was charged to the account of Dean and the other one-half to Spring; that both Dean and Spring were employed by the corporation at a monthly salary, and an individual account with each of them as to such salary, interest, and other matters was kept on the books of the corporation.

No notice of the dissolution of the corporation was ever published in any newspaper, nor is there any claim made that notice in writing was ever given to the bank of such dissolution. That Dean frequently was in the bank from all the time from 1888 down to 1900 is conceded, and he testifies that he never knew of the giving of the notes by Spring in the firm name until about 1883, when he had a talk with Adams, the cashier of the bank, who stated that he had a Dean & Spring note which he wanted Dean to sign; that he told the cashier that he did not know anything about any such note, and would not sign it; that the cashier then asked him if he wanted him to sue him, and he said he did; that, if he had any such note, that was just what he wanted, and further told the cashier that he must not take any more notes with his name on them, unless he knew about them, or something to that effect; that he never received notice of protest of such notes at any time, and knew nothing further about them until after Spring left Franklinville, when he was again asked by the then cashier of the bank to sign such notes, and again refused. Dean does not claim to have personally given the bank any other notice of dissolution than as above stated.

It appears by the evidence that A. P. Adams, the cashier of the bank, knew that the firm of Dean & Spring had sold out their business to the Dean & Spring Manufacturing Company at the time it was done. N. F. Weed, a director of the bank, was one of the stockholders in the Dean & Spring Manufacturing Company. The same is true of A. O. Holmes, and also of Alfred Spring. Adams was a stockholder in the Dean & Spring Manufacturing Company. R. S. Litchfield, cashier of the bank from February, 1894, to April, 1904, knew that the firm sold out to the corporation, and that Mr. Dean and Mr.

Spring were thereafter employed by the corporation, and that the whole time of each was taken up by such employment. Litchfield testifies that he had no knowledge that they were engaged in transacting any business on their own account as a copartnership during any of the time from 1890 down to 1899.

[1, 2] Upon the trial the defendant Dean testified that at the time of the sale of the business of the partnership to the corporation he had a talk with his partner, Mr. Spring, upon the subject of the dissolution of the partnership, but was not allowed to state the conversation; the court holding that unless the partners were connected with the bank, or unless the conversation was shown to have been brought home to the bank, it could not be received in evidence. In this ruling we think the court was in error. The partnership relation is in the nature of a contract relation, and may be dissolved at any time by agreement; and, even although the partnership agreement be in writing, the dissolution may be proved by parol. *Emerson v. Parsons*, 46 N. Y. 560. Unless an actual dissolution of the partnership was made, the bank would be entitled to recover on the notes in question, even though the bank might have believed that there had been a dissolution prior to the inception of the notes. So that we think the court should have received the parol evidence of dissolution, in order that the jury might consider it, in connection with all the other facts, in determining whether the partnership had been dissolved before the notes in suit were made.

[3, 4] We are also of the opinion that the court should have permitted the jury to pass upon the question of whether or not the bank had notice of the dissolution of the partnership, if they found that a dissolution had been made. As to parties who have never previously dealt with a copartnership, constructive notice of the dissolution seems to be sufficient; but, as to those who have had dealings with the partnership, actual notice must be given, and it matters not how the notice may be acquired. Knowledge of the fact is sufficient notice, in whatever manner the knowledge may have been acquired, and no formal notice in such case need be served.

[5] Likewise knowledge of facts which would lead a party to believe that the partnership has been dissolved is sufficient. *Austin v. Holland*, 69 N. Y. 571, 25 Am. Rep. 246. The undisputed facts in the record tend strongly to show that the partnership had been dissolved. The sale of the business and good will of the firm to the corporation, the cessation of all business activity for many years, the devoting of the entire time of the partners to the work of the corporation upon a salary basis, would seem to point rather to a dissolution of the partnership than to its continuance.

[6, 7] It is elementary that if the partnership had been dissolved, and the bank had knowledge of such fact, or knowledge of such facts as would lead it to believe that the partnership had been dissolved, neither of the partners had the right to bind the other by the making of any new notes or the creation of other obligations in the firm name. If the jury found that sufficient notice of a dissolution came to the

knowledge of the officers and directors of the bank above named, that would constitute notice to the bank.

[8] The plaintiff was allowed to prove certain entries in books alleged to have been kept by the Dean & Spring Manufacturing Company, whereby the personal accounts of Mr. Dean and Mr. Spring were charged with each one-half of the interest upon the notes of which the notes in suit are renewals, without showing that the defendant Dean had knowledge of the fact that such charges had been made. While Dean was a director and the secretary of the corporation, he was not chargeable with constructive notice of what appeared upon such accounts, and the entries themselves were no more competent against him than against a stranger to the corporation. *Rudd v. Robinson*, 126 N. Y. 113, 26 N. E. 1046, 12 L. R. A. 473, 22 Am. St. Rep. 816. The books themselves were not produced, and no sufficient foundation was laid for the introduction of secondary evidence regarding them in any event. They were shown to have been in the possession of the plaintiff subsequent to the commencement of this action, and no sufficient reason was shown why they could not have been produced upon the trial.

[9] The witness Scott was permitted to testify that in 1901 at the bank he examined books purporting to be the books of the Dean & Spring Manufacturing Company, although he had never seen them before. He identified them by a label on the books, and by the fact that they contained entries against Mr. Dean and Mr. Spring. This was wholly insufficient to identify the books as the books of the Dean & Spring Manufacturing Company. A label is of little value in determining the nature of a book of accounts, unless, perchance, the label be in the handwriting or made at the direction of the person sought to be charged thereby. All of such proof was given over the objection and exception of the defendant Dean, and we think the court erred in admitting such evidence. As above pointed out, the entries in and of themselves were not sufficient to establish constructive notice against Dean, and, if upon a new trial it should be sought to show actual notice of such entries, the books themselves should be properly proven as such, and secondary evidence of their contents should not be received, unless a proper foundation be first laid therefor.

[10] Payments of principal or interest by the defendant Dean upon the indebtedness represented by the notes in suit, such as to remove the bar of the statute of limitations, must, in order to bind Dean, have been made with his knowledge and acquiescence.

For these reasons, the judgment and order appealed from must be reversed, and a new trial granted, with costs to the appellant to abide event. All concur.

(79 Misc. Rep. 227.)

B. CRYSTAL & SON v. OHMER.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

APPEARANCE (§ 26*)—OPENING DEFAULT—DISMISSAL.

Where, after a default judgment for plaintiff, defendant moved, on proof by affidavit that the summons and complaint was not served, to open the default and to permit him to appear and serve a proposed answer, the court, upon determining that no service was had, should merely have vacated the judgment, permitted defendant to interpose his answer, and set a date for trial, instead of dismissing the complaint, since defendant waived the jurisdictional defect and submitted himself to the jurisdiction of the court.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 154-159; Dec. Dig. § 26.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by B. Crystal & Son against Eugene A. Ohmer. From a judgment dismissing the complaint, and from an order vacating a judgment for plaintiff, plaintiff appeals. Judgment reversed, and new trial ordered. Order modified.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Jerome L. Adler, of New York City, for appellant.

Gallert & Heilborn, of New York City, for respondent.

SEABURY, J. The complaint alleges two causes of action. In the first cause of action, the plaintiff seeks to recover \$115, alleged to be due as rent under a lease between the parties. In the second cause of action, the plaintiff seeks to recover \$9.80, alleged to be due for work, labor, and services performed at the request of the defendant. On September 25, 1912, a summons was duly issued and made returnable on October 7, 1912. The affidavit of service recites that service of the summons and complaint was duly made on September 30, 1912. On October 7, 1912, the return day, judgment was entered in favor of the plaintiff for the amount claimed, upon the defendant's default of appearance. On the 4th day of November, 1912, the defendant procured an order to show cause, directing the plaintiff or his attorney to show cause on November 8, 1912—

"why an order should not be made, entered, and filed herein, permitting the defendant, Eugene A. Ohmer, to appear and answer herein, and why the judgment heretofore entered herein should not be vacated and set aside, and why the cause should not be set down for trial, and why the defendant should not have such other and further relief as to this court may seem just and proper in the premises."

This order to show cause was procured upon a duly verified proposed answer, in which the defendant interposed a plea of payment to the first cause of action and a denial of the second cause of action alleged. The defendant also submitted an affidavit in which he stated that the summons and complaint were not served upon him on Sep-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tember 30th, as set forth in the proof of service, or at any other time. The moving papers also contained an affidavit of merits, and a recitation of facts tending to support the allegations of the proposed answer, and, at the end thereof, contained a prayer for relief, under which the defendant prayed that—

"his default be opened, and that he be permitted to appear and serve the amended answer."

On November 8, 1912, the return day of the order to show cause, the court below took proof to determine whether or not the defendant had been served with the summons and complaint, and upon evidence ample to support his finding determined that the summons and complaint had not been served. The record discloses that, after the trial of the so-called traverse, the judgment entered in favor of the plaintiff was vacated, and that the complaint was dismissed.

Under the facts above recited, the defendant waived the jurisdictional defect, and submitted himself to the jurisdiction of the court. He requested the court to regard his failure to appear as a default not caused by his own negligence, and prayed for leave to interpose a proposed answer, duly verified and submitted to the court, and to be allowed to defend the action. As the defendant submitted to the jurisdiction of the court, the learned court below should not have dismissed the complaint, but should have vacated the judgment entered in favor of the plaintiff, permitted the defendant to interpose the proposed answer, and then have set a date for trial. *Review & Record Co. v. Gilbreth*, 65 Misc. Rep. 503, 120 N. Y. Supp. 100; *Goldstein v. Goldsmith*, 28 Misc. Rep. 569, 59 N. Y. Supp. 677.

The judgment dismissing the complaint is reversed, and a new trial ordered, with costs to abide the event. The order vacating the judgment entered in favor of the plaintiff and dismissing the complaint is modified, by striking out the provision directing a dismissal of the complaint, and, as modified, affirmed, without costs. The defendant is granted leave to interpose the answer proposed. All concur.

CROKER v. TAYLOR et al.

(Supreme Court, Appellate Division, First Department. January 31, 1913.)

Appeal from Special Term, New York County.

Action by George O. Croker against Harry Taylor and others. From an order denying the motion of defendants Harry and Thomas Taylor for judgment on the pleadings, they appeal. Affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and DOWLING, JJ.

E. D. Miner, of New York City, for appellants.

David M. Houberger, of New York City, for respondent.

PER CURIAM. Order affirmed, with costs.

INGRAHAM, P. J., dissents.

DOWLING, J. (dissenting). The testator herein died at the city of New York on April 6, 1909, and his will was duly admitted to probate on February 1, 1910. This action was brought pursuant to the provisions of section 2653a. Code of Civil Procedure, under which the action therein provided must be commenced within two years after the will has been admitted to probate. The defendants Harry Taylor and Thomas Taylor are nonresidents, and as to them the summons was ordered to be published; the order therefor being made February 15, 1912, within the two-year period, but the publication of the summons being commenced on March 14 and completed on April 18, 1912, both dates after the expiration of the two-year period.

In my opinion section 2653a is complete in itself, and the limitation upon the commencement of the action which is therein provided is an exclusive one. This is not only apparent from the language of the section, but from the extension of the time to commence the action, which is thereby allowed to minors, persons of unsound mind, and those imprisoned or absent from the state. This being so, the exceptions provided in the general statute of limitations are not applicable. Code of Civil Procedure, § 414, subd. 1. But, even should a different conclusion be reached, and the exceptions applying as to limitations generally be held to apply, I do not believe that this case is brought within the exception. Section 398, Code of Civil Procedure, provides that an action is commenced against a defendant when the summons is served upon him; but as it has been held that, where the summons is published, the service is made only when the publication is completed, that clause of the section does not apply in this case. *McEwens Ex'r v. Public Adm'r*, 3 Code R. (N. S.) 139; *Reilly v. Hart*, 55 Hun, 465, 8 N. Y. Supp. 717, affirmed 130 N. Y. 625, 29 N. E. 1099, 27 Am. St. Rep. 540.

The same section further provides that the action is also commenced when the summons is served upon a codefendant who is a joint contractor or otherwise united in interest with the defendant sought to be held. The summons was personally served upon the executor of the estate of Francis C. Taylor, one of the defendants herein, on December 20, 1911, within the two-year period, and on December 22, 1911, and still within the same period, upon Jenny Taylor, another defendant. But Jenny Taylor is contesting the will, whose validity the defendants Harry Taylor and Thomas Taylor are seeking to uphold, and her interests are concededly adverse to theirs. The executor, it seems to me, has no interest in the estate, and certainly is not united in interest with the defendants, for he takes nothing by way of legacy or residuary bequest under the will.

The sole remaining defendant is Woodlawn Cemetery, which was not served, but voluntarily appeared on February 24, 1912, after the expiration of the two-year period; and, while a legatee under the will, it has no interest in the estate, or in this litigation,

for its legacy has been paid in full, and in the complaint herein it is expressly stated no claim is made against it.

Under these conditions, I believe that as to the defendants Harry Taylor and Thomas Taylor, the provisions of section 2653a not having been complied with, the action against them was barred, and that the motion for judgment in their favor upon the pleadings should have been granted, and that the order appealed from should therefore be reversed.

PACE v. D'ANGELO.

(Supreme Court, Appellate Division, First Department. January 24, 1913.)

TRIAL (§ 139*)—DISMISSAL.

Plaintiff having made out a prima facie case presenting issues of fact for the jury, it was error to dismiss the complaint at the close of his case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

Appeal from Trial Term, New York County.

Action by Gicomo Pace against Antonio D'Angelo for negligence. From a judgment entered on a dismissal of the complaint at the close of his case, plaintiff appeals. Reversed, and new trial ordered.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Wesley S. Sawyer, of New York City, for appellant.

Carl Schurz Petrasch, of New York City, for respondent.

PER CURIAM. Plaintiff made out a prima facie case presenting questions of fact. It was error, therefore, to dismiss the complaint at the close of his case.

The judgment appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event.

(79 Misc. Rep. 240.)

WATERS v. LANG et al.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

1. SET-OFF AND COUNTERCLAIM (§ 21*)—ACTION FOR CONVERSION—DEFENDANT'S FAILURE TO COMPLY WITH LIEN LAW.

The fact that defendant, sued for the conversion of horses, had sold them without compliance with the Lien Law, did not preclude him from proving a counterclaim, alleging that a certain amount was originally due from the plaintiff, and allowing credit for the sale price.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 25; Dec. Dig. § 21.*]

2. SET-OFF AND COUNTERCLAIM (§ 29*)—SUBJECT-MATTER—CLAIM CONNECTED WITH SUBJECT OF ACTION.

A counterclaim in an action for the conversion of horses, alleging that a certain amount was originally due from the plaintiff, and allowing credit for the sale price, arose out of the contract under which the horses

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

were delivered, and so was connected with the subject of the action, as required by Code Civ. Proc. § 501, to be the subject of a counterclaim.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 49-51; Dec. Dig. § 29.*]

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by John J. Waters against Minnie Lang and another. From a judgment for plaintiff, defendants' appeal. Reversed, and new trial ordered.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Bernard Drachenberg, of New York City (Arthur G. Fuchs, of New York City, of counsel), for appellants.

Wing & Wing, of New York City (Theodore H. Lord, of New York City, of counsel), for respondent.

SEABURY, J. The plaintiff sues to recover for the alleged conversion of two horses. The defendant Lang claimed that the plaintiff was indebted to her in the sum of \$375, and that she had sold the horses for \$300, and interposed a counterclaim for \$75. The court below failed to submit to the jury the issue raised by the counterclaim, and submitted to the jury the issue as to the value of the horses, which the defendant Lang was alleged to have converted. The action resulted in a judgment for the plaintiff for \$475 and costs.

[1] We think this result is unjust to the defendants, and that the defendant Lang should have been given an opportunity to prove that the plaintiff was indebted to her in the sum of \$375. If she should succeed in establishing this claim, then it is clear that the \$375 should have been deducted by the jury from the sum which they found to represent the value of the horses converted. The fact that the defendant did not comply with the Lien Law in selling the horses did not preclude her from proving a counterclaim, which alleged that originally \$375 was due her from the plaintiff, and allowing the plaintiff credit for the \$300 which was realized from the sale of the horses.

[2] The claim alleged by the defendant arose out of the contract under which the horses were delivered, and was connected with the subject of the action. Section 501, Code of Civil Procedure; *Carpenter v. Life Insurance Co.*, 93 N. Y. 552; *O'Brien v. Dwyer*, 76 App. Div. 516, 78 N. Y. Supp. 600.

It follows that it was error to dismiss the counterclaim, and that the judgment should be reversed, and a new trial ordered, with costs to appellants to abide the event. All concur.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(79 Misc. Rep. 209.)

MILLS v. GOLD.

(Supreme Court, Appellate Term, First Department. February 6, 1913.)

1. PAYMENT (§ 63*)—PLEADING AND PROOF.

Where plaintiff gave defendant a check for \$5,000, and they bought a chicken ranch, each paying \$5,000, defendant paying with the check, and subsequently incorporated the venture, in an action by plaintiff for the \$5,000, claiming that it was a loan, evidence as to the distribution of the stock, and that plaintiff received \$5,000 extra stock, was admissible, although defendant had not pleaded payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 152-161; Dec. Dig. § 63.*]

2. PLEADING (§ 280*)—SUPPLEMENTAL ANSWER.

In an action for money lent, the court properly refused to allow a supplemental answer pleading in bar a judgment for money borrowed several months after the loan in question, where it was not alleged that such second cause of action was a part of the same transaction, or part of a single course of dealings between the parties.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 842-846; Dec. Dig. § 280.*]

Appeal from City Court of New York, Special Term.

Action by Frank P. Mills against Henry Gold. Judgment for plaintiff, and defendant appeals, bringing up for review an order denying leave to serve a supplemental answer. Reversed.

Argued November term, 1912, before LEHMAN and PAGE, JJ.

Arthur L. Fullman, of New York City, for appellant.

Morgan & Breckenbridge, of New York City (George P. Breckenbridge, of New York City, of counsel), for respondent.

PAGE, J. The action was brought to recover \$5,000, alleged to have been loaned by the plaintiff to the defendant. The answer is a general denial.

[1] At the trial it was undisputed that the parties had for some time been contemplating a joint venture in chicken farming. They finally purchased a farm for \$10,000, and the defendant made it his home and undertook the active management of the business. After a short period they incorporated the business. The \$10,000 which they paid for the farm was contributed in this way: Prior to the purchase the plaintiff drew a check to the defendant's order for \$5,000, and at the closing of title each paid \$5,000 toward the purchase price; the defendant using for that purpose the check previously given to him by the plaintiff. The purpose of this transaction is the main issue in the case; the plaintiff claiming that the check was given by him to the defendant to enable him to contribute equally in the business. The defendant asserts that the plaintiff agreed to furnish all the necessary money for the enterprise, and to allow the defendant a half interest for his services in taking entire charge of the business, and he explains that the check was given to him, so that it would appear to outsiders that they were contributing equal money.

The defendant's attorney attempted to give evidence of the final distribution of the stock of the corporation, and how much stock the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

plaintiff received for the money he invested, as some proof of the purpose and intention of the parties in regard to the \$5,000 check given to the defendant. The trial justice excluded the evidence on the ground, as stated, that payment was not pleaded. An exception was duly taken. After the jury had been out a short while they requested the court to instruct them if they could consider whether the plaintiff received \$5,000 extra in stock as a result of his having given the check to the defendant. The court replied in the negative, whereupon a verdict was rendered for the plaintiff for \$5,000. The subsequent conduct of the parties in regard to the money advanced, especially when their arrangements crystallized and took final form in the distribution of the corporate stock, have a peculiar probative value as coloring the transaction and determining its meaning, and its natural relevancy is strongly evidenced by the question which the jury addressed to the court. I am of the opinion that the exclusion of this evidence was reversible error.

[2] As to the second question raised by the appeal, namely, the refusal of the Special Term to permit the defendant to serve a supplemental answer, it need only be said in passing that the appellant has failed to bring himself within the rule which he cites. The judgment which he seeks to plead in bar was brought to recover a different sum of money claimed to have been loaned to the defendant at a date several months subsequent to the transaction, which is the subject of this action, and the proposed supplemental answer does not allege that the second cause of action was a part of the same transaction or a single course of dealings between the parties. The order of the Special Term denying the defendant's motion for leave to serve a supplemental answer is therefore affirmed, without prejudice, however, to a renewal of his motion upon papers properly setting forth his defense.

For the reasons above stated, and on the additional ground that the City Court of the City of New York has no jurisdiction to render a judgment for more than \$2,000 and costs, the judgment appealed from should be reversed, and a new trial ordered, with costs to appellant to abide the event.

LEHMAN, J., concurs.

(79 Misc. Rep. 245.)

BARTHOLDI v. HICKSON.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

1. MASTER AND SERVANT (§ 43*)—CONTRACT OF EMPLOYMENT—CONSTRUCTION—QUESTION FOR JURY.

A contract of employment as "coat tailor or foreman," which provides that the employé shall devote the necessary time to see that coats are delivered on time and to certify to the workmanship, and to make coats when not otherwise employed as foreman, is a contract of employment primarily as foreman, and as coat tailor only when not otherwise em-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ployed as foreman; but the proper construction of the contract depends on the sense in which the quoted words are used, which is for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 57, 58; Dec. Dig. § 43.*]

2. **CONTRACTS (§ 176*)—CONSTRUCTION—QUESTION OF LAW AND FACT.**

The interpretation of a written contract is a question of law, except where the interpretation depends on the sense in which the words are used, in which case it is a mixed question of law and fact.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 767-770, 917, 956, 979, 1041, 1097; Dec. Dig. § 176.*]

Appeal from City Court of New York, Trial Term.

Action by Pasquale Bartholdi against Richard J. Hickson. From a judgment of the City Court of the City of New York dismissing the complaint at the close of plaintiff's case, and from an order denying a new trial, in an action on contract of employment for wrongful discharge, plaintiff appeals. Reversed, and new trial ordered.

See, also, 136 N. Y. Supp. 92.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Jacob Friedman, of New York City, for appellant.

Samuel L. Weyl of New York City (Max D. Steuer, of New York City, of counsel), for respondent.

LEHMAN, J. The plaintiff was employed by defendant under a written contract reading as follows:

"We agree to employ P. Bartholdi as coat tailor or foreman for a period of one year at a salary of \$25 each week. He is to devote such time as is necessary to see that coats are delivered on time by the tailors and to certify to the workmanship being of good standard when completed. He agrees to make coats when not otherwise employed by his duties as foreman."

The plaintiff showed that he worked as foreman for the defendant until his wife became ill. He then absented himself for a few days with defendant's permission. On his return he was told:

"Well, Bartholdi, you know those few days you were home the job as foreman was given away; but if you want to work as tailor cutter you can work."

The plaintiff refused this work, and now brings suit for a wrongful discharge. The court dismissed the complaint, on the ground that the written contract gave the defendant the right to employ the plaintiff exclusively as coat tailor, without giving him any work as foreman.

[1] While the words, "We agree to employ F. Bartholdi as coat tailor *or* foreman," apparently bear out the construction placed upon the contract by the trial justice, the contract must be read as a whole, and the subsequent words show an employment primarily as foreman, and an employment as coat tailor only when the plaintiff was "not otherwise employed by his duties as foreman." In conjunction with the latter part of the contract the words "as coat tailor or foreman" are open to the construction that they were not intended to describe alternative forms of employment, but one form of employment, which the parties describe as "coat tailor or foreman," since

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

neither term exactly fitted the duties to be performed. The proper construction of the contract, therefore, depends upon the sense in which these words were used, and this question should have been submitted to the jury.

[2] "As a rule, the interpretation of written instruments is with the court as a question of law; but when the interpretation depends upon the sense in which the words are used, or the sense in which the promisor had reason to believe the promisee understood them, a fact to be determined from the relation of the parties and the surrounding circumstances, it would seem that it becomes a mixed question of law and fact. It is not, then, a matter of interpretation merely, but the ascertainment of the minds and intents of the parties." *White v. Hoyt*, 73 N. Y. 505; *Trustees of East Hampton v. Vail*, 151 N. Y. 463, 45 N. E. 1030.

Judgment should therefore be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

CARPENTER v. CHAPMAN et al.

(Supreme Court, Trial Term, Fulton County. April, 1912.)

1. SALES (§ 429*)—BREACH OF WARRANTY—RIGHT OF ACTION—CONDITIONAL SALE.

Where a mare was delivered to the buyer at the time of sale, upon condition that title should remain in the seller until payment of the price stated in the note, the sale was conditional on payment of the whole price, so that an action for breach of warranty of soundness will not lie where the purchase-money note was not paid at maturity.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1224-1229; Dec. Dig. § 429.*]

2. SALES (§ 430*)—REMEDIES OF SELLER—RECOVERY OF PRICE—BREACH OF WARRANTY.

If there was a warranty as to the condition of a mare sold, and breach thereof, the mare dying, the seller could not recover the balance of the purchase-money note, in the buyer's action for breach of warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1230, 1231; Dec. Dig. § 430.*]

Action by Lillian Carpenter against B. L. Chapman and another, in which defendants counterclaimed. Complaint and counterclaim dismissed.

William W. Smith, of Johnstown, and Horton D. Wright, of Gloversville, for plaintiff.

Charles D. Thomas, of Herkimer, for defendants.

WHITMYER, J. [1] The plaintiff has brought this action to recover damages from defendants for breach of warranty as to the soundness of a mare sold by defendants to plaintiff. The purchase price was \$150 of which \$100 was paid at the time of the sale, and the balance, \$50, was represented by a note, payable six months after its date. The mare was delivered to plaintiff, at the time of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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sale, upon the condition, set forth in the note, that the title was to remain in defendants until full payment of the purchase price. The note was not paid at maturity or at the time of the commencement of the action. The sale, then, was conditional on payment of the full price, so that the action for breach of warranty will not lie. *Osborn v. Cantz*, 60 N. Y. 540; *English v. Hanford*, 75 Hun. 428, 27 N. Y. Supp. 672; *Benjamin on Sales*, p. 865; *Roach v. Curtis*, 115 App. Div. 765, 101 N. Y. Supp. 333, affirmed 191 N. Y. 387, 84 N. E. 283; *Levis v. Pope Motor Co.*, 202 N. Y. 402, 95 N. E. 815.

The case of *Pierce v. Hellenic American Realty Co.*, 76 Misc. Rep. 473, 135 N. Y. Supp. 605, cited by plaintiff, is not an authority here, since that was an action in tort. It is urged by plaintiff that the action is not for breach of warranty, but to rescind the sale. The complaint, however, is clearly for breach of warranty, and a recovery based on a rescission cannot be sustained. The complaint must therefore be dismissed, with costs.

[2] On the other hand, defendants are not entitled to judgment on their counterclaim, by which they seek to recover the balance due on the note. The reply of plaintiff, while admitting the delivery and nonpayment of the note, denies that any sum is due thereon, for the reason that the mare was not sound, and was not as warranted, and refers to the complaint for the other items of the warranty. The mare was breathing short and quick at the time of the sale. Being inexperienced, plaintiff called attention to this fact, whereupon defendants stated that it was due to what they called "a car cold," which was not serious, and urged plaintiff to take her, guaranteeing that she was a good work horse, that she would work in all harnesses, that nothing serious was the matter with her, and that, if she was not all right, it was no sale, and plaintiff could bring her back.

These warranties were made by defendants as an inducement to plaintiff to purchase, and plaintiff took the mare, relying upon them. They were worthless. Instead of growing better, the mare grew worse, without the fault of plaintiff, and died within five days thereafter in a barn on the road between Gloversville and Johnstown, to which place plaintiff's driver had succeeded in leading her in the effort to return her to the defendants. There was, then, a breach of the warranty made and given. Defendants claim, however, that the obligation to pay the note was absolute and survived the death of the horse. That would have been the case, if there had been no warranty and no breach. It is in this respect that the case here is distinguishable from *Comer v. Cunningham*, 77 N. Y. 391, 33 Am. Rep. 626, and *National Cash Register Co. v. South Bay Club House Association*, 64 Misc. Rep. 125, 118 N. Y. Supp. 1044, cited by defendants in support of their claim.

Under the circumstances, the counterclaim must be dismissed. Findings may be prepared accordingly.

BRADY v. DONOHUE.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

WITNESSES (§ 144*)—TRANSACTIONS WITH DECEASED PERSONS—EVIDENCE.

A plaintiff, suing an executrix for money had and received, based on the theory that he had been employed by testator at a weekly salary, is not competent to testify to such employment and an agreement that testator should retain a specified part thereof for plaintiff.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 625-643; Dec. Dig. § 144.*]

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action for money had and received by John Brady against Margaret A. Donohue, executrix of Philip Donohue, deceased. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Daniel Daly, of New York City (Joseph H. Banigan, of New York City, of counsel), for appellant.

Moses Weill, of New York City, for respondent.

LEHMAN, J. Plaintiff claims that he was employed by defendant's testator as bartender at a salary of \$14 per week, that he agreed that the decedent should retain \$4 per week from his wages, and that each week he paid himself \$10 from the cash receipts. Plaintiff produced three disinterested witnesses, who testify that the decedent told them at various times that he was retaining \$4 per week from plaintiff's wages; otherwise, plaintiff would lose it all at horse racing.

The plaintiff's evidence as to the employment at \$14 and the agreement that decedent was to retain \$4 per week was clearly incompetent. With this evidence out of the case, there is no sufficient basis for a recovery. The testimony of the disinterested witnesses merely shows that at some time the decedent retained part of plaintiff's wages, but it does not show for how long a period the practice continued.

Judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

(79 Misc. Rep. 229.)

WEISS v. VALENSTEIN.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

LANDLORD AND TENANT (§ 164*)—FALLING CEILING—NEGLIGENCE.

A tenant cannot recover for injuries caused by a falling ceiling, even though she relied on the promise of the janitor to take care of it, having noticed that it was cracked, where there is no evidence of any duty by the owner other than a contract duty.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 630-641; Dec. Dig. § 164.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by Annie Weiss against Julius Valenstein. Judgment for plaintiff, and defendant appeals. Reversed.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

James I. Cuff, of New York City, for appellant.

L. B. Brodsky, of New York City, for respondent.

PAGE, J. This action is brought to recover damages for injuries sustained by the plaintiff by reason of the falling of a ceiling in her apartment, which she rented from the defendant. The evidence on behalf of the plaintiff was that the ceiling had been cracked for some time before it fell, and the plaintiff had notified the janitor, who was a brother of the defendant and in charge of the property, of its dangerous condition. The defendant's brother looked at it and said:

"I am responsible for the ceiling. It is in good condition for about two years yet, and don't worry."

After reviewing the evidence, the court charged the jury:

"The question before you, gentlemen, is this: Whether this woman, Anna Weiss, had a conversation with this man, Louis Valenstein; whether she relied upon his promise to make good the repairs on that ceiling, and, relying upon that promise, she remained in those premises and was injured. * * * Now, if you find from all the facts and circumstances in this case that there was a promise made by this man, Louis Valenstein, to Mrs. Weiss, that he would repair that ceiling, and that she, relying upon that promise, remained there, then you may find such verdict for the plaintiff," etc.

It is well-settled law that a tenant cannot recover from his landlord, under a contract to repair, damages for personal injuries sustained by reason of the unsafe condition of the premises. *De Negro v. Christman*, 77 Misc. Rep. 147, 151, 136 N. Y. Supp. 364. To support such a recovery there must appear to be some duty imposed by law upon the landlord independent of his contract. *Schick v. Fleischauser*, 26 App. Div. 210, 49 N. Y. Supp. 962; *Frank v. Mandel*, 76 App. Div. 413, 78 N. Y. Supp. 855. The charge to the jury was erroneous, and the judgment must accordingly be reversed. A careful examination of the record fails to disclose any evidence from which it could be found that there was a duty in the defendant to repair the ceiling, other than a contractual one. Therefore no recovery for negligence can be supported by the testimony. The alleged representations of the defendant's janitor as to the safety of the apartment were clearly nothing more than expressions of opinion on his part, and it is not shown that as defendant's agent he had any authority to guarantee the safety of the premises. The motion of the defendant's attorney to dismiss the complaint should have been granted, as there was no evidence upon which the jury could find for the plaintiff.

The judgment appealed from is reversed, with costs, and the complaint dismissed, with costs. All concur.

AMERICAN CONTRACTOR PUB. CO. v. MICHAEL NOCENTI CO.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

CORPORATIONS (§ 642*)—FOREIGN CORPORATION—"DOING BUSINESS" IN THE STATE.

Where orders for special building reports were sent to a Chicago publishing company having no capital invested in New York, but having an office there for soliciting business, the transaction did not constitute "doing business" in New York by the publishing company, within General Corporation Law (Consol. Laws 1909, c. 23) § 15, requiring foreign corporations doing business in the state to obtain a certificate and pay a license tax.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.*

For other definitions, see Words and Phrases, vol. 3, pp. 2155-2160; vol. 8, pp. 7640, 7641.]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by the American Contractor Publishing Company against the Michael Nocenti Company. From judgment for defendant, plaintiff appeals. Reversed, and judgment directed for plaintiff.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

George Ryall, of New York City, for appellant.

Moses Weill, of New York City, for respondent.

PER CURIAM. The complaint was dismissed upon the ground that the plaintiff was a foreign corporation doing business in this state without authority. The plaintiff publishes a trade journal in the city of Chicago, and has an office in the city merely for the purpose of collecting news and soliciting contracts for advertisements and for certain trade reports. The orders for special building reports, upon which this action was brought, were sent to Chicago and filed from there. The plaintiff has no capital invested here, and is not doing business within this state within the meaning of section 15 of the General Corporation Law. *American Contractor Publishing Co. v. Bagge* (Sup.) 91 N. Y. Supp. 73. If the person who signed the contract on defendant's behalf did not have authority, the contract was accepted and ratified by the defendant.

Judgment reversed, with costs, and judgment directed for the plaintiff for \$95 and costs.

McCARTY v. LIGHT.

(Supreme Court, Appellate Division, Fourth Department. January 22, 1913.)

1. BANKRUPTCY (§ 196*)—JUDGMENT—LIEN ON REALTY.

Where a judgment is rendered within four months of an adjudication of bankruptcy, it becomes a lien on the bankrupt's real estate which the trustee does not elect to claim, in spite of Bankruptcy Act July 1, 1898, c. 541, § 67f, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3450), providing that such a judgment is void, and that the property affected thereby shall pass

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to the trustee, since, although not effective as against the trustee, or persons claiming under him, or the insolvent personally, the lien on the property is not wholly destroyed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 306-316; Dec. Dig. § 196.*]

2. BANKRUPTCY (§ 150*)—TRUSTEE IN BANKRUPTCY—TITLE TO LAND.

Although the title to land passes to the trustee in bankruptcy by the proceedings in bankruptcy, if he so elects, he need not accept it, if in his opinion it is worthless or will be unprofitable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 228; Dec. Dig. § 150.*]

3. BANKRUPTCY (§ 433*)—SECURED CLAIMS—JUDGMENT LIENS.

Where a judgment creditor proved his claim against the estate of a bankrupt, but got nothing thereon, and there was nothing to show that he had surrendered or waived the security of the lien on land not sold by the trustee, such lien was not affected by the discharge in bankruptcy of the judgment debtor, under Bankruptcy Act July 1, 1898, c. 541, § 57g, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), as amended in 1903 (Act Feb. 5, 1903, c. 487, § 12, 32 Stat. 799 [U. S. Comp. St. Supp. 1911, p. 1504]), allowing the filing of secured claims without losing the security.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 808-823; Dec. Dig. § 433.*]

McLennan, P. J., and Lambert, J., dissenting.

Appeal from Special Term, Monroe County.

Action by Edward McCarty against Arthur S. Light. Judgment for plaintiff, and from an order granting leave to issue execution, the defendant appeals. Affirmed.

Argued before McLENNAN, P. J., and KRUSE, ROBSON, FOOTE, and LAMBERT, JJ.

P. Cameron Shutt, of Rochester, for appellant.

Harry Otis Poole, of Rochester, for respondent.

KRUSE, J. The order from which the appeal is taken permits an execution to be issued upon the judgment recovered by the plaintiff against the defendant, and the question is whether, in view of the defendant's discharge in bankruptcy and the proving in the bankruptcy proceedings of the debt upon which the judgment was recovered in the bankruptcy proceedings, the lien of the judgment survived, notwithstanding it was recovered within four months before the adjudication of the defendant as a bankrupt in the federal court. The Special Term held that the lien of the judgment survived and granted leave to issue an execution, and from the order entered thereon the defendant appeals.

It appears that the judgment was recovered on the 23d day of September, 1902, on a promissory note made by the defendant to the plaintiff, and that the judgment was docketed in Monroe county clerk's office on that day; an execution was issued to the sheriff of Monroe county, November 13, 1902, and returned wholly unsatisfied; that at the time of the entering of said judgment, the defendant was the owner of an undivided interest in certain real estate situate in that county, upon which the judgment became a lien. The plaintiff in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

judgment having died, Edward A. McCarty was appointed the executor of the will by the probate court of Saginaw county, state of Michigan, and thereafter ancillary letters testamentary were issued to him by the surrogate of Monroe county. The executor makes the application for leave to issue the execution.

On the 4th day of December, 1902, the judgment debtor filed a petition in bankruptcy, and on that day was adjudicated a bankrupt by the District Court of the United States for the Western District of New York, and thereafter, and on the 29th day of December, 1902, filed a supplementary petition stating that at the time he filed the original petition he was the owner of an undivided one-fifth interest in said real estate. The plaintiff's claim was included in the schedule of the defendant in the bankruptcy proceeding. The defendant states in his affidavit that it was a debt provable in the bankruptcy court; that the plaintiff had due notice of the bankruptcy proceedings, and that his claim was duly proven as a debt against the bankrupt in the bankruptcy proceedings; that a trustee was appointed of the defendant's property; that the trustee qualified, entered upon the discharge of his duties, and thereafter he was discharged; and that on December 1, 1904, the defendant was duly discharged from all debts and claims provable in bankruptcy. A copy of the order granting the discharge in bankruptcy is contained in the record, and is the only paper in the bankruptcy proceedings of which a copy appears to have been presented upon this application. The other facts referred to are made to appear by affidavit.

The order of discharge provides that a discharge be and the same is granted to the bankrupt, discharging and releasing him from all his debts provable in bankruptcy, except only such as are exempt by the provisions of the Bankruptcy Act of 1898, and directs that a formal discharge be signed, issued, and delivered to the bankrupt.

It appears by the affidavit of the attorney who makes the application for leave to issue the execution (who was also the trustee in bankruptcy and the attorney who obtained the judgment) that the interest of the bankrupt in the real estate was not sold in the bankruptcy proceedings, and it is further stated in the affidavit that the judgment debtor, the bankrupt, was discharged in bankruptcy proceedings while still the owner of the interest. There is no explanation why the interest of the bankrupt was not sold, nor does it appear in any way what was the amount of his indebtedness, the value of his estate, the amount realized, or the amount paid upon the indebtedness, except what may be inferred from the statement in the affidavit of the attorney that no part of the judgment has been paid and that the same still remains unsatisfied.

It is also stated in the affidavit that the judgment is still a lien on the real property and interests owned by the debtor in accordance with section 150 of the Debtor and Creditor Law (Consol. Laws 1909, c. 12) and section 1268 of the Code of Civil Procedure, which provides that, where the judgment was a lien on real property owned by the bankrupt prior to the time he was adjudged a bankrupt, the lien thereof upon said real estate shall not be affected by said order and may

be enforced. It is further stated that, while the judgment was still a lien upon the interest in said real estate, the defendant conveyed the same to his wife by quitclaim deed, February 15, 1910, which is recorded in Monroe county clerk's office, and that the wife still retains the record title to the property, subject to the lien of the judgment.

[1] The defendant states in his affidavit that at the time the judgment was obtained he was insolvent, and contends that the judgment, having been obtained within four months prior to the filing of his petition in bankruptcy, is void not only as to the trustee in bankruptcy, but also as to him, the bankrupt judgment debtor. While section 67f of the federal Bankrupt Law provides generally that such a judgment is void, and that the property affected thereby shall pass to the trustee as a part of the estate, unless the court shall order the lien preserved for the benefit of the estate, such a judgment is good, and the lien thereof remains effective, except as against the trustee in bankruptcy, or person or persons claiming under or through him. *Frazee v. Nelson*, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391, decided in 1901; *McKenney v. Cheney*, 118 Ga. 387, 45 S. E. 433, decided in 1902; *Rochester Lumber Co. v. Locke*, 72 N. H. 22, 54 Atl. 705, decided in 1903; 1 *Loveland on Bankruptcy* (4th Ed.) § 438. The discharge in bankruptcy affects only the defendant's personal liability upon the debt, not the lien of the judgment recovered upon the debt. 2 *Loveland on Bankruptcy* (4th Ed.) §§ 742, 747.

[2] While the title to the land would pass to the trustee in bankruptcy by the proceedings in bankruptcy, if he elected to take the land, he was not required to accept it if in his opinion it was worthless or would be unprofitable for him to take the same. Indeed, in such a case it was his duty not to accept it. *Matter of Cogley* (D. C.) 107 Fed. 73. Whether the trustee concluded that the bankrupt was solvent at the time the judgment was entered, and the lien valid, or, if invalid, that the land was so heavily incumbered as to make it unprofitable for him to take it, we do not know. There is nothing disclosed by the record which throws any light upon that question; and perhaps that is not important here. It is a sufficient answer to the appellant's contention that the trustee in bankruptcy elected not to take the property and has not challenged the validity of the judgment, or taken any proceedings to avoid the lien thereof.

[3] But it is now said that the plaintiff, by proving his claim in bankruptcy, elected to abandon his security. No such claim was made at Special Term or upon the argument before us, and I think the facts stated in the record are insufficient to present that question. While it appears that the adjudication in bankruptcy against the defendant was made in December, 1902, the proceedings in bankruptcy were not terminated until December, 1904, and it does not appear when the claim was proven, nor the form in which it was presented or allowed. Under the provisions of section 57e of the Bankruptcy Act, as it existed in 1902, the plaintiff, although his claim was secured, had the right to participate in the proceedings at creditors' meetings held prior to the determination of the value of his security, but his claim could only be allowed for such sum owing over and above the value of his secu-

rity; and under section 57h provision is made for determining the value of the security and crediting such value upon the claim, directing a dividend to be paid upon the unpaid balance. In 1903 the Bankruptcy Act was amended; but the amendments, I think, made the right of the secured creditor to file and prove a claim like this, without losing his security, more definite and certain than under the original act. Section 57g, as amended in 1903. If the defendant desired to present that question, he should have made the facts appear which had the effect to discharge the plaintiff's lien or would make it inequitable for him now to enforce the same. *Cook v. Farrington*, 104 Mass. 212.

The proposition as contended for by the defendant amounts to this: That he may include in his schedule of assets property subject to the lien of the judgment which the trustee in bankruptcy refuses to take, and upon the determination of the bankruptcy proceedings and his discharge, the property comes back to him, with not only his personal liability extinguished, but the property freed from the lien of the judgment, without the payment of anything thereon to the judgment creditor. I am of the opinion, however, that since the property was never subjected by the trustee to the jurisdiction of the bankruptcy court, the lien thereon was not affected thereby, and that the plaintiff may enforce the same against the property in question under the state law. Debtor and Creditor Law, § 150; Code of Civil Procedure, § 1268.

I think the order should be affirmed, with \$10 costs and disbursements. All concur, FOOTE, J., in a separate memorandum, except McLENNAN, P. J., and LAMBERT, J., who dissent in an opinion by LAMBERT, J.

FOOTE, J. (concurring for affirmance). While the language of section 67f of the Bankrupt Act plainly makes void judgments recovered within four months prior to the filing of the petition, still I think this section must be construed with reference to the object intended to be accomplished by it; that is to say, with reference to the proper and equal distribution of the estate among the creditors. Loveland in his work on Bankruptcy (4th Ed.) § 438, says:

"Section 67f does not avoid the levies and liens therein referred to against all the world, but only against the trustee in bankruptcy and those claiming under him, so that the property may pass to and be distributed by him among the creditors of the bankrupt."

For this he cites a number of cases, including those referred to in the opinion of Mr. Justice KRUSE. It is for this reason that liens acquired within four months upon exempt property hold good, notwithstanding the provisions of section 67f. As to such liens, Loveland, at section 427, says:

"A lien created by legal proceedings, as by a levy of execution, attachment, garnishment, or a judgment, within four months of bankruptcy, remains in force upon so much of the property as is exempt from those proceedings. The reason for this is that section 67f, annulling liens obtained by legal proceedings, deals with liens on property which passes to the trustee for the benefit of the creditors of the bankrupt, but does not affect liens on property, which is not a part of the estate."

For this the author cites a number of authorities, among others, *In re Driggs* (D. C.) 171 Fed. 897, where Judge Hand, in the Southern district of New York, held that creditors who had levied upon a bankrupt's wages only four days before the petition in bankruptcy could not be restrained from proceeding to collect such part of the wages as were exempt property not passing to the trustee in bankruptcy.

The case in the Circuit Court of Appeals for the Ninth Circuit of *In re Forbes*, 186 Fed. 79, 108 C. C. A. 191, is not an authority to the contrary. In that case, the bankrupt's homestead property came into the custody of the trustee in bankruptcy, and it became necessary for him to convert it into money, because the property was far more valuable than the \$2,500 in value, which was the limit of the exemption allowed as a homestead under the Arizona statute, and it appeared that the attachment in that case was levied upon this homestead property before the bankrupt had selected it as a homestead. And in *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, the Supreme Court of the United States directed the bankrupt's discharge to be withheld in order to permit a creditor to proceed in the state court to collect his debt out of exempt property, as to which the creditor held a waiver of exemption, and in which the general creditors were not interested. See Loveland's discussion of these questions. Volume 1, pp. 883-886.

As to the second question referred to in Mr. Justice LAMBERT'S opinion, namely, that by proving a claim in bankruptcy, the judgment creditor waived the lien of his judgment, I think we cannot so hold in this case. Defendant had the affirmative of showing, in answer to plaintiff's motion, that the lien had been discharged. The Bankrupt Act provides a method of proving secured debts, so as to enable the creditor to retain his security and prove for the balance of the debt over and above the amount of the security. The Supreme Court has prescribed forms in proving claims in bankruptcy. The only practical difference between the form of proof of secured and unsecured debts is that in case of unsecured debts the creditor should state that he "has not * * * had or received any manner of security for said debt whatever," and, for a secured debt, "and that the only securities held by this deponent for said debt are the following." Defendant's affidavit in opposition to the motion below states:

"And plaintiff's said claim herein was duly proven as a debt against said bankrupt in said bankruptcy proceedings, * * * and that the claim of plaintiff herein was one of the debts proven against deponent in said bankruptcy proceedings, and discharged by operation thereof."

This statement may have been entirely true, and still there may have been no waiver; for, if the debt was proved as a secured debt, there would be no waiver. To sustain the burden resting upon him, defendant should have shown that the debt was proved as an unsecured debt.

I doubt whether it was intended that questions such as are pre-

sented here should be determined upon a motion under section 1378 of the Code for leave to issue an execution. In this case, when the motion was made, the 10 years was about to expire after which the judgment would cease to be a lien upon the land which defendant had already conveyed to his wife. Under those circumstances, plaintiff's rights, if any he had, could only be preserved by granting the motion for leave to issue execution, leaving the defendant to assert his supposed rights under his discharge in bankruptcy, either by motion to discharge the judgment because of the discharge in bankruptcy, or by action to restrain plaintiff from proceeding to enforce the judgment. At all events, if it were proper to litigate such questions as this at Special Term on a motion for leave to issue execution, certainly defendant should have presented to the Special Term such parts of the proceedings in bankruptcy and other facts as were necessary to put the court in possession of all the facts. Defendant may now bring his action to protect himself, if he has that right, while, if leave to issue execution is denied, plaintiff's lien cannot be restored, though it be found on fuller disclosure of the facts that the lien has not been waived.

For these reasons, it seems to me the order should be affirmed.

LAMBERT, J. (dissenting). The major facts involved upon this appeal are sufficiently stated in the opinion of Justice KRUSE. The Bankruptcy Act of 1898 (section 67f) furnishes ample reason for the reversal of the order. By that section it is provided:

"That all judgments * * * obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void, in case he is adjudged a bankrupt, and the property affected by the levy, judgment, * * * shall be deemed wholly discharged and released from the same and shall pass to the trustee, as a part of the estate. * * *"

This statute provides three prerequisites to its operation. The judgment must be against a debtor, insolvent at the time of its rendering. The petition in bankruptcy must have been filed within the four months thereafter. The adjudication of bankruptcy must follow. When these elements are present, their legal effect is plain. The judgment is dissolved, ipso facto, as of the time of its rendition. The United States Supreme Court so declared the effect of this statute in the following words:

"This nullity and invalidity relate back to the time of the rendition of the judgment. The language of the statute is not 'when,' but 'in case, he is adjudged a bankrupt,' and the lien obtained through these legal proceedings was by the adjudication rendered null and void from its inception." *Clarke v. Larremore*, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555.

This court has also had occasion to pass upon this section of the Bankruptcy Act, and its conclusions harmonize with the foregoing. *Nat. Bank & Loan Co. v. Spencer*, 53 App. Div. 547, 65 N. Y. Supp. 1001; *De Graff v. Lang*, 92 App. Div. 564, 87 N. Y. Supp. 78. If the rule of interpretation, announced in these cases is applicable to the facts here, then there was no lien remaining under this judgment, upon

which the saving clause of section 150 of the Debtor and Creditor Law might operate. The lien of the judgment having been destroyed by the Bankruptcy Act, the state enactment is ineffectual to reinstate it.

It is suggested in the prevailing opinion that the rule established by the cases cited is one for the benefit of creditors, and can only be asserted by the trustee and those claiming through or under him. I cannot accede to this proposition as of unvarying application. But, assuming it to be true, it does not, in my opinion, permit the respondent to retain the order involved upon this appeal. The real property, upon which it is claimed this judgment was a lien, was scheduled by the bankrupt as a part of his estate, and he in fact then owned the title. By the clear provisions of section 67f, his title vested in the trustee as of the date of adjudication, and equally clear is it that it vested, freed from the lien of the judgment. This is made so by the provision of that section, "that the property" shall be deemed wholly discharged from such lien and pass to the trustee as a part of the estate. The statute, above quoted, distinctly so provides. Upon the appointment of the trustee, then the title, by operation of law, left the bankrupt and vested in the trustee, free from the lien of the judgment.

It is well settled law that a trustee is at liberty to refuse to administer property so vesting, if its administration would prove disadvantageous to the estate he represents. *First Nat. Bank v. Lasater*, 196 U. S. 115, 25 Sup. Ct. 206, 49 L. Ed. 408; *American File Co. v. Garrett*, 110 U. S. 288, 295, 4 Sup. Ct. 90, 28 L. Ed. 149; *Sparhawk v. Yerkes*, 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915; *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; *Dushane v. Beall*, 161 U. S. 513, 16 Sup. Ct. 637, 40 L. Ed. 791. Those and other cases that might be cited decide that, in case the trustee elects not to administer the property, the title reverts to the bankrupt by operation of law, and that such election may be inferred from circumstances. The fact is conceded in the record of this appeal that the trustee in bankruptcy did not administer the real property in question, and we may reasonably conclude that his failure to do so resulted from a determination by him that to administer it would prove unprofitable to the estate. The reasonableness of his conclusion not to administer it is not open to question here, as a means for its review is provided in the bankruptcy court. It follows that by operation of law the title thereupon passed back to the bankrupt. Unless the trustee did make such a determination, and unless such was its effect, then there is now no title in the appellant to be reached by the execution. It is thus made certain that the title owned by him, at the conclusion of the bankruptcy proceedings, was a title that he acquired from and through the trustee. Having succeeded to the title of the trustee, he has a privity of title with the trustee, and is in a position to assert any right that the trustee might assert with reference to such title. The privity arises from the succession of title. *Smith v. Reich*, 80 Hun, 287, 30 N. Y. Supp. 167, affirmed 151 N. Y. 642, 45 N. E. 1134.

As has been seen, the title vested in the trustee free from the lien of the judgment, and I can find no provision of law, statutory or oth-

erwise, reviving such lien upon the transition of the title back to the bankrupt. Undoubtedly a construction of this section of the Bankruptcy Act is proper, and even required, which removes from its operation liens upon property not reached by the bankruptcy law and which that court cannot administer. Such a construction is essential to a recognition of the property rights in the bankrupt not reached through and by the Bankruptcy Act, and leaves such property and the liens attendant thereon to be administered by the state courts, unfettered by the bankruptcy proceedings. Such a construction is recognized by Mr. Loveland in his work on Bankruptcy (4th Edition, § 438), and the cases from foreign jurisdictions, which he cites to sustain that construction, so hold. With the doctrine of these cases I have no controversy as to the facts there involved. Those facts, however, do not quadrate with those of this case. Here the judgment debtor sought the bankruptcy court to be relieved from his debt, and turned this particular property over to that court for administration by it. Here the judgment creditor also invoked the aid of that court for the collection of his debt, by proving his claim, and submitted it and himself to the jurisdiction of that court. Here the property was of a character which permitted its administration in that court, and it actually passed to the trustee for such administration. With the property, the judgment debt, and both parties all in that court and within its jurisdiction, we must assume that their respective rights, which they were there asserting, were fully administered, and no right survived to be enforced in the state courts. If the proceedings had in that court were not complete in the adjustment of their rights, then the burden was upon the moving party in this application to make such fact appear. That he has failed to do.

It appears from the record that in the bankruptcy proceeding the judgment creditor proved the judgment "as a debt" against the bankrupt. This, it would seem, justifies the conclusion that he proved such as an unsecured claim. To assume otherwise requires the inference that he proved it, not only as a "debt," but also as a lien. I find no intimation in the record that any claim was made there that the claim was one upon a lien. If in fact the claim was one upon a lien, the respondent should have made such fact to appear, to escape the conclusion that it was not. Assuming, therefore, as I think we must, that the claim was proven as an unsecured claim, such action effectually bars the relief sought here by the respondent. This is equally true if we assume that a lien existed upon which he might have proven a secured claim. There would then have been two courses of action open to him. He might rely upon such lien and look to the property for the satisfaction of his debt, or he might file an unsecured claim and look to dividends for reimbursement. He could not do both, for the two positions are made inconsistent by the Bankruptcy Act. By section 56b of that act, the holder of a secured claim is debarred from voting at creditors' meetings. By sections 57e and 57h, the holder of such a claim is required either to realize upon his security or to appraise its value, to the end that it may be determined what proportion of the claim is not protected by the security. The official forms

in bankruptcy have practically the effect of statutory enactments, and by such the creditor, in filing his claim, is required to specify whether his claim be secured, and, if so, to identify its security. Substantial rights to all creditors are affected by these provisions. It is only the unsecured creditors who participate in dividends, and to allow a secured creditor to receive dividends upon the full amount of his claim, and then to realize upon his security, would be manifestly unjust and inequitable.

Nor do I see that the status of the respondent is affected through the failure of the estate to pay dividends. The judgment debtor voluntarily assumed a position which entitled him to receive dividends, if any were paid. His claim to be so entitled was repugnant to any claim of security in his hands. With the two inconsistent positions presented, he was required to assume one position or the other, and his election to take the stand of an unsecured creditor was an abandonment of all claim that he had any security. This doctrine is recognized in the case of *Ansonia Co. v. Babbitt*, 74 N. Y. 395, and, as was there stated, the place for him to correct any position he may have misguidedly assumed is not in this court. He stands here, as he did there, an unsecured creditor.

It follows that the order appealed from should be reversed, with costs.

SANDS v. SALTSMAN et al.

(Supreme Court, Appellate Division, Third Department. December 30, 1912.)

1. EVIDENCE (§ 332*)—DOCUMENTS—JUDICIAL RECORDS—ENTIRE RECORD.

In an action to recover money represented by certificates of deposit claimed to belong to plaintiff's intestate, it was error to admit the record of proceedings in the Surrogate's Court, and his findings in proceedings against defendant herein to discover assets of the estate, since the certificates could have been produced by subpoena duces tecum if they were in the surrogate's custody.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1237-1246; Dec. Dig. § 332.*]

2. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, in an action to recover money represented by certificates of deposit claimed to belong to plaintiff's intestate, defendant did not make out a prima facie case of ownership of the certificates or their proceeds, any error in admitting evidence would not require reversal of a judgment for plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

3. EVIDENCE (§ 265*)—CERTIFICATES OF DEPOSIT—TITLE.

Mere admissions of intestate, while certificates of deposit were in her possession, that they belonged to defendant, or that intestate had agreed that they or the proceeds should be his, did not show prima facie title in defendant, in absence of proof of assignment, indorsement, or delivery to him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029-1050; Dec. Dig. § 265.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Trial Term, Cortland County.

Action by George S. Sands, as administrator of Sarah J. Saltsman, deceased, against Frank Saltsman, impleaded with another. From a judgment for plaintiff, the defendant named appeals. Affirmed.

Argued before SMITH, P. J., and KELLOGG, HOUGHTON, BETTS, and LYON, JJ.

B. T. Wright, of Cortland, for appellant.

Fred Hatch, of Cortland, for respondent.

PER CURIAM. [1] It was error to receive in evidence for any purpose the record of the proceedings in the Surrogate's Court and the findings of the surrogate in the matter of the discovery of assets belonging to the estate of the plaintiff's intestate, instituted therein against the defendant Saltsman. If the certificates which the defendant had obtained the money upon were in the custody of the surrogate or his clerk, a subpoena duces tecum could have produced them. without introducing in evidence the entire record in that proceeding.

[2, 3] If the defendant on the trial had succeeded in making even a prima facie case of ownership of the certificates of deposit in controversy, or the moneys which they represented, we would feel called upon, because of such error, to reverse the judgment. The evidence, however, falls far short of showing any title in the defendant. Mere admissions by the plaintiff's intestate, while the certificates remained in her possession, that they belonged to the defendant, or that she had agreed with him that they should be his, or that the money was his, and that he had the right to draw the money thereon, in the absence of any proof that they had been assigned, or indorsed over to him, or delivered to him, are insufficient to establish prima facie title. The proof of possession of the key by the defendant Saltsman to the trunk in which the certificates were kept, with other securities belonging to the plaintiff's intestate, under the circumstances, was insufficient to show delivery of the certificates in question.

For the same reason, if it was error to receive the letters which the defendant wrote to his sisters, which we do not decide, the error was harmless.

It follows that the judgment must be affirmed, with costs.

STEINMANN v. HOSIER.

(Supreme Court, Special Term, New York County. April 22, 1912.)

1. EXECUTION (§ 386*) — SUPPLEMENTARY PROCEEDINGS — EXAMINATION OF THIRD PERSON.

Under Code Civ. Proc. § 2441, providing that upon satisfactory proof that an execution against property has been issued and returned wholly or partly unsatisfied, or has not been returned, and that a person or corporation has "personal property" of the judgment debtor exceeding \$10 in value, or is indebted to him in a sum exceeding that amount, the judgment creditor is entitled to an order for his examination, a third

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

party, who is not claimed to have in his possession any property of the judgment debtor, except a dower interest in real estate claimed to have been fraudulently assigned, cannot be examined.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1123; Dec. Dig. § 386.*]

2. EXECUTION (§ 386*) — SUPPLEMENTARY PROCEEDINGS — EXAMINATION OF THIRD PERSON.

When a receiver of the judgment debtor's property has been appointed in supplementary proceedings, real estate belonging to the debtor in the hands of third persons can be reduced to possession only by such receiver, and an order for the examination of third persons on the judgment creditor's application is improper.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1123; Dec. Dig. § 386.*]

3. EXECUTION (§ 386*) — SUPPLEMENTARY PROCEEDINGS — EXAMINATION OF THIRD PERSONS.

Under Code Civ. Proc. § 2441, authorizing a proceeding supplemental to execution for the examination of a third party having in its possession property of the judgment debtor, a third party, who is under subpoena as a witness in supplementary proceedings against the judgment debtor, cannot be examined under a third party order until after his examination as a witness under the subpoena.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1123; Dec. Dig. § 386.*]

Proceeding supplemental to execution by one Steinmann for the examination of Edward B. Hosier as a third party. On motion to vacate order for the examination of the third party. Motion granted.

Rosenthal & Steckler, of New York City, for plaintiff.

Jay Noble Emley, of New York City, for defendant.

McCALL, J. The order to examine Edward B. Hosier as a third party must be vacated for the following reasons:

[1] (a) The only property of the judgment debtor which is claimed to be possessed by the third party is a dower interest in real estate claimed to have been fraudulently assigned. Under section 2441 of the Code, a third party can only be examined if he has personal property of the debtor or is indebted to him in a sum exceeding \$10.

[2] (b) A receiver of all the interests of the debtor in this property has been appointed, and if there is real estate in the hands of third persons belonging to the debtor, it can only be reduced to possession by the receiver. *Sorrentino v. Langlois*, 144 App. Div. 271, 128 N. Y. Supp. 1003.

[3] (c) The third party is now under subpoena as a witness in supplementary proceedings instituted against the debtor by the judgment creditors. He must therefore be examined as a witness under the subpoena served upon him, and a third party order should not issue while that subpoena is in force. *First National Bank v. Gow*, 139 App. Div. 576, 124 N. Y. Supp. 449.

Motion granted. Settle order on notice.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HUGHES v. CONSTANTIN.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

1. EVIDENCE (§ 441*)—PAROL EVIDENCE—VARYING WRITTEN ORDERS FOR MERCHANDISE.

Parol evidence that a buyer, ordering in writing merchandise for delivery about December 30th, told the seller's salesman that the merchandise was intended for the Christmas trade, was incompetent, as varying the written order.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719-1845, 2030-2047; Dec. Dig. § 441.*]

2. SALES (§ 81*)—CONTRACTS—COMPLIANCE.

A contract calling for the delivery of merchandise about December 20th, and for a shipment f. o. b. Boston, is complied with where the goods are shipped on December 22d.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 217-223; Dec. Dig. § 81.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Thomas K. Hughes against George Constantin. From a judgment of the Municipal Court for defendant in an action for work, labor, and services performed, plaintiff appeals. Reversed, and judgment directed for plaintiff.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Wilber, Norman & Kahn, of New York City (Samuel Reid, of Brooklyn, of counsel), for appellant.

Frank E. Loughran, of New York City, for respondent.

LEHMAN, J. The plaintiff seeks to recover for the sale and delivery of certain calendars ordered by the defendant. The order was in writing, upon a printed blank of defendant which contains the words:

"The said mdse. to be delivered about ——— 190—. We pay no freight or express charges. All goods f. o. b. Boston."

The defendant claims that the blank for the date contains the words "20 Dec.," but a careful examination of the order and carbon copy, I think, shows clearly that the date of delivery was "30 Dec." The goods were shipped from Boston on December 22d and received in New York on December 26th.

[1] The defendant was permitted to testify that at the time the order was given he told the salesman that the calendars were intended for the Christmas trade and must be delivered before December 20th. This evidence was clearly incompetent, and tended to vary the written term that delivery was to be made "about" December 30th.

[2] Even if the date of delivery of the order was "about 20 December," the contract called for a shipment f. o. b. Boston. The goods were shipped on December 22d, and, unless the word "about" is to be entirely disregarded, this delivery was in time.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
139 N.Y.S.—55

Judgment should be reversed, with costs, and judgment directed for the plaintiff for the amount demanded in the complaint, with costs. All concur.

(79 Misc. Rep. 241.)

SANDERS v. SCHULTHEIS.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

BROKERS (§ 8*)—EMPLOYMENT—EVIDENCE.

Evidence in an action for a broker's commission on a sale of real estate held insufficient to authorize a finding of employment of plaintiff.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 9; Dec. Dig. § 8.*]

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

Action by Louis Sanders against Christian H. Schultheis. From a judgment for plaintiff, entered after a trial without a jury, defendant appeals. Reversed, and new trial ordered.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Charles C. Suffren, of Brooklyn, for appellant.

Samuel Greenbaum, of New York City, for respondent.

PAGE, J. This is an action for broker's commission upon the sale of real estate. The plaintiff is an attorney, with offices in Manhattan borough. On Decoration Day, 1912, he went to Brooklyn with a friend and client named Kahn to assist him in purchasing property. They noticed a "For Sale" sign on some houses which attracted their attention, and pursuant to the directions on the sign applied to one Hyman, in the neighborhood, for particulars. They were shown the property by Hyman, liked it, and Kahn placed a deposit of \$10 with Hyman. Hyman told them the name and address of the owner.

Some days later the defendant and plaintiff met by appointment at the plaintiff's office and arranged the terms of sale. The plaintiff states that at this meeting he first asked the defendant for a commission, and the defendant replied that it would be all right, but also said he would have to pay something to Hyman. The plaintiff then testified that at the next meeting, when the contract was signed, he asked the defendant for \$100 commission, and was told that it would be all right, but he would have to fix it up with Hyman. A contract of sale was prepared by the plaintiff containing a provision for \$100 commission. This provision was objected to by the defendant and was stricken out. The defendant in his testimony denies that he ever promised a commission to the plaintiff, and says that he told him to make his arrangements with Mr. Hyman; that Mr. Hyman had charge of the property, and whatever brokerage the plaintiff received must come from Mr. Hyman, who was the broker in the transaction.

The evidence is clearly insufficient to support a recovery upon the theory of an express agreement by the defendant to pay the commis-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sion. There is nothing to substantiate it but the testimony of the plaintiff himself, which is extremely vague on this point, being mainly to the effect that the defendant "would make it all right." The surrounding circumstances make it extremely improbable that any promise was intended, especially the fact that the defendant strenuously opposed a provision for commission in the contract of sale and insisted upon its being stricken out. It is not claimed that the plaintiff was engaged to sell the property; on the other hand, it appears that Hyman was the defendant's agent and broker for that purpose. Neither do the attending circumstances disclose any facts from which an employment of the plaintiff as broker could be implied. In the entire transaction he was acting for the purchaser as his attorney and agent in procuring the property, and the mere fact that he was so acting did not impose a duty upon the defendant to either repudiate the transaction or pay him a commission. *Southack v. Ireland*, 109 App. Div. 45, 95 N. Y. Supp. 621; *Brady v. American Machine & Foundry Co.*, 86 App. Div. 267, 83 N. Y. Supp. 663; *Miller v. Waclark Realty Co.*, 139 App. Div. 47, 123 N. Y. Supp. 837.

The judgment appealed from is clearly against the weight of evidence, and should be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

ROMEO et al. v. GRAPPONE et al.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

CONTRACTS (§ 198*)—BUILDING CONTRACT—CONSTRUCTION.

A building construction contract, which provided for the payment of a certain sum by the owners upon the completion of the house, "\$300 to be allowed to us from said price for foundation walls to be built by us," did not cover the work of constructing the foundation walls, but, when unexplained, left with the owners the responsibility of their construction.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 861-883; Dec. Dig. § 198.*]

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Gelsomino Romeo and another against Frank A. Grappone and another. From judgment for defendants, plaintiffs appeal. Reversed, and new trial ordered.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Holmes Jones, of New York City, for appellants.

Henry K. Davis, of New York City, for respondents.

LEHMAN, J. The plaintiffs sued for the value of work, labor, and materials furnished to defendants in building foundation walls of a house. The defendants deny that they employed the plaintiffs for this purpose, and claim that they had absolutely nothing to do with this work on the foundation, as the entire work was covered by a general

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

contract for the erection of the house, made with the firm of Conti & Venuti. Conti & Venuti deny that the foundation work was covered by the general contract, and claim that they made an allowance for the foundation walls. The contract for the house between Conti & Venuti and the defendants was then introduced in evidence, and it provides for a payment by the defendants of \$5,500 upon the completion of the house, "*\$300 to be allowed to us from said price for foundation walls to be built by us.*" No explanation is presented of this clause of the contract, and I am unable to reconcile it with the defendants' claim that they had nothing to do with the work on the foundation walls, which was covered by the general contract.

While the trial justice has had the advantage of seeing the witnesses, and his determination of the facts would therefore ordinarily be conclusive upon us, the parol testimony of the defendants could not possibly be so convincing as to destroy the mute testimony in contradiction of the written contract signed by them. So long as this contract is unexplained, a finding that the work of building the foundation walls was performed for the general contractors must be against the weight of evidence.

Judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

CALLAN v. CALLAN et al.

O'BEIRNE v. SAME.

(Supreme Court, Appellate Division, First Department. January 31, 1913.)

APPEAL AND ERROR (§ 564*)—FILING CASES—EXTENSION OF TIME.

Where appellant's attorney failed to comply with the court rules requiring him to print and serve the case and papers on appeal, and made a willfully false affidavit to excuse such default, appellant's motion to extend the time to have the case placed on the calendar for argument will be denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501–2506, 2555–2559; Dec. Dig. § 564.*]

Actions by Philip Callan and by Mary O'Beirne against Peter Callan and others. Judgment for plaintiffs, and defendants appeal. On appellants' motions for additional time to have the cases placed on the calendar ready for argument. Motion denied, and appeals dismissed.

See, also, 138 N. Y. Supp. 1110, 1131.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Jacob Cebulsky, of New York City, for the motion.

Cornelius Huth and W. L. Tierney, both of New York City, opposed.

PER CURIAM. Judgment in these two actions was entered on June 26, 1912, and notice of appeal was served on July 23, 1912. The defendant then obtained 120 days within which to make and serve a case. No such case having been served, the respondent moved to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dismiss the appeal, which by order entered December 27, 1912, was granted, unless appellant procured return to be filed and case printed and served and filed, and the cases on the calender for argument, one on January 13, and the other on January 22, 1913. Up to these dates no case was served, and appellant now moves for additional time to have the cases on the calendar ready for argument. He bases this application on the fact that one of the official stenographers was in Europe during the summer, and that it was therefore impossible to obtain the minutes, and for that reason appellant could not prepare the case.

In answer to the allegation, it appears that the official stenographer was not in Europe, that the appellant could have obtained the stenographer's minutes at any time, and that no order was given for the minutes to the stenographer until after January 1, 1913. This would appear to be a deliberate attempt to deceive the court. There is not a particle of excuse for the failure of defendant to file the case within the time allowed by the trial court. There is not a particle of excuse for the failure of defendant to prepare and serve case and papers on appeal within the time allowed by this court. The defendant's attorney, having failed to comply with the rules requiring him to print and serve case and papers on appeal, to excuse such default, has made an affidavit which is misleading and could only be intended to deceive. Such practice cannot be too strongly condemned, and it must result in a denial of this motion.

Motion to extend time is therefore denied, with \$10 costs, and the appeal stands dismissed.

(79 Misc. Rep. 185.)

IN RE RAAB'S WILL.

(Surrogate's Court, New York County. January 22, 1913.)

1. WILLS (§ 81*)—PARTIAL INVALIDITY.

A will may be entitled to probate, notwithstanding the invalidity of some of its provisions.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 201, 202; Dec. Dig. § 81.*]

2. WILLS (§ 446*)—CONSTRUCTION—UNNATURAL CONSTRUCTION.

The language of a will cannot be wrested from its natural import in order to preserve its validity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 962; Dec. Dig. § 446.*]

3. WILLS (§ 489*)—CONSTRUCTION—EXTRINSIC EVIDENCE.

While extrinsic evidence is not admissible where testator's intent is clear on the face of the will, it may be admissible to show who were the objects of testator's bounty.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1037-1046; Dec. Dig. § 489.*]

4. WILLS (§ 82*)—VALIDITY.

If testator was of disposing mind, he could give all of his estate to his grandchildren without providing for his son.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 203; Dec. Dig. § 82.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. PERPETUITIES (§ 6*)—TIME OF VESTING.

The fifth paragraph devised the remainder of the estate in trust to collect the rents, issues, and profits during the minority of testator's grandchildren, and provided that the surplus after payment of taxes, etc., should accumulate during such minority, and, "upon the arrival of the age of twenty-one years of any of my grandchildren, I direct my said trustee to pay to such grandchildren his or her proportionate share of my estate and the proportionate share of all accumulations," dividing the estate into as many shares as there may be grandchildren or the representatives of any grandchildren "living at the time the oldest living grandchild arrives at" majority, and further provided that the share of any grandchild dying "before arriving at said age leaving lawful issue" shall be paid to such issue equally, and, if it die without issue, then to the surviving grandchildren, or the issue of any deceased grandchildren, and the sixth paragraph directed the payment of the estate and all accumulations to certain corporations upon the death of all grandchildren during minority without issue. *Held*, that the gift to each grandchild could not be considered as severed instantly from the general estate and payable to him at any event at majority, and the income during minority.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-47, 49-53, 56; Dec. Dig. § 6.*]

6. PERPETUITIES (§ 6*)—SUSPENSION OF ALIENATION.

The trust was to continue until the eldest surviving grandchild became 21 years of age, and the estate was not to be divided when the eldest grandchild living at testator's death became of age, and, in view of the fact that there were four grandchildren living at testator's death, aged, respectively, eight, seven, four, and two years, the trust was invalid as suspending the power of alienation of realty for more than two lives in being and a possible minority, contrary to Real Property Law (Consol. Laws 1909, c. 50) § 42, and suspending the absolute ownership of personalty for more than two lives in being when the estate was created, contrary to Personal Property Law (Consol. Laws 1909, c. 41) § 11.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-47, 49-53, 56; Dec. Dig. § 6.*]

7. WILLS (§ 447*)—CONSTRUCTION—FAVORING VALIDITY.

The surrogate must adopt a valid construction of a will if it be equally susceptible of a valid and an invalid interpretation, but the surrogate cannot uphold a disposition clearly contravening a statute.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 963; Dec. Dig. § 447.*]

8. WILLS (§ 630*)—FUTURE DEVISE—CONTINGENT ESTATE.

Where the words of gift in a testamentary trust directed division of the trust estate or payment of the share at a future time dependent upon the beneficiary's arrival at majority, the gift is future and contingent, and not vested.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1464-1480, 1486, 1487; Dec. Dig. § 630.*]

9. WILLS (§ 523*)—BEQUESTS TO CLASS.

Where, under a testamentary trust, no division of the property was to be made until a grandchild attained majority, when it was to be divided equally between the then living grandchildren and the issue of a deceased grandchild, the bequest was to a class, so that subsequently born grandchildren would be entitled to a share if living when the estate was divided.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1115; Dec. Dig. § 523.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

10. PERPETUITIES (§ 9*)—UNLAWFUL ACCUMULATIONS.

In view of Real Property Law (Consol. Laws 1909, c. 50) § 61, providing that an accumulation of profits of realty directed to commence upon the creation of the estate must be made for the benefit of minors then in being, and of Personal Property Law (Consol. Laws 1909, c. 41) § 16, making an accumulation of the income of personalty valid if directed to be made for the benefit of minors in being at testator's death, a direction in a testamentary trust for the accumulation of an income from realty and personalty for the benefit of minors some of whom were not in being at the time the accumulation commenced was void.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 67-73; Dec. Dig. § 9.*]

11. WILLS (§ 81*)—INVALIDITY IN PART.

The invalidity of a provision in a testamentary trust for the accumulation of an income during the minority of beneficiaries and until the division of the estate would not invalidate the rest of the trust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 201, 202; Dec. Dig. § 81.*]

12. PERPETUITIES (§ 9*)—ACCUMULATIONS OF PROFITS—BENEFICIARIES—ADULTS.

Rents and profits cannot be accumulated under a testamentary trust for the benefit of adults.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 67-73; Dec. Dig. § 9.*]

13. PERPETUITIES (§ 4*)—CONTINGENT ESTATE.

A remainder which because of an uncertain event cannot vest in possession until the termination of more than four lives in being at the creation of the first estate is invalid.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-44; Dec. Dig. § 4.*]

14. WILLS (§ 852*)—ESTATE DEVISED—CONTINGENT REMAINDERS—VALIDITY.

A contingent remainder limited upon an invalid trust term is invalid.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2167, 2168; Dec. Dig. § 852.*]

In the matter of the will of Charles Raab, deceased. Decree of Surrogate's Court adjudging certain clauses invalid.

The parties in a proceeding for the probate of the last will (and a codicil thereto) of Charles Raab, deceased, expressly put in issue the validity, construction, and effect of the following portions of the said will (executed within this state by a resident thereof), viz.:

"Fifth. All the rest, residue and remainder of all my estate, both real and personal, I give, devise and bequeath to my executor and trustee hereinafter named, in trust, however, to collect the rents, issues and profits thereof during the minority of my grandchildren, hereinafter provided for; to apply the same towards the payment of all taxes, assessments and towards the repair, maintenance and improvement of said property; and the surplus thereof to accumulate the same during the minority in bonds and mortgages and other securities as may be permitted by law.

"Upon the arrival of the age of twenty-one years of any of my grandchildren, to wit, the children of my son George Thomas Raab, I direct my said trustee to pay and distribute to such grandchild his or her proportionate share of my estate and the proportionate share of all accumulations thereof, dividing my estate into as many shares as there may be children of my said son George Thomas or the representatives of any child or children of my said son living at the time the oldest living grandchild arrives at said age of twenty-one years.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"In the event of the death of any child of my son said George Thomas who shall die before arriving at said age leaving lawful issue, the share of the one so dying shall be paid to and is hereby devised and bequeathed to such issue equally. Should any child of my said son die before arriving at said age of twenty-one years without leaving lawful issue, I then give and bequeath his or her share to the surviving sisters and brothers or the issue of any deceased brother or sister per stirpes.

"Sixth. In the event of the death of all of my said grandchildren during minority without leaving lawful issue, I give and bequeath and I direct the payment of my estate and all accumulations thereof to the Presbyterian Hospital, St. Lukes Hospital, the Post Graduate Hospital, all of the Borough of Manhattan, and to the Wartburg Home for Aged and Infirm of the Borough of Brooklyn, in equal proportions."

Charles Raab, the testator, died in New York county on the 6th day of June, 1912. At the time of his death he was a resident of New York county. His will was made and executed in New York county on the 14th day of March, 1906, and the codicil thereto was made and executed in New York county on the 21st day of December, 1908. At the time of his death he possessed both real and personal property in this state. George Thomas Raab, the contestant herein, was his only heir and next of kin.

George Thomas Raab, the only son of the testator, had two children living at the time of the execution of the will, aged two years and one year, respectively. At the time of the execution of the codicil he had three children living. At the time of the testator's death the said George Thomas Raab had four children living, aged eight, seven, four, and two years, respectively.

Krauthoff, Harmon & Matthewson, of New York City (Edward J. Petterson, of counsel), for the will and codicil and for the United States Mortgage & Trust Co.

Forster, Hotaling & Klenke, of New York City, for contestant George Thomas Raab.

Taylor, Jackson & Brophy, of New York City, for New York Post-Graduate Hospital and Medical School.

John C. Stemmermann, of Brooklyn, for Wartburg Home for Aged and Infirm.

Jeremiah A. O'Leary, of New York City, special guardian.

FOWLER, S. [1] The last will of Charles Raab, being entitled to probate, irrespective of the alleged invalidity of some of its provisions (Matter of Davis, 182 N. Y. 468, 75 N. E. 530; Matter of Trumble, 199 N. Y. 454, 92 N. E. 1073), is now here for construction, pursuant to section 2624, Code of Civil Procedure. Prior to the amendment of section 2624, in the year 1910 (chapter 584, Laws of 1910), the surrogate was without jurisdiction to construe devises or other provisions relating to real property contained in a will (Matter of Trotter, 182 N. Y. 465, 75 N. E. 305). Since that amendment it would appear to be otherwise, and the surrogate has such jurisdiction. *Bellinger v. Taylor*, 144 App. Div. 851, 129 N. Y. Supp. 435; *Matter of Randall*, 77 Misc. Rep. 41, 137 N. Y. Supp. 319. Unless the amendment of 1910 had such effect, its scope and purpose is not apparent. As the surrogate's jurisdiction is not questioned in this proceeding, it will be taken for granted for the purposes of the present cause, although some points of the general legislation of 1910, touching the surrogate's jurisdiction over devises, may be, perhaps, open to serious contention ultimately in the higher courts of the state. Those points

are not, however, involved here, and consequently need not be noticed at large by the surrogate.

Where the meaning of a will is apparent from its language, the plain import of the language cannot be departed from, even though that import result in rendering the will invalid. *Van Nostrand v. Moore*, 52 N. Y. 12.

[2] Courts of construction are not permitted to wrest the language of a will from its natural import in order to save it from deserved condemnation. *Cottman v. Grace*, 112 N. Y. 299, 19 N. E. 839, 3 L. R. A. 145. The first duty of a court of construction is to interpret the testamentary disposition which the testator intended to make, and, when that is done, the validity or invalidity of the disposition must be adjudged regardless of consequences. The court cannot, where there is no ambiguity or doubt, make a new will for the purpose of applying the maxim, "*Ut res magis valeat suam pereat.*" *Central Trust Co. v. Egleston*, 185 N. Y. 23, 77 N. E. 989. It is only where there is uncertainty, doubt, or equivocation on the face of a will that that established maxim of construction is to be applied.

[3] Where the intention of testator is clear on the face of the will itself no resort to extrinsic circumstances is permissible. It is not accurate to say in such a case that the court may always consider circumstances surrounding the testator when he made his will or at the time of his death in order to arrive at his intention. *Higgins v. Dawson*, A. C. 1; *Smith v. Smith*, 1 Edw. Ch. 189. Extrinsic evidence is never permissible where the intent of the testator may be gathered from the language of the will itself. To my mind this is such a case. But it is permissible to resort to extrinsic circumstances in order to show who in fact were the objects of the testator's bounty. There is an important distinction between evidence of testator's intention deduced from circumstances surrounding testator and the evidence of testator's bounty deduced from facts surrounding the objects of such bounty. The latter kind of evidence is, I may say, generally admissible in causes of this character.

The will in this case makes no provision for the testator's only son. It passes over him to the son's children. The grandchildren, on the face of the will, were to be the main objects of the testator's bounty.

[4] The testator, being capax, was quite within his rights in making such a disposition of his estate. *Jackson v. Betts*, 9 Cow. 208, reversed on another point, 6 Wend. 173; *Horn v. Pullman*, 72 N. Y. 269, 276. In order to carry out the scheme of his will testator bequeathed and devised his estate to a trustee for the benefit of his grandchildren. The trust scheme is asserted to be counter to the statute now directed against perpetuities, and this is the first question in this cause. It may be observed that the statute against perpetuities is of increasing importance at this day, when the wisdom of tolerating express trusts is being more and more challenged in many states and countries. Certainly the correct application of a statute founded on public policy is most important in any case.

[5] It does not seem possible to bring this will within the ruling of such decisions as *Warner v. Durant*, 76 N. Y. 133, and *Matter of Lin-*

coln Trust Co., 76 Misc. Rep. 421, 137 N. Y. Supp. 162, and treat the gift to each grandchild as severed instantly from the general estate, and to be paid to him in any event at majority, meanwhile giving him the income from the fund. This is just what the late Mr. Raab does not do. On the contrary, he provides that the trust property shall be kept by the trustee intact until the happening of an event specified.

[8] Is the trust term prescribed too long? The will directs the trustee to collect the rents, issues, and profits of the residuary estate during the minority of testator's grandchildren, who at his death were four in number, ages eight, seven, four, and two years, respectively. It will be observed that there is no direction to pay any portion of such rents, issues, and profits to the grandchildren during their minority, but the same are to be accumulated and invested by the trustee. Upon the arrival at the age of 21 years of any of said grandchildren, the trustee was directed to pay and distribute to such grandchild his or her proportionate share of the residuary and its accumulations. Then follows a provision of the will providing for the death of any grandchild before attaining the age of 21 years. These clauses must be read together. The real question then raised by the peculiar language of Mr. Raab's will is this: Does the trust term which he prescribes necessarily involve four actual minorities?

On the face of the will there is no direction for division or distribution of the property before the arrival at the age of 21 of "the oldest living grandchild." Nor is there any direction to limit the division to the number of grandchildren who were living at the death of the testator, and who would be living at the time of the division, or would have died before that time leaving issue. On the contrary, there is an express direction to divide the property into as many shares as there may be children or representatives of children of his son George Thomas Raab living at the time of division. At what time or upon the occurrence of what event did the testator intend that such division should be made? Was it when the eldest grandchild living at the time of his death should arrive at the age of 21 or died before reaching that age, or was it when the eldest grandchild who survived should reach the age of 21? If it be assumed in arguendo that testator intended the division of the trust estate to be made when the eldest grandchild living at the time of his death reached the age of 21 or died before that time, this will be contradictory of the direction contained in the first part of the paragraph to distribute and pay "upon the arrival at the age of twenty-one years of any of my grandchildren." If, however, the testator is taken to mean by the words "at the time the oldest living grandchild arrives at the age of twenty-one years," the eldest of his grandchildren who survived until he reached the age of 21 years, the different phrases of the paragraph harmonize and express a definite conception, namely, that the trust was to continue until the eldest grandchild who survived until he was 21 should reach that age. "The arrival of the age of twenty-one years of any of my grandchildren" necessarily means the first of his grandchildren who arrived at that age, or the eldest living grandson who survived to that age, and is entirely inconsistent with an interpretation which would ascribe to the testator an intention that the division should be made when the

eldest grandson living at the time of his death arrived at the age of 21 or died before reaching that age. It would therefore appear that it was the intention of the testator to create a trust; that the trustee was to accumulate the rents and profits of the trust fund until the eldest living grandchild who survived until he was 21 reached that age, when the corpus of the trust was to be divided into as many shares as there were living grandchildren or issue of deceased grandchildren; that the share of the one who had reached 21 was to be paid to him at that time, and the share of any one who had died leaving issue was to be paid to such issue; that the remainder of the trust property was to be held by the trustee and the rents and profits accumulated until the next grandchild reached 21 or died before that time leaving issue, when the share of such grandchild would be paid to him or his issue, and that such accumulations and payments were to continue until all the grandchildren living at the time of the division reached 21 or died before reaching that age, and, if all the grandchildren died before reaching 21 without leaving issue, the corpus of the trust fund, with the accumulations, was to be paid to the corporations mentioned in the sixth clause of the will. Such, I think, is the apparent intent of the testator in regard to the duration of the trust term. No other interpretation seems possible under settled canons of interpretation.

According to my interpretation of this will, already indicated, the provisions of the fifth and sixth clauses of the will must be adjudged invalid. Those clauses create a trust which suspends the power of alienation of real property for more than two lives in being and a possible minority, and which suspends the absolute ownership of personal property for more than two lives in being at the time of the creation of the estate. Section 42, Real Property Law (Consol. Laws 1909, c. 50); section 11, Personal Property Law (Consol. Laws 1909, c. 41); *Jennings v. Jennings*, 7 N. Y. 547; *Schettler v. Smith*, 41 N. Y. 328; *Benedict v. Webb*, 98 N. Y. 460; *Greenland v. Waddell*, 116 N. Y. 234, 22 N. E. 367, 15 Am. St. Rep. 400; *Schlereth v. Schlereth*, 173 N. Y. 444, 66 N. E. 130, 93 Am. St. Rep. 616; *Central Trust Co. v. Egleston*, 185 N. Y. 23, 77 N. E. 989; *Leach v. Godwin*, 198 N. Y. 35, 91 N. E. 288. The directions for accumulations are by the adjudications of this state also invalid (section 61, Real Property Law; section 16, Personal Property Law), as I shall hereafter show.

[7] If, however, the provisions of this will were ambiguous and equally susceptible of some other interpretation which makes the limitation in trust valid, it would be the surrogate's duty to adopt such interpretation. *Jacoby v. Jacoby*, 188 N. Y. 124, 80 N. E. 676. But in arriving at such an interpretation the court cannot make a new will for the testator nor sanction a plain attempt on the part of a testator to make a testamentary disposition of property in a manner prohibited by statute. Let us, then, consider in detail the contentions of counsel that no perpetuity exists in this will.

[8] It is contended by the learned counsel for the proponent that at the death of the testator each of the grandchildren then living took a vested interest in one-fourth of the corpus of the trust. As the only words of gift used by the testator were a direction to divide or pay at

a future time, the gift is not vested, but future and contingent. *Salter v. Drowne*, 205 N. Y. 204, 98 N. E. 401; *Matter of Crane*, 164 N. Y. 71, 58 N. E. 47; *McGillis v. McGillis*, 154 N. Y. 532, 49 N. E. 145. It is also contended that the testator intended to limit the beneficiaries of the trust fund to the grandchildren who were living at the time of his death.

[9] The testator having created a trust and directed that it should be held in solido, no division or distribution to be made until a grandchild arrived at the age of 21, when the trust fund was to be divided into as many shares as there were grandchildren then living, the issue of any deceased grandchild to take its parent's share, the bequest was to a class, and the children born to George Thomas Raab after the testator's death would be entitled to share in the estate if they were living when the time for division arrived. *Matter of King*, 200 N. Y. 189, 93 N. E. 484, 34 L. R. A. (N. S.) 945, 21 Ann. Cas. 412; *Matter of Baer*, 147 N. Y. 348, 41 N. E. 702; *Matter of Crane*, 164 N. Y. 71, 58 N. E. 47.

The special guardian for the infants contends that the trust was only for the benefit of those grandchildren who survived the testator; that the latter intended that the trust should continue during the minority of the eldest grandchild living at his death, and that it should terminate upon the arrival of such grandchild at the age of 21 years, or by his death before reaching that age; and that at the time when the first of these events occurred the trust estate was to be divided into as many shares as there were grandchildren then living who survived the testator and the issue of any such deceased grandchildren. The objection to this contention is that it requires for its support two assumptions not warranted either by authority or by the language of the testator: First, that the testator intended the division to take place when the eldest grandchild living at his death reached 21, or died before reaching that age; and, second, that the testator intended to limit his bounty to such of his grandchildren as were living at the time of his death. Remembering that at the time the testator made his will his son, George Thomas Raab, had only two children, and that at the time of testator's death his son had four children, the youngest of whom was only two years of age, it would seem an entirely unjustifiable assumption that the testator intended to exclude from participation in his estate those grandchildren who might be born after his death, while evidencing such a keen desire to provide for the maintenance of those who were living at the time of his decease. According to the special guardian's interpretation, if the eldest grandchild living at the time of testator's death died one day thereafter, the corpus of the trust fund would vest in the grandchildren then living to the exclusion of any after-born grandchildren. But the words of the testator directing the trust to continue "during the minority of my grandchildren," directing payment "upon the arrival of the age of twenty-one years of any of my grandchildren," and directing a division of the trust estate "into as many shares as may be children of my son George living when the oldest living grandchild arrives at the age of twenty-one," are so clear and comprehensive and so evidently meant to apply to any children of his son George who would be living at the time

when the eldest grandchild arrives at the age of twenty-one, that their signification cannot be limited by any mere assumption which would impute to the testator an intention to exclude from the participation in his estate those grandchildren who might be born after his death. The plain language of the testator negatives the first assumption. The cases above cited show that authority is against the second.

If we assume, for the sake of argument, that the testator intended that the division of the property held in trust should be made when the eldest grandchild living at the time of his death reached his majority, or died before that time, we get the following result: If such grandchild died before arriving at the age of 21 without leaving issue, and if the other grandchildren who survived the testator were then living, the trustee could divide the trust fund into four shares, and pay the one-fourth of the one who had died to the survivors as their absolute property. If the second eldest died before his majority without leaving issue, his share of the trust property would be paid to the survivors. Upon the death of the third grandchild before arriving at the age of 21 without leaving issue, his share would be paid by the trustee to the surviving grandchild; and, if the latter died before 21, without issue, his share—i. e., the remaining one-fourth of the trust estate—would be paid by the trustee to the corporations mentioned in the sixth clause of the will. The four grandchildren would then have died during minority without leaving issue, which is the contingency mentioned by the testator in the sixth clause of his will upon which the corporations therein mentioned became entitled to "my estate and all accumulations thereof." But according to this interpretation, not his estate, but only one-fourth of his estate, would then be available for payment to the corporations. Therefore it appears conclusively that the interpretation contended for by the special guardian and the counsel for the proponents does not accord with the manifest intention of the testator.

The learned counsel for the proponents, as well as the special guardian for the infants, cite *Matter of Lally*, 136 App. Div. 781, 121 N. Y. Supp. 467, in support of their position. But the *Matter of Lally* is readily distinguishable from the matter under consideration. In that case the testator gave his property to trustees, with directions to hold and manage it for the support and education of his children during their minority and when the youngest of such children had arrived at the age of 21 to divide and distribute the property and accumulated income between such children share and share alike. There was no gift over or substituted remainder. The court held that it was the intention of the testator that the trust should terminate upon the majority of his youngest daughter who survived him, or upon her death before reaching her majority, and that, upon her reaching the age of 21 or dying before that time, the trust terminated, and the duty of the trustees was to divide and distribute. In the matter now before me, even under their interpretation of the will, the trust does not terminate upon the arrival of the eldest living grandchild at the age of 21 years or his death before that time. It continues as to part of the trust property until the youngest living grandchild who reaches the age of 21 has arrived at that age. Therefore the trust is not, as

in the Matter of Lally, to terminate when a certain child shall reach its majority or die before that time. Besides, in the matter now here the will provides for gifts over and substituted remainders, and a final contingent remainder to corporations in the event that all the grandchildren die before the age of 21 without leaving issue. So that, as the court said in *Whitefield v. Crissman*, 123 App. Div. 233, 108 N. Y. Supp. 110:

"There is no method by which the trustees could distribute the property bequeathed until the termination of the minority of the four children, nor could there be an alienation of the real property and distribution of its proceeds during the like period."

It is true that, under the interpretation contended for by the proponents, there could be a distribution of a part of the trust property, but there could not be a distribution of all the property until the youngest surviving grandchild reached his majority or died before that time.

The proponents rely also upon the case of *Seitz v. Faversham*, 205 N. Y. 197, 98 N. E. 385. In that case the testatrix gave her real and personal property to the issue of her daughter, the rents and profits to be paid to them until they arrived at the age of 21. At the time of testatrix's death her daughter had two children. The court held that a future contingent estate vested in the two infants upon the death of the testatrix, subject to divestment as to either one who should die before he became of age. In the event of such divestment, the estate vested absolutely in the survivor, so that the trust was measured by two lives. In the matter under consideration there were four grandchildren living at the death of the testator, so that the period of suspension of alienation may not be measured by two lives as in the *Seitz v. Faversham* Case, but by four lives. The surrogate has now considered all the contentions and arguments of counsel in support of the will, and for the reasons stated he must adhere to the conclusion already reached to the contrary.

[10] The direction for accumulation is void, because upon any interpretation of the provisions of the will these accumulations would inure to the benefit of minors not in being at the time the accumulation commenced, namely, at the death of the testator. Thus, if testator intended that the grandchildren born after his death should participate in his estate, the direction for accumulation would be invalid. If he intended to limit the beneficiaries to those living at the time of his death and who arrived at the age of 21, or died before the time of division leaving issue, as such issue would be entitled to their parents' share of the accumulation, and as they were not in being when the accumulation commenced, the direction for such accumulation would be invalid. Section 61, Real Property Law; section 16, Personal Property Law; *U. S. Trust Co. v. Soher*, 178 N. Y. 442, 70 N. E. 970.

[11] But the invalidity of the direction for accumulation would not of itself render the trust invalid. *Cochrane v. Schell*, 140 N. Y. 516, 35 N. E. 971. In view of the disposition which I intend to make of this matter, it is not necessary to decide who would be entitled to the accumulation if the trust were valid.

In *Jennings v. Jennings*, 7 N. Y. 547, the testator directed that his

executor should pay to his wife from the income of his estate sufficient for her support and the support and maintenance of his children, and that they should accumulate the remainder of the income until the oldest surviving child reached the age of 21, when such child's portion was to be paid to him, and that the same course should be pursued with respect to his other children. The testator was survived by four children. The court held that the trust was void as suspending the power of alienation for more than two lives in being. In *Benedict v. Webb*, 98 N. Y. 460, the period of division was designated by the testator as follows:

"When all my said children or the youngest survivor of them shall have attained the age of twenty-one years."

The court held that it was the intention of the testator to suspend the division until all his minor children living at his death should attain their majority. There were two minor children living at his death. The trust was continued in part for the benefit of two daughters during their lives. The court held that the trust was bad as to that part which was continued after the period of minority of the two minors. In *Greenland v. Waddell*, 116 N. Y. 234, 22 N. E. 367, 15 Am. St. Rep. 400, the testator provided that one-third of his property should be held in trust, the income to be paid to his sister during her life, and upon her death the income to be paid to her children "until the youngest child shall arrive at the age of twenty-one, and on said youngest child arriving at the age of twenty-one, my said executors shall pay and transfer to the child or children that shall then be living the whole of said one-third with its accumulations, and on the death of all of said children before arriving at said age my executors shall pay the one-third to my brother and sister." The court said:

"If the children do not reach the age of 21, the fact that the direction is that the fund shall go to a brother and sister of testator is not consistent with the vesting of the absolute ownership in the children on the death of their mother. It is therefore clear that the direction in the will will operate to suspend the absolute ownership of the fund."

In *Bindrim v. Ullrich*, 64 App. Div. 444, 72 N. Y. Supp. 239, testator gave his property to trustees, with directions to pay the income to his widow for life. At the death of the widow to "pay the income from one share to Eva B. during the minority of my grandchildren, the children of my son Julius, to be used for the support and education of said grandchildren, and when they attain the age of twenty-one years to divide such share among said grandchildren equally, share and share alike." Held invalid as suspending the absolute ownership of property for the life of the widow and five grandchildren. Also because there was a possibility of a grandchild being born after the creation of the estate, and the power of alienation according to the terms of the will would be suspended until all the members of the class arrived at the age of 21. In *Whitefield v. Crissman*, 123 App. Div. 233, 108 N. Y. Supp. 110, the testator gave property to trustees for the benefit of his four children, "the income and so much of the principal as may be necessary for their maintenance to be used until all have reached their

majority, when the residue is to be divided share and share alike among them, and in the event of the death of any of them without issue said share to be divided pro rata among those remaining." Held that the trust violated the statute. In *Schlereth v. Schlereth*, 173 N. Y. 444, 66 N. E. 130, 93 Am. St. Rep. 616, the testator left real and personal property with a power of sale. He directed that the income should be paid to his sister during her life, after her death to pay over such income to her issue in equal shares until the youngest of such issue attain the age of 21, and then to divide and distribute the whole of the trust fund so held among such issue in equal shares. The court said:

"It is obvious from the provision to pay over the principal when the issue reached the age of 21, paying to them the income in the meantime, that the testator intended to make a future and not a present gift. It is also obvious that the income and corpus of the estate was intended by the testator to be divided among the persons answering the description contained in the seventh clause of the will at the time when such division was to be made. Thus the time during which the absolute ownership was to be suspended was not measured by two lives in being at the death of the testator."

The trust was held invalid. These cases cited are analogous in principle to the matter under consideration. It therefore follows that the trust attempted to be created by the fifth clause of the testator's will is invalid.

The sixth clause provides that, in the event of the death of all the children of George T. Raab before arriving at the age of 21 without leaving issue, the whole estate with the accumulated rents and profits shall be paid to the corporations therein mentioned.

[12] As to the accumulated rents and profits the bequest is void, because profits cannot be accumulated for the benefit of adults. Before the trustee could pay the trust estate or any part of it to those corporations, it would be necessary for him to hold the property in trust during at least four lives, because it is only upon the death of the last survivor of the grandchildren without leaving issue that the corporation would be entitled to take.

[13] A remainder contingent because of an uncertain event, which cannot vest in possession until after the termination of more than four lives in being at the time of the creation of the estate upon which it is limited, is invalid.

[14] Besides, a contingent remainder limited upon an invalid trust term is invalid. *Knox v. Jones*, 47 N. Y. 389; *Bindrim v. Ullrich*, 64 App. Div. 449, 72 N. Y. Supp. 239; *Greenland v. Waddell*, 116 N. Y. 234, 22 N. E. 367, 15 Am. St. Rep. 400.

As the fifth and sixth clauses of the will are invalid, the testator died intestate as to the property which he attempted to dispose of by those clauses, and such property passes to his heirs at law and next of kin. Let the decree be settled accordingly.

(79 Misc. Rep. 232.)

DUSCHENES v. NATIONAL SURETY CO. OF NEW YORK.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

1. INSURANCE (§ 665*)—LARCENY INSURANCE—PROOF OF LOSS.

Under a policy insuring against direct loss by burglary, theft, or larceny, requiring the assured to produce "direct and affirmative evidence" that the loss was due to such causes, and providing that the disappearance of the articles should not be deemed such evidence, theft or larceny cannot be inferred merely from the disappearance of jewelry from a place in insured's room in a hotel to which only she had legal access; direct and affirmative evidence that the jewelry was taken in commission of a felony being necessary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1535, 1707-1728; Dec. Dig. § 665.*]

2. INSURANCE (§ 146*)—LARCENY INSURANCE—CONSTRUCTION OF POLICY.

A policy insuring against loss from theft, etc., is to be liberally construed in favor of assured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.*]

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Emily K. Duschenes against the National Surety Company of New York. From a judgment for plaintiff, defendant appeals. Reversed, and complaint dismissed.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Joseph L. Prager, of New York City, for appellant.

Louis E. Felix, of New York City, for respondent.

LEHMAN, J. The plaintiff has recovered judgment against the defendant for the value of a piece of jewelry which she claims was stolen from her apartment in a hotel. The plaintiff's testimony is to the effect that she occupied two rooms in a hotel; that she wore this piece of jewelry the day before the alleged theft, and placed it in a plush case, and then placed the case in a jewelry box on the bureau. Nobody was in the room at this time, except her husband. The next morning her husband left before plaintiff was awake. On that morning the plaintiff took breakfast in the dining room of the hotel. Some time after she returned to her apartment she realized that she was not wearing the jewelry, and, remembering that she had not put on the jewelry that morning, she went to her jewelry box and found the piece of jewelry for which she claims missing. She called her maid, who was working in the next room, and she searched her apartment thoroughly, but failed to find the jewelry or the box in which it was contained.

[1] It appears that plaintiff was accustomed to wear the jewelry or to carry it in the box upon her person. The evidence negatives any probability that, if the plaintiff was carrying the box on her person that morning, it could have escaped from her person. The defendant had insured the plaintiff against direct loss by "burglary.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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theft, or larceny," and her contention now is that the evidence produced by her is sufficient to show that the piece of jewelry was lost by theft or larceny. I am unable to find that the circumstances shown in this case can logically be distinguished from the circumstances shown in the cases of *Schindler v. United States Fidelity & Guaranty Co.*, 58 Misc. Rep. 532, 109 N. Y. Supp. 723, and *Gordon v. Ætna Indemnity Co.* (Sup.) 116 N. Y. Supp. 558. At most, the plaintiff has submitted evidence which shows that the piece of jewelry has disappeared under circumstances that might perhaps permit an inference that it was stolen. The policy, however, provided that:

"The assured shall also produce *direct* and *affirmative* evidence that the loss of the article or articles for which claim is made was due to the commission of a burglary, theft, or larceny; the disappearance of such article or articles not to be deemed such evidence."

[2] While the policy is to be construed liberally in favor of the assured, I do not think that we can affirm this judgment without entirely disregarding this clause of the policy. No direct or affirmative evidence has been presented of any theft or larceny. We are asked to infer theft or larceny merely from the disappearance of the article from a place to which nobody but the plaintiff had lawful access. The purpose of the insurance was to provide only against loss by burglary, theft, or larceny, and the liability of the defendant was confined to reimbursement for such loss. In order to protect itself from claims under the policy for loss of the articles covered by the policy by reason of some other cause than burglary, theft, or larceny, the company has provided that the insured must produce, not circumstantial, but direct and affirmative, evidence of the wrong. Parties may be mistaken in their recollection of where they placed a piece of jewelry, but they are not apt to be mistaken in recollection as to matters directly and affirmatively showing a felony, and the defendant could reasonably provide that there could be no recovery unless, in addition to the testimony of the disappearance of the jewelry, the insured should produce testimony of a direct and affirmative kind that there has been a felony.

Judgment should therefore be reversed, with costs, and complaint dismissed, with costs. All concur.

BUTLER v. ALTER et al.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

GOOD WILL (§ 7*)—SALE OF ESTABLISHED BUSINESS—FRAUD—EVIDENCE.

In an action on a note, evidence *held* to show that defendants were induced to make such note through the false and fraudulent representations of the plaintiffs that a certain restaurant, for which it was given, would pay the owner \$200 a month profit, so that judgment for plaintiff thereon was erroneous.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. §§ 6-9; Dec. Dig. § 7.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from City Court of New York, Trial Term.

Action by John R. Butler against Charles Alter and another. Judgment for plaintiff, and defendants appeal. Reversed.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

David M. Neuberger, of New York City (Louis Lowenstein, of New York City, of counsel), for appellants.

Simpson & Simpson, of New York City (Edwin M. Simpson, of New York City, of counsel), for respondent.

LEHMAN, J. The plaintiff sues upon a note made by the defendant Alter, indorsed for Alter's accommodation by the defendant Pike, and delivered so indorsed to one Norris, who, after maturity, indorsed and delivered it without recourse to the plaintiff. The defense is that the notes were given in part payment for the purchase by Alter of a restaurant business owned by the plaintiff; that the plaintiff, for the purpose of inducing Alter to buy the business and of inducing Pike to indorse the notes, represented that the business was then on a paying basis, and was then and had been theretofore yielding a net profit of \$200 monthly over and above all expenses and disbursements; that the business owed no money for merchandise, debts, or for rents, and all fixtures, utensils, implements, and chattels therein contained belonged to the plaintiff and were free from all liens; and that all rent for said premises had been fully paid. The defendants at the trial proved fully the making of these representations. They showed that these representations were made with intent that they should be relied upon, and that in fact they were relied upon. They showed, further, that Alter could not make the restaurant pay, and was dispossessed by the sheriff because of his inability to pay his obligations. They further showed that, when they charged the plaintiff with misrepresentations, he answered:

"I told you no such thing. The place was a losing proposition, always had been a losing proposition, and that is why I sold it to you. If it would not have been a losing proposition, I would not have sold it to you."

The plaintiff put in no evidence, but moved for the direction of a verdict, and the trial justice granted his motion. I think that this was error. I have no doubt but that the defendants fully showed that the representations were made, that they were made as statements of fact and not of opinion, and that they were intended to be relied upon. I think that they also proved their falsity. I do not see in what way the defendants could better prove that the business was not a paying business, and did not pay the owner \$200 a month profit, than by the admission by the owner that the business had always been a losing business.

It follows that the judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

CANNING et al. v. LANE.

(Supreme Court, Appellate Term, First Department. January 31, 1913.)

1. **BILLS AND NOTES (§ 316*)—ASSIGNMENT—CONSIDERATION.**

It is no defense to a note, as against an assignee thereof, that the assignee paid no consideration therefor, and he is entitled to the rights possessed by the assignor.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 752; Dec. Dig. § 316.*]

2. **BILLS AND NOTES (§ 493*)—CONSIDERATION—EVIDENCE.**

Where there is no evidence that a note sued on was without consideration, and it shows on its face that it was given for value, judgment should be given for plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1652-1662; Dec. Dig. § 493.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Richard Canning and another against Leo E. Lane; the name "Leo" being fictitious. Judgment for defendant, and plaintiffs appeal. Reversed.

Argued October term, 1912, before SEABURY, GUY, and BIJUR, JJ.

Joseph M. Williams, of New York City, for appellants.

White & Case, of New York City (Graham Foster, of New York City, of counsel), for respondent.

PER CURIAM. A motion for reargument herein was duly granted.

[1] Plaintiffs, as assignees of the payee of a note made by defendant, bring this action against the maker to recover the amount named therein. Upon the trial the defendant claimed that the plaintiffs had given no consideration to the payee for the note. Assuming this to be true, it was immaterial. The plaintiffs were entitled to the same rights that their assignor possessed.

[2] Upon appeal the defendant claims that the note was originally without consideration. There is, however, no proof in the record in support of this contention. The note was produced, and upon its face shows that it was given for value. Under these circumstances, the court below should have awarded judgment for the plaintiffs.

Judgment reversed, and a new trial ordered, with costs to appellants to abide the event.

BRANDT v. STADLER.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

LANDLORD AND TENANT (§ 149*)—PAYMENT OF WATER RATES.

The contractual relation of landlord and tenant imposes no obligation upon the landlord to pay water rates, which are not a tax upon the property.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 519-535; Dec. Dig. § 149.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action by Herman Brandt against A. Lincoln Stadler. From a judgment for plaintiff, defendant appeals. Reversed and dismissed.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Ira Leo Bamberger and Sidney Lowenthal, both of New York City, for appellant.

Leon Kauffman, of New York City, for respondent.

LEHMAN, J. The plaintiff on June 4, 1912, leased a house at the seashore from the defendant for the summer season. The lease is silent as to the payment of water rates. Thereafter the plaintiff received a bill from the Tintern Manor Water Company for \$42 for water rates for the year from June 1, 1912, to June 1, 1913. The bill contained a notice that, "unless paid by August 24, 1912, the water service will be discontinued."

In the case of *New York University v. American Book Co.*, 132 App. Div. 732, 117 N. Y. Supp. 387, Id., 197 N. Y. 294, 90 N. E. 819, it was held that a landlord is under no obligation to furnish a tenant with water, and is bound to pay the water rates only if these rates constitute a tax upon his premises, regardless of whether the tenant uses the water or not. In other words, no contractual relation with the tenant imposes any obligation upon the landlord to furnish the tenant with water, and an obligation to pay water rates arises only where the obligation is imposed by the state as a tax. In this case there is absolutely nothing in the evidence to show that the water rates of the Tintern Manor Water Company are a tax upon the premises. Apparently the company is merely a private corporation, which furnishes water by contract. The complaint herein should therefore have been dismissed.

Judgment should be reversed, with costs, and the complaint dismissed, with costs. All concur.

KNICKERBOCKER TRUST CO. v. ONEONTA, C. & R. S. RY. CO. et al.

(Supreme Court, Appellate Division, Third Department. December 30, 1912.)

Appeal from Special Term, Otsego County.

Action by the Knickerbocker Trust Company, as trustee, against the Oneonta, Cooperstown & Richfield Springs Railway Company and another. From the judgment, the party aggrieved appeals. Affirmed.

Thomas Carmody, Atty. Gen. (Wilber W. Chambers, Deputy Atty. Gen., of counsel), for comptroller.

Louis F. Reed, of New York City (Ralph W. Gwinn, of New York City, of counsel), for appellants.

PER CURIAM. Order affirmed, with \$10 costs and disbursements.

HOUGHTON, J. (dissenting). I do not think the avails arising from the sale of the Oneonta, Cooperstown & Richfield Springs Rail-

way Company (which for convenience may be termed the Cooperstown Company) can be taken for the purpose of paying the franchise tax incurred by the Oneonta & Mohawk Valley Railway Company (which may be termed the Mohawk Valley Company) while it operated the railway. Through foreclosure the franchise and property of the Cooperstown Company was sold to one Bean, and he organized the Mohawk Valley Company for the purpose of taking over his bid and operating the railroad. Those in charge of the foreclosure proceedings permitted him to make partial payment, and gave him time in which to pay the balance, and meanwhile and during the period for which the tax is claimed the railroad, which was an electric one, was operated by the Mohawk Valley Company. Eventually it turned out that neither Bean nor the Mohawk Valley Company was able to fulfill the conditions of the purchase, and a resale was ordered of the property and franchise of the Cooperstown Company. During the year for which the tax in controversy was levied the Mohawk Valley Company made gross earnings of \$190,042.74, and in pursuance of the right given under section 185 of the Tax Law the comptroller imposed a tax of 1 per cent. upon such gross earnings against such operating company, amounting to \$1,900.43, which, with the penalty added, is the tax sought to be collected from the property or proceeds of sale of the property of the Cooperstown Company, which was not operating the road at the time, nor exercising any of its functions as an electric railway corporation.

The franchise tax on elevated and surface railroads not operated by steam, provided for by section 185 of the Tax Law (Consol. Laws 1909, c. 60), is not a tax imposed for the privilege of being a corporation or upon capital employed, but is a tax imposed upon a corporation for the privilege of exercising its franchise in conducting and operating a railroad of such description. For aught that appears, the Mohawk Valley Company, against which the tax was imposed, has property from which the tax can be collected. The record shows that it was stipulated on the hearing that the Cooperstown Company was abandoned and did no business during the year for which the tax in controversy was imposed, and that during that time the road was in fact operated by the Mohawk Valley Company, which was a corporation having a legal right so to do. This latter company paid the franchise tax for a certain period during which it operated the road, but failed to pay for a later period, and because of such failure it is sought to charge the property of the Cooperstown Company therefor.

It is true that the title to the roadbed upon which the Mohawk Valley Company operated belonged to the Cooperstown Company, and it is also true that in the decree directing a sale the referee was directed to pay all taxes. Of course, this provision of the decree means all taxes legally imposed, and does not include taxes of another corporation not properly chargeable to it. It is also true that section 197 of the Tax Law makes all the taxes legally assessed a charge on the real and personal property of the corporation liable to pay the same. This provision does not aid the respondent, if the Cooperstown Road is not the corporation which is liable for the payment of the tax.

If there be any questions as to the propriety of imposing a tax upon the operating company, rather than the dormant one, the latter part of section 185 would seem to be quite conclusive; for it is there provided that, if such railroad corporation has leased its property to another railroad, it shall not pay the 1 per centum imposed upon the operating company, but only a tax of 3 per cent. upon dividends paid in excess of 4 per cent. upon the amount of its capital stock. The tax in fact was levied by the comptroller upon the operating company, and not upon the dormant company, which owned the roadbed, and I think the company against which the assessment was made should pay, and not the dormant company, which did not exercise the franchise of operation.

COHEN v. LONG ISLAND R. CO. et al.

(Supreme Court, Appellate Division, First Department. January 24, 1913.)

1. EVIDENCE (§ 579*)—EVIDENCE AT FORMER TRIAL—DECEASED WITNESS.

Under Code Civ. Proc. § 830, providing that, where a witness dies after trial of an action, his testimony at such trial may be read in evidence at a new trial of the same subject-matter in the same or another action between the same parties, testimony of one, who saw an accident at a railroad crossing, in which a brother and sister, both unmarried, were killed, given in an action by an administrator for the death of one of them, was admissible in an action by the same administrator in an action for damages for the death of the other; the witness having died.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2412; Dec. Dig. § 579.*]

2. EXECUTORS AND ADMINISTRATORS (§ 51*)—CAUSE OF ACTION—ASSETS—DEATH.

A cause of action for death is no part of the assets of the decedent's estate, nor are the damages.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 51; * Death, Cent. Dig. §§ 132-138.]

Laughlin, J., dissenting.

Appeal from Trial Term, New York County.

Action by Zipe Cohen, as administrator of Ida Cohen, deceased, against the Long Island Railroad Company and another. Judgment for plaintiff, and defendants appeal. Reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Wm. C. Beecher, of New York City, for appellant Long Island Railroad Co.

Abram I. Elkus, of New York City, for respondent.

SCOTT, J. The plaintiff sues for and has recovered damages for the death of her intestate, her daughter, resulting, as it is alleged, from the negligence of the defendants. The accident, which resulted in death, occurred at a point in Queens county within the limits of the city of New York, where the highway known as Woodhaven avenue crossed, at grade, the line of the defendant companies. Both the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

highway and the railway ran at a slightly descending grade to the point of intersection, and the crossing was to an extent a blind one, because the corner which was at the natural grade served as a mask between the highway and the railway, so that a traveler on the highway could not see an approaching train until within 50 or 60 feet of the track.

The plaintiff's decedent and four other persons, two women and two men, were driving in a wagon along Woodhaven avenue. As they crossed the railroad tracks, they were struck by one of defendants' trains running at a high rate of speed, with the result that every person in the wagon was killed. Without attempting to state the facts in detail, it may be said that there was a sharp conflict of evidence as to the care exercised by defendants' servants, and by decedent and the other persons in the wagon. One important question litigated was as to the acts of a flagman stationed at the crossing by defendants. According to one story, he neglected to give any warning until the persons in the wagon had come into a position of danger. According to another story, he had been alert, and had warned the travelers on the highway in ample time to have enabled them to avoid the accident. It is manifest that the testimony of the flagman himself might have been of the utmost value, but he had died before the trial.

[1] The only question which we deem it necessary to consider is whether or not the defendant was entitled to read his evidence given on a former trial. This evidence at first was admitted and a part of it read to the jury. It was subsequently stricken out, and the jury warned that they were not to consider it. Among those killed by the accident, a passenger in the same wagon with decedent, was Jacob Cohen, a brother of decedent, and a son of the plaintiff, who caused herself to be appointed administratrix of his estate, and as such brought suit against the defendants. At the trial of that action the flagman was called as a witness and examined and cross-examined at length, the plaintiff being represented by the same counsel by whom she was represented on the trial of the present action. The question is whether defendant was entitled to read on the trial of this action the testimony of the flagman given on the trial of the Jacob Cohen action. It appears that Jacob Cohen and Ida Cohen were both the children of the plaintiff Zipe Cohen, and were both unmarried. Identically the same persons are therefore entitled to share in any recovery in either action.

The defendant relies upon section 830, Code Civil Procedure, which provides:

"Where a party or witness has died * * * since the trial of an action * * * the testimony of the decedent * * * taken or read in evidence at the former trial * * * may be given or read in evidence at a new trial * * * of the same subject-matter in the same or another action or proceeding between the same parties to such former action or proceeding. * * *"

The defendants are the same in both actions. The "subject-matter" to which the evidence relates, to wit, the negligence or lack of negligence of defendants' servant, is the same in both actions, and it is

worthy of note that to entitle evidence on a former trial to be read in a subsequent one it is not necessary that the causes of action shall be identical, but only that the subject-matter to which the evidence relates shall be the same. This leaves only open for consideration therefore the question whether in this particular instance both actions were prosecuted by the same person. In a literal sense the same person, to wit, Zipe Cohen, is plaintiff in both actions, although her qualification is different, and it is therefore claimed that Zipe Cohen as administratrix, etc., of Ida Cohen, deceased, is a different persons in the eye of the law from Zipe Cohen, as administratrix, etc., of Jacob Cohen, deceased. The distinction is, I think, for the purposes of the question now under consideration rather apparent than real. In *Pratt, Hurst & Co., Ltd., v. Tailer*, 135 App. Div. 1, 119 N. Y. Supp. 803, an action for damages against a landlord for permitting a roof to become leaky, a question arose as to the propriety of reading the evidence given by a witness upon the trial of another action to recover for the same loss; the witness having died meanwhile. The first action was against the same defendants, who were sued only "as executors and trustees." In the second action they were also sued "individually," and the evidence was objected to because the parties were not the same. This court said:

"The subject-matter of both actions was the same, and the fact that in the present action defendants are sued both in their individual and representative capacity did not render such testimony inadmissible. The parties are the same"—citing to support this view *Boyd v. U. S. Mortgage Co.*, 187 N. Y. 262, 79 N. E. 909, 9 L. R. A. (N. S.) 399, 116 Am. St. Rep. 599, 10 Ann. Cas. 146, and *Deering v. Schreyer*, 88 App. Div. 457, 85 N. Y. Supp. 275.

The case which I have quoted is not, of course, exactly parallel with the present, but it is of value in the consideration of the question now before us, because it served to illustrate the disposition of the courts to give to section 830, Code Civil Procedure, a liberal and reasonable, rather than a narrow and technical, construction. The admissibility in general of evidence given on a former hearing of the same subject-matter between the same parties did not originate with the Code, but existed at common law long before a Code of Procedure was dreamt of. "The fundamental ground upon which evidence given by a witness who afterwards dies may be read in evidence on a subsequent trial is that it was taken in another proceeding where the parties against whom it is offered, or their privies, have had both the right and the opportunity to cross-examine the witnesses as to the statement offered." *Young v. Valentine*, 177 N. Y. 347-357, 69 N. E. 643, 646. This foundation clearly existed in the present case.

That the evidence falls within the intention of the Code provision above quoted becomes even more apparent when we consider the nature of the two actions. As has been already said, the persons who would be entitled to share in a recovery of damages for the death of Jacob Cohen are the same persons entitled to share in a like recovery for the death of Ida Cohen. So that Zipe Cohen was not only plaintiff in both actions, but she represented in both the same persons.

[2] An action for damages for death was unknown at common

law, and is solely the creation of statute. The cause of action is no part of the assets of decedent's estate, and the damages become no part of the estate, but are exclusively for the benefit of the decedent's husband or wife or next of kin. *Stuber v. McEntee*, 142 N. Y. 200, 36 N. E. 878. That, in this state, the statute gives the right to sue for such damages to an executor or administrator, is purely fortuitous, and was provided merely as a matter of convenience. It might equally have been left to the next of kin to sue, as it is in some states. If it had been so left, the cause of action would have been the same, and the recovery would have benefited the same persons. In that case, the next of kin being identical, there could be no doubt that evidence upon a subject-matter common to both actions given on the trial of an action for damages for the death of one son or brother could be used on the trial of a subsequent action for damages for the death of another son or brother killed by the same accident. The present case is no different in any essential particular. We are therefore of the opinion that the evidence of the deceased flagman was admissible, and that it was error to strike it out. The evidence was of such a character that its exclusion may have seriously prejudiced the defendant. Upon this ground alone, therefore, without considering the other exceptions, we are constrained to reverse the judgment and order appealed from, and grant a new trial, with costs to appellant to abide the event.

INGRAHAM, P. J., and McLAUGHLIN and CLARKE, JJ., concur. LAUGHLIN, J., dissents, and votes for affirmance.

(79 Misc. Rep. 212.)

KOBRE v. CORN EXCHANGE BANK.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

BANKS AND BANKING (§ 148*)—CHECKS—PAYMENT ON FORGED INDORSEMENT OF PAYEE.

Where plaintiff, discounting a note made by S. to M. and B., indorsed in blank in the name of M. and B., and presented by V., gave to V. a check payable to M. and B., intending to deal only with M. and B., and the bank paid it on its indorsement in the name of M. and B., forged by S., as had been the indorsement of the note, it could not charge the payment to plaintiff, even if he was negligent in delivering the check to V.; the circumstances not clearly charging him with knowledge that V. was an impostor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-452; Dec. Dig. § 148.*]

Appeal from City Court of New York, Special Term.

Action by Max Kobre against the Corn Exchange Bank for refusal to pay over the amount of a deposit made by plaintiff with defendant. From an order setting aside a verdict for plaintiff, rendered by direction of the court, plaintiff appeals. Reversed, and verdict reinstated.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Feltenstein & Rosenstein, of New York City (Moses Feltenstein, of New York City, of counsel), for appellant.

Katz & Sommerich, of New York City (Otto C. Sommerich and L. E. Schlechter, both of New York City, of counsel), for respondent.

LEHMAN, J. The plaintiff carries on business as a banker under the name of Max Kobre's Bank. On March 26th his cashier issued a check in proper form, drawn on plaintiff's account in the defendant bank to the order of Miller & Bonime. This check was presented to the defendant bank through the clearing house by the Metropolitan Bank. At that time it bore indorsements in the name of Miller & Bonime, S. Bonomowitz, Syrkin & Back, and the Metropolitan Bank. The check was paid by the defendant, and the amount charged to plaintiff's account. At the trial the plaintiff showed that the firm of Miller & Bonime was composed of Harris A. Miller and Abraham Bonime, and that they had never indorsed the check themselves, nor authorized any other person to indorse it for them.

"The relation existing between a bank and a depositor being that of debtor and creditor, the bank can justify a payment on the depositor's account only upon the actual direction of the depositor." *Critten v. Chemical National Bank*, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529.

If it was necessary for Miller & Bonime to indorse the draft before it could be paid by the defendant for the plaintiff's account, then the plaintiff has made out a complete cause of action, because it is undisputed that their apparent indorsement was not made by them. If they were the actual payees of the check, then, of course, their pretended signature could give the subsequent purchasers no right to enforce payment of the check. Section 42, Negotiable Instrument Law (Consol. Laws 1909, c. 38). Since they were named as payees, and their signature was forged, the defendant has failed to make payment according to the written direction of the plaintiff, and cannot charge this payment to the plaintiff's account, unless it proves either that the payment was made to the payee actually intended to receive payment though improperly described, or that the conduct of the drawer of the instrument has been such as to impose a liability upon him beyond his intent. *Gallo v. Brooklyn Savings Bank*, 199 N. Y. 222, 92 N. E. 633, 32 L. R. A. (N. S.) 66.

For this purpose the defendant has presented the following testimony: It shows that the plaintiff's cashier, who signed the check, delivered it to a Mr. Vladower. The check was given in discount of a note for \$500. This note purported to be made by the Metropolitan Novelty Company, by Solomon Bonomowitz, president, to their own order, and bore their indorsement in blank, and also a blank indorsement in the name of Miller & Bonime. The latter indorsement was forged. Vladower gave plaintiff the note when he received the check. The plaintiff's cashier did not know Solomon Bonomowitz. Apparently Vladower delivered the check to Bonomowitz, who forged the indorsement of Miller & Bonime, and then discounted the check with Syrkin & Back. I fail to see any theory upon which these facts prove any defense to plaintiff's cause of action.

The defendant urges that the real question in the case is not "whether the indorsement on the check of the alleged payee was a forgery, but rather was it intended that Miller & Bonime were to receive the proceeds of the check of Bonomowitz." I can find absolutely no evidence that the plaintiff ever intended that Bonomowitz should receive the proceeds of the check. The plaintiff did not make the check payable to Bonomowitz, but to Miller & Bonime. It is shown that Miller & Bonime were an actual firm, and their name inserted as payee was not intended to be a fictitious name. In this respect the case differs from the case of *Phillips v. Mercantile National Bank*, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596. The plaintiff did not know Bonomowitz, and did not intend to make a check payable to him. He did not intend to give that check in discount of a note of which Bonomowitz was the actual owner; but he made that check payable to the firm who appeared on the note as the holders and last indorsers, and therefore the parties who had the right to transfer title to him.

In this respect the case differs from the cases of *Sherman v. Corn Exchange Bank*, 91 App. Div. 84, 86 N. Y. Supp. 341, and *First National Bank v. American Exchange Bank*, 170 N. Y. 88, 62 N. E. 1089. In both of these cases the drawer of the check was actually dealing with the payee named in the check and described as payee, though as a matter of fact the drawer had been deceived into believing that it was dealing with another person. The courts there held that the bank, having paid the money to the person actually designated as payee, has carried out the drawer's directions. In this case, however, the plaintiff not only thought that he was dealing with Miller & Bonime, but he directed payment to the parties with whom he thought that he was dealing, and the bank has failed to obey these directions. Bonomowitz could not indorse the name of Miller & Bonime, unless he was the owner of the check. *Seaboard National Bank v. Bank of America*, 193 N. Y. 26, 85 N. E. 829, 22 L. R. A. (N. S.) 499. Certainly the indorsement made by himself could pass no title to himself, and his title must therefore be derived, if at all, directly from the plaintiff.

The plaintiff, however, had no dealings with any person except Vladower. Vladower appeared clothed with apparent authority from the firm of Miller & Bonime to discount a note. Plaintiff discounts the note, and gives in payment a check made payable to the apparent owners. The payee was an existent firm, and there is not a scintilla of evidence that the plaintiff ever intended to deal with any other person except that firm, or ever delivered the check with intent to pass title except to the persons named. The fact that Vladower or Bonomowitz obtained possession of the check from plaintiff with intent to retain it is immaterial, as is also the fact that Miller & Bonime were never actually entitled to the proceeds of the discounted note.

The governing fact in this case is that plaintiff delivered to Vladower a check which only Miller & Bonime were intended to use, and which only Miller & Bonime could use, and no title to the check passed either to Vladower or Bonomowitz. In the case of *Seaboard National Bank*

v. Bank of America, 193 N. Y. 26, 85 N. E. 829, 22 L. R. A. (N. S.) 499, an employ  of a depositor known to the bank presented to the bank in Pittsburgh a forged check, purporting to be drawn by the depositor, and requested the bank to give him a New York draft payable to the order of Carroll Bros. Carroll Bros. were an actual firm, with whom the depositor was doing business, but to whom the depositor was not indebted. The bank gave the employ  the draft as requested, and the employ  negotiated the draft, forging Carroll Bros.' signature. It was held that the bank making the check to Carroll Bros. could not be charged with the payment. The court there said:

"The secret intention of a criminal, contrary to his express intention and the avowed purpose for which he obtains possession of a draft, does not give the criminal ownership of the draft, or a legal right to change a draft payable to a real payee to one payable to bearer. There is no presumption arising from the facts proven that the name Carroll Bros. was intended as a fictitious or nonexisting payee. Such intention, to be effective, must necessarily arise from knowledge and exist as an affirmative fact in the mind of the drawer of a draft at the time of its delivery. There is nothing in this case to estop the plaintiff from controverting the genuineness of the indorsement of the draft in controversy as in *Coggill v. American Exchange Bank*, 1 N. Y. 113, 49 Am. Dec. 310, where one of the members of a partnership, the makers of a draft, put into circulation with the forged indorsement of the payee upon it, or as in *Phillips v. Mercantile National Bank*, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596, where the person who forged the name of the payee was the cashier of the defendant, empowered to bind the bank by his checks."

So in this case the secret intention of Bonomowitz by fraud to obtain possession of a check for his own benefit, contrary to his apparent intention and avowed purpose that the check should belong to Miller & Bonime, does not give him any ownership inconsistent with the form and tenor of the check, and there is no presumption that the name Miller & Bonime was intended as a fictitious or non-existing payee. On the contrary, it affirmatively appears that the name Miller & Bonime was intended to describe an actual payee, and there is nothing in the case that estops the plaintiff from controverting the genuineness of the indorsement.

The defendant claims that it was negligence on the part of the plaintiff to put in the hands of Vladower a check drawn to Miller & Bonime without investigating whether the indorsement of Miller & Bonime on the note which the plaintiff was discounting was genuine. Obviously, of course, this argument must be based upon the premise that the plaintiff actually intended that the check should be payable to Miller & Bonime, and not to any owner of the note or to bearer, and that only Miller & Bonime could legally transfer title to the check. This alleged negligence, however, is immaterial, because no act of the defendant was induced by the acts, representations, or admissions of the plaintiff. See *Seaboard National Bank v. Bank of America*, supra. Even if the plaintiff had been actually suspicious of Vladower's right to receive a check payable to Miller & Bonime, he could have given Vladower a check payable to Miller & Bonime's order, confident in the knowledge that the diversion of the check could entail no loss upon him, for only Miller & Bonime

could transfer title to it, unless, of course, the check was delivered under circumstances clearly charging the plaintiff with knowledge that Vladower was an impostor.

In the case of *Gallo v. Brooklyn Savings Bank*, *supra*, a man representing himself as a depositor of a savings bank presented a bank book and demanded payment of the deposit. The appearance of the alleged depositor was totally different from the description contained in the bank book, and the bank was not satisfied with his explanation of this fact. It therefore paid him by check drawn to the order of the depositor, instead of in money. The check was thereafter paid and charged to the Savings Bank. The court there said, *per Cullen, C. J.*:

"I am not prepared to admit the proposition that when a bank or individual, not being satisfied of the rights or identity of the party claiming payment from it or him, declines to pay the party in money, but gives a check to the order of the known creditor, it or he is thereby necessarily guilty of negligence or fraud. It is the general rule of law in this country, and such is the common law, that the drawee of a bill or check or persons purchasing it 'take the paper relying solely on the reputed responsibility of their transferrors, and the other parties to it, and its apparent genuineness, and they, therefore, deal in it at their peril.' *Crawford v. West Side Bank*, 100 N. Y. 50 [2 N. E. 881, 53 Am. Rep. 152]."

It follows that the verdict directed for the plaintiff was correct, and should be reinstated.

Order reversed, with costs, and verdict reinstated, with costs. All concur.

OPPENHEIMER v. TREBLA REALTY CO. et al.

(Supreme Court, Appellate Division, First Department. January 24, 1913.)

1. BILLS AND NOTES (§ 489*)—ACTIONS—PRIMA FACIE CAUSE OF ACTION.

Where, in an action on a note, the answer set up as an affirmative defense an agreement of plaintiff to release defendant from liability on the note, the mere production of the note on the trial established a prima facie case, leaving for trial only the affirmative defense.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1587-1642; Dec. Dig. § 489.*]

2. ACTION (§ 25*)—NATURE—LEGAL OR EQUITABLE.

An action on a promissory note is a common-law action, and the interposition of a defense involving the taking of an account does not change its character.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 124-145, 147-149, 153, 156-159; Dec. Dig. § 25.*]

3. COURTS (§ 188*)—CITY COURT—JURISDICTION—ACTION AT LAW.

Under Code Civ. Proc. § 3247, subd. 4, permitting equitable defenses in common-law actions, applicable to the City Court of the city of New York, that court, having jurisdiction of an action at law, can entertain an equitable defense involving the taking of an account, except that it may not grant affirmative equitable relief.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 437-468; Dec. Dig. § 188.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. REFERENCE (§ 26*)—CITY COURT—JURISDICTION TO ORDER.

Where the City Court of the city of New York had jurisdiction to try an action at law to which an equitable defense involving the taking of an account was interposed, it could, by consent, refer the action.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 43; Dec. Dig. § 26.*]

Appeal from Appellate Term, First Department.

Action by Herman H. Oppenheimer against the Trebla Realty Company and others. From a determination of the Appellate Term (76 Misc. Rep. 452, 134 N. Y. Supp. 1095) reversing a judgment of the City Court of the City of New York for plaintiff and dismissing the complaint, plaintiff appeals. Reversed, and judgment of the City Court affirmed.

See, also, 152 App. Div. 948, 137 N. Y. Supp. 1132.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Abraham Tulin, of New York City, for appellant.

Manheim & Manheim, of New York City, for respondents.

SCOTT, J. [1] The plaintiff sued in the City Court for the sum of \$2,000, due upon a promissory note. The answer, besides certain obviously sham denials, pleaded as a separate defense that prior to the maturity of the note an agreement had been entered into between plaintiff and defendant, whereby plaintiff agreed to release defendant from all liability on account of said note, and to cancel and surrender the same. Although it does not appear on the face of the answer, the fact was afterwards disclosed that what defendant really claimed was that in the course of, and as a result of, certain real estate transactions the plaintiff had received all that was due him upon the note, and in consideration thereof had agreed to cancel the indebtedness. Under the pleadings the mere production of the note established plaintiff's *prima facie* cause of action, and all that was left to be tried was the affirmative defense. When the cause came on for trial, the defendants made the following proposition:

"Counsel for the defendant has offered that there be an accounting between the parties to this action in the manner provided by law, and that the amount, if any, due to plaintiff from any of the defendants be then ascertained and determined, and that the collateral be properly applied, and that a proper judgment be rendered under the circumstances."

The plaintiff accepted this proposition; whereupon the court appointed a referee, who proceeded to try the issues tendered by the separate defense. Upon the coming in of his report, which was adverse to the defendants, a judgment was entered in favor of plaintiff for the amount claimed. Upon appeal to the Appellate Term this judgment was reversed, but no direction given for a new trial. On a motion to amend the order of reversal, it was amended by adding a provision dismissing the complaint, so that plaintiff, having a perfectly good cause of action of which the City Court admit-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tedly had jurisdiction, and to which there is no valid defense, has his complaint dismissed and finds himself saddled with a large bill of costs, incurred because he accepted an apparently fair proposition by the defendants. This is not an appropriate time to criticise the methods and motives of the defense. Our duty will be done if we are able to prevent an injustice from resulting therefrom.

[2] The Appellate Term appears to have been of the opinion that the effect of the stipulation and order of reference was to convert the action into one in equity for an accounting, and therefore that the City Court had no jurisdiction to proceed with it. We think that this view was erroneous. The character of the action is to be determined by the complaint, and, so tested, it was from the beginning and remained throughout a common-law action upon a promissory note, of which the City Court concededly had jurisdiction.

[3] That the defense involved or might involve the taking of an account did not change the character of the action, nor oust the City Court of jurisdiction to determine the controversy; for the interposition of an equitable defense does not transform a legal action into an equitable one. *New York & Brooklyn Brewing Co. v. Angelo*, 144 App. Div. 655, 656, 129 N. Y. Supp. 713. Section 507, Code Civil Procedure, made applicable to the City Court by subdivision 4 of section 3347 of the Code, permits equitable defenses to be interposed in common-law actions; and it has been held repeatedly that the City Court has jurisdiction to entertain and dispose of equitable defenses interposed in common-law actions, except that it may not give affirmative judgment for a defendant upon a counterclaim which demands only equitable relief.

[4] No doubt the order of reference in the present case was inaptly phrased, but it affords no ground for the contention that its effect was to transform the action into an equitable one. As the pleadings stood, the court could have tried the issues raised by the pleadings; and what it could try itself it could, by consent, refer, and this was all that was done. The attempted defense having failed, left the plaintiff entitled, upon the undisputed facts, to a judgment upon his legal cause of action.

The determination of the Appellate Term must therefore be reversed, and the judgment of the City Court affirmed, with costs to the plaintiff appellant in all the courts. All concur.

PEOPLE *ex rel.* UNGER *v.* KENNEDY, Warden of Sing Sing Prison.
(Supreme Court, Appellate Division, First Department. January 17, 1913.)

1. CONSTITUTIONAL LAW (§ 65*)—STATUTES (§ 35½*)—LEGISLATIVE POWERS—
DELEGATION—REFERENDUM PROVISION.

The referendum provision of Bronx County Act (Laws 1912, c. 548) § 16, to the effect that the act should be inoperative and void unless at the general election in November, 1912, a majority of the votes cast by the electors in the county of Bronx as designated should be in its favor, is unconstitutional as a delegation of the legislative power of the state,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which, by Const. art. 3, § 1, is expressly vested in the Senate and the Assembly.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 116; Dec. Dig. § 65;* Statutes, Dec. Dig. § 35½.*]

2. STATUTES (§ 64*)—PARTIAL INVALIDITY—COUNTIES.

The invalidity of section 16 of the Bronx County Act (Laws 1912, c. 548), providing that the act should be inoperative unless at the general election in November, 1912, a majority of the votes cast in the county, as designated, should be in its favor, which provision was added by the Legislature, and without which it would not have been enacted, affects a substantial part of the statute, and renders the whole act unconstitutional.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.*]

Scott and Dowling, JJ., dissenting.

Appeal from Special Term, New York County.

Habeas corpus by the People of the State of New York, on the relation of Joseph J. Unger (alias McKenna), against John S. Kennedy, as Warden of Sing Sing Prison. From an order (138 N. Y. Supp. 581) dismissing the writ and remanding the relator to custody, he appeals. Affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Emanuel Klein, of New York City, for appellant.

Louis O. Van Doren, of New York City, for Association of the Bar, Borough of the Bronx.

Robert C. Taylor, Asst. Dist. Atty., of New York City, for respondent.

INGRAHAM, P. J. The facts upon which it is claimed in this proceeding that one Joseph J. McKenna is improperly restrained in a state prison are that said McKenna was charged with the commission of a crime in the territory of the borough of the Bronx on June 6, 1912; that he was subsequently indicted by a grand jury of the county of New York, tried in the Court of General Sessions of the Peace, and by a judgment of the said court was convicted of the crime for which he was indicted. The relator claims that the Court of General Sessions had no jurisdiction to indict or try the said McKenna by reason of the fact that the Legislature by chapter 548 of the Laws of 1912 created the said territory of the borough of the Bronx into a separate county of the state, which act became a law on April 19, 1912. The crime for which the said McKenna was indicted and convicted was murder in the first degree, and he is held by the warden of the state prison at Ossining under a warrant reciting the conviction. If this statute, chapter 548 of the Laws of 1912, is void as in violation of the Constitution, it is conceded that the Court of General Sessions had jurisdiction to try the relator, and the writ must be dismissed.

The question of the constitutionality of that act having been fully argued before us, it is important that there should be an early determination of that question. The prisoner was indicted by a grand

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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jury in the county of New York. Section 6 of article 1 of the Constitution provides that no person shall be held to answer for a capital or otherwise infamous crime, except in cases of impeachment, and in cases of militia when in actual service, unless on presentment or indictment of a grand jury. Section 252 of the Code of Criminal Procedure provides that the grand jury has power, and it is their duty, to inquire into all crimes committed or triable in the county, and to present them to the court. There is no provision of law, with which I am acquainted, which authorizes the grand jury to inquire into or present an indictment against a prisoner who has committed a crime in another county than that in which the grand jury is impaneled. In *Mack v. People, etc.*, 82 N. Y. 235, it was held that though at common law a grand jury could not regularly inquire of a fact done out of that county for which they were sworn, and that as a rule an indictment could be preferred and tried only in the county where the offense was committed, there were exceptions to that rule of instances in which the Legislature had directed otherwise. The section of the Constitution to which attention has been called must be held to have recognized that legislative power, and that it must be taken to have meant the action of a grand jury taken as authorized by law. It was also held that the offense was against the peace of the people of the state of New York, and the people, by a law passed before the commission of the offense, may lawfully direct that the offender be tried in another county than that in which the offense occurred.

There is no provision, however, in this law now under consideration, which authorizes the grand jury of the county of New York to inquire into a crime committed in what was to be by the act the county of the Bronx. Section 8 of the act provides that:

"There shall be a commissioner of jurors for the county of the Bronx who shall be appointed as provided by chapter four hundred and forty-one of the Laws of eighteen hundred and ninety-nine, except that within thirty days after the time of taking effect of this act, the Governor shall appoint a commissioner of jurors for the county of Bronx, who shall hold such office until the first day of January, nineteen hundred and fourteen, and until the appointment of his successor, and such commissioner of jurors within said county of Bronx shall exercise all the powers and possess all the authority as to the returning and summoning of grand and trial jurors for the said county of Bronx as now provided by said chapter four hundred and forty-one of the Laws of eighteen hundred and ninety-nine, and all acts amendatory thereof and supplemental thereto."

Provision is therefore made for a commissioner of jurors for the county of Bronx before January 1, 1914, and he is authorized to return and summon a grand jury for that county. The act, therefore, contemplates the returning and summoning of both grand and trial jurors in the county of Bronx before January 1, 1914. Certainly, if such a grand jury had been constituted as the act contemplates, that grand jury would have had the sole authority to inquire into and present indictments for crimes committed in the county of Bronx. There is nothing in the law to justify the conclusion that it was intended to confer on a grand jury of the county of New York power to inquire into and present indictments for crimes committed in the county of Bronx.

Section 9 of the act provides that:

"The several courts within the county of New York and within the First judicial district of the Supreme Court of the state of New York shall have and retain jurisdiction of all actions, proceedings and matters that shall have been *rightfully* commenced in said courts prior to the said first day of January, nineteen hundred and fourteen, and the several courts of the county of Bronx having criminal jurisdiction on and after the first day of January, nineteen hundred and fourteen, shall have the same jurisdiction of crimes, offenses and misdemeanors that shall have been committed in the said territory that the courts of the county of New York having criminal jurisdiction now have in the county of New York, provided proceedings shall not have been already rightfully commenced in any of the courts of the county of New York for the prosecution of said crimes, offenses and misdemeanors, in which case, the said courts within the county of New York shall have and retain jurisdiction of the same for the full, complete and final disposition thereof, and until the said first day of January, nineteen hundred and fourteen, the said courts of the county of New York, and in the said First judicial district, shall retain and exercise in all civil and criminal proceedings the same jurisdiction they now have."

The jurisdiction of a court of criminal jurisdiction to try a prisoner for a felony must depend upon an indictment being presented by a grand jury authorized to inquire into and present an indictment for the crime charged, and undoubtedly under this statute as it stands, if valid, a crime having been committed in the Bronx before the county of Bronx was created, and a grand jury of New York county having indicted the person guilty of the crime, the courts of New York county could try the accused and render judgment against him. But in none of the provisions of the statute is the grand jury of the county of New York authorized to present an indictment against a person accused of committing a crime within the borough of the Bronx after that county is duly created.

If the commissioner of jurors had been appointed, as was contemplated by the act, within 30 days after its passage, and had returned and summoned a grand jury for the county of Bronx, I do not think the grand jury of the county of New York would have had jurisdiction to inquire into and present an indictment for a crime committed in the borough of the Bronx after the act took effect. As a fact the Governor had not appointed a commissioner of jurors within 30 days after the passage of the act, but no action or nonaction of the Governor or of a commissioner of jurors appointed by him could confer jurisdiction on a grand jury of New York county to indict a person for a crime committed in the borough of the Bronx after that county was duly created and existing as a separate and independent county of the state. As I view it, therefore, the question directly presented on this application involves a determination of the question as to whether this act, creating a county of Bronx, violates any provision of the Constitution.

The division of this state into counties has existed since the state was organized, and is recognized by several provisions of the Constitution. Thus, section 10 of article 8 recognizes a county as one of the political subdivisions of the state, and provides for the amount of indebtedness which a county is authorized to incur. Section 1 of article 10 provides for the election of sheriffs, clerks of counties, district

attorneys, and registers, and provides that these officers shall be chosen by the electors of the respective counties. Section 2 of the article provides that all county officers whose election or appointment is not provided for by the Constitution shall be elected by the electors of the respective counties, or appointed by the board of supervisors, or other county officers, as the Legislature shall direct. Section 18 of article 3 provides that the Legislature shall not pass a private or local bill locating or changing county seats, and provides for the election of members of boards of supervisors. Section 27 of the article provides that :

"The Legislature shall, by general laws, confer upon the boards of supervisors of the several counties of the state such further powers of local legislation and administration as the Legislature may, from time to time, deem expedient."

The Constitution, therefore, recognizes a county as a political subdivision of the state, organized for the purpose of local self-government. The local legislative body, with the other county officers whose election or appointment are provided for by the Constitution, constitutes the officials by whom the offices of the county are to be conducted. There can be no doubt of the power of the Legislature to change county lines and create new counties; but, when a county once becomes established by law, these various provisions of the Constitution become applicable, and the county officers could be elected or appointed only as provided for by the Constitution. Now, the act of the Legislature under consideration was passed to create a new county, which, when created, should become one of the counties of the state; and to it applied the various provisions of the Constitution which regulated the election or appointment of county officers, and it would seem to be clear that the Legislature could not, by creating a new county, provide that any officers should perform the duties of the various county officers, unless they were elected as provided for by the Constitution.

Bearing in mind these several provisions of the Constitution, the question as to the time when the new county existed becomes material. Section 1 of the act provides that :

"All that territory now comprised within the borough of Bronx in the city of New York * * * is hereby set off from the county of New York and is erected into the county of Bronx as a separate and distinct county of the state of New York from and after the date of taking effect of this act, except, however, that until constitutional and legal change, the said territory hereby erected as the county of Bronx shall continue to be, for the purpose of electing members of assembly, a part of the thirtieth and all of the thirty-second, thirty-third, thirty-fourth and thirty-fifth Assembly districts of the county of New York, as now constituted by law, and shall continue to be, for the purpose of electing senators, a part of the twenty-first and all of the twenty-second Senate district in the county of New York as now constituted by law."

And section 17 provides :

"This act shall take effect immediately."

Thus the act took effect at the date of its passage, and all the other provisions of the act show, I think, that such was the intention of the

Legislature. Thus, in section 1, provision is then made for the election of justices of the Supreme Court and a representative to Congress, and then it is provided that:

"Freeholders, citizens and inhabitants of said county of Bronx for all purposes except as aforesaid shall have and enjoy all and every the rights, powers and privileges as freeholders, citizens and inhabitants of any of the counties of this state are by law entitled to have and enjoy, but they shall be subject to be assessed and taxed for city, county and state purposes in the manner provided by the laws of the state of New York, and by the provisions of chapter three hundred and seventy-eight of the Laws of eighteen hundred and ninety-seven and of all acts amendatory thereof and supplemental thereto."

Section 2 of the act provides that the canvass of votes for officers to be elected—

"shall be made by the board of county canvassers of the county of Bronx in the same manner and with like effect as statements of election are made by boards of county canvassers of other counties in the city of New York."

Section 3 provides for a County Court and Surrogate's Court in the county of Bronx, for the election at the general election in 1913 of a county judge, a surrogate, a district attorney, a sheriff, a county clerk, and a register of deeds, who are to perform all the duties as required by the Constitution and laws of this state. Provision is then made for deputies and assistants to those officers. Section 4 provides for the salary of the county judge, surrogate, and district attorney, and that such salaries or other compensation and all other county charges and expenses of the county of Bronx shall be audited and paid by the department of finance in the manner provided for the audit and payment of the salaries of all county officers and the charges and expenses of the counties now included within the city of New York. Section 5 provides that:

"All the county officers for the county of Bronx hereby erected and which are authorized by this act shall be elected at the general election of this state in the year nineteen hundred and thirteen."

And it is then provided:

"In the meantime, in order that no existing rights may be prejudiced, and to prevent an interregnum, the county officers of New York county shall continue to have their present jurisdiction, powers and duties in the territory within the county of Bronx until the first day of January, nineteen hundred and fourteen, except as herein otherwise provided."

Section 6 of the act provides for the holding of the County Court, the Surrogate's Court, and the sittings and terms of the Supreme Court held in and for the county of Bronx. Provision is made for a courthouse to be erected in said county, and until then the said courts shall be held at such place and places in said county as should be designated and fixed by the commissioners of the sinking fund of the city of New York, and it is further provided that:

"Within thirty days after the time of taking effect of this act, the justices of the Appellate Division in the First Department shall fix the times and places for holding Special and Trial Terms of the Supreme Court in the county of Bronx, as provided by the Judiciary Law."

Section 8 provides that:

"There shall be a commissioner of jurors for the county of Bronx who shall be appointed as provided by chapter four hundred and forty-one of the Laws of eighteen hundred and ninety-nine, except that within thirty days after the time of taking effect of this act the Governor shall appoint a commissioner of jurors for the county of Bronx, who shall hold such office until the first day of January, nineteen hundred and fourteen, and until the appointment of his successor."

Section 9 provides that:

"From and after the time of the taking effect of this act, the Supreme Court, and on and after the first day of January, nineteen hundred and fourteen, the County Courts shall have jurisdiction over all crimes and misdemeanors committed within the territory of the county of Bronx, except as herein otherwise provided."

The section then provides for Courts of Special Sessions and Magistrates' Courts; that the several courts within the county of New York and within the First judicial district of the Supreme Court of the state of New York shall have and retain jurisdiction of all actions, proceedings, and matters that shall have been rightfully commenced in said courts prior to the 1st day of January, 1914, and the several courts of the county of Bronx having criminal jurisdiction on and after the 1st day of January, 1914, shall have the same jurisdiction of crimes, offenses, and misdemeanors that shall have been committed in the said territory that the courts of the county of New York having criminal jurisdiction now have in the county of New York. Section 10 of the act provides that:

"The prisoners of the said county of the Bronx and persons lawfully detained on any process therein shall be confined in the jail or prison or other place of detention of the county of New York, in which such prisoners and persons of the county of New York arrested, held or detained are now confined or detained as provided by law, until the jail or other place of detention to be hereafter erected by the county of Bronx shall be furnished in such manner as in the opinion of the sheriff of the said county of Bronx will confine the prisoners or other persons lawfully detained in the same, when it shall be lawful for the said sheriff to remove and commit them to the jail or other place of detention of the said county of Bronx."

Also that:

"The reasonable charges and expenses of the county of New York for the custody, maintenance and detention of all said prisoners or other persons detained as aforesaid as may be thus committed to the keeper of said jail or other place of detention of the said county of New York, shall be ascertained and audited by the comptroller of the city of New York and the same shall be levied and collected against the county of Bronx in the same manner that other county charges are levied and collected against said county, and the amount thereof shall be paid into the treasury of the city of New York and credited by the comptroller to the county of Bronx."

Section 12 of the act provides that:

"The county of Bronx erected by this act shall possess all the rights and be subject to all the obligations of the counties now included within the city of New York, except as in this act specifically provided."

Section 13 provides for the raising by taxation of the amount required for the salary of county officers, and all other county expenses

and charges of the county of Bronx, and that the same shall be levied and collected upon the taxable property within said county in the manner provided for by the city of New York; and section 15 provides that the county judge of the county of Bronx shall forthwith adopt and procure a seal for the said county of Bronx. Section 16 provides for the submission of the question as to whether the territory within the borough of the Bronx shall be erected into the county of Bronx at the general election in 1912, which will be referred to hereafter.

This analysis of the statute seems to me to conclusively establish that by it the county of the Bronx was created as of the date of the passage of the act, April 19, 1912. The first section of the act declares that all the territory now comprised within the borough of the Bronx—
“Is hereby set off from the county of New York and is erected into the county of Bronx as a separate and distinct county of the state of New York from and after the date of taking effect of this act.”

No language could be clearer or more emphatic. To construe this provision as postponing the creation of the county until a future time would, it seems to me, be a direct violation of its express language. All the subsequent provisions of the act contemplate the existence of a new county from the date of the passage of the act, and provide for what the Legislature understood would otherwise be called an “interregnum,” viz., the period between the time of the coming into existence of the county and the time when the proper county officers should be elected. If the county was not created until the 1st day of January, 1914, when the county officers would be ready to assume their duties, the provisions to which attention has been called would have been unnecessary; for, until that time, the territory included within the boundaries of the new county would have remained a part of the county of New York. What was intended to be accomplished by the act was to create a county, and then provide that the duties which by law were devolved upon the county officers should, until the county officers were elected, be performed by the officers of an adjoining county, viz., the county of New York.

The operative part of the act was to take effect immediately, viz., April 19, 1912. On that day the act became a law of the state of New York, and, as I view it, it became operative in all its parts. The act commanded that certain acts should be performed in the future, and fixed the time within which those acts should be performed, in some instances by the designation of terms of the Supreme Court by the justices of the Appellate Division in this Department, and by the appointment by the Governor of a commissioner of jurors of the county after the taking effect of the act. It was contemplated, it seems to me, that these duties should be performed within 30 days from April 19, 1912. The time for the performance of these acts required to be done, viz., the election of county officers, was fixed to occur after the general election to be held in 1913. The mandatory provisions of the whole act, includ-

ing the direction as to the performance of these duties before indicated, came into force when the act took effect. There is not one word, that I can see, in this statute, from beginning to end, that postpones the time when the act itself should become a law after the date of its passage, and therefore the act itself became a law on that date, and all of its provisions then came into full force and effect.

If that be true, no provision being made for the election of county officers until the general election of 1913 and their installation in office on the 1st day of January, 1914, a county was created without officials to perform the county functions until January 1, 1914. It seems to me quite clear that after that time there could be no tax levied upon the property located in the county of Bronx to pay the county officials of the county of New York; the county of Bronx being no longer a part of the county of New York. The machinery for the government of counties, so far as the territory within the new county was concerned, was changed, so that the officials of the county of New York would no longer have jurisdiction to perform their duties within the county of Bronx, except so far as they were authorized to perform such duties by the provisions of the statute; but the Constitution expressly provides, in the section to which attention has been called, that these county officers—those officers who have jurisdiction to perform the governmental parts of the counties—should be elected by the election of the counties, and it seems to me that any attempt of the Legislature to provide that the duties of the county officers should be performed by officers other than those elected or appointed as provided for by the Constitution was void. The act, as I read it, attempted to create a new county on April 19, 1912. The act provides that the—
“freeholders, citizens and inhabitants of said county of Bronx for all purposes except as aforesaid shall have and enjoy all and every the rights, powers and privileges as freeholders, citizens and inhabitants of any of the counties of this state.”

They were to be assessed for city, county, and state purposes. They certainly could not be taxed for county purposes of counties other than the county of Bronx, and that county was created and those rights confirmed from and after the date of the taking effect of the act, and this act took effect on its passage. I cannot escape the conclusion that the creation of such a county, with the power to authorize the performance of duties of the county by other persons than those elected by the electors of the county, was a violation of the provisions of the Constitution which renders the whole act inoperative and void.

[1] We now come to the effect of section 16 of the act. That section provides that:

“At the general election in November, nineteen hundred and twelve, there shall be submitted to the voters of the borough of the Bronx the question: ‘Shall the territory within the borough of the Bronx be erected into the county of Bronx?’ If it shall appear that a majority of the votes cast on said question at said general election were against the erection of said county of Bronx, then this act shall be inoperative and void.”

By this section the Legislature has for the first time in the history of this state, and, so far as I know, in any state, submitted a question to the people of a portion of the state, whether or not an act duly passed and which has become a law should become "inoperative and void," or, in other words, whether such act should or should not be repealed, was to be determined, not by the Legislature, but by the people of a limited territory specified. The question that was to be submitted was not whether an act which was to be in force over all the state should or should not apply to a particular locality, or whether the provisions of the law which, although in form general, should be the law in a certain political subdivision of the state where the electors determined that it should not there be in force; but here these electors of the borough of the Bronx, a borough of the city of New York and a part of the county of New York, were asked to vote upon a question as to whether that borough should be constituted a county, and, if they voted in the negative, then the statute which had become a law on April 19, 1912, was to become inoperative and void.

The question is: Was this within the power of the Legislature? As I think, I have shown the act went into effect on April 19, 1912, and it then became a law of the state, unless it violated some provision of the Constitution. Its object was to create a new county of the state, and that object was accomplished by the passage of the act. The passage of the act was a distinct exercise by the Legislature of the power vested by the Constitution in the Senate and Assembly of the state of New York, and yet by virtue of this provision the electors of the borough of the Bronx were authorized by a vote cast at the following general election to repeal that act. There is nothing that postponed the taking effect of the act until after this vote of the people. Certainly some parts of the act were effective, because the act of taking a vote on the question was of itself the exercise of an act of the Legislature. There was no question submitted to the existing county of New York as to whether this act should be effective, or applied to the borough of the Bronx; but the bald power was given to the electors of the borough of the Bronx to repeal an act duly enacted by the Legislature, and this certainly seems to me to have been as much an act of the Legislature as was the original enactment of the act by the Legislature with the approval of the Governor.

Now, the Constitution (section 1, art. 3) in the broadest terms vests the legislative power of the state in the Senate and Assembly. The people, by adopting this Constitution, renounced for themselves the exercise of legislative power and vested it in their representatives. When the state of New York became a free and independent state, the legislative, as well as the executive and judicial, powers were assumed by and were vested in the people. To insure a proper exercise of the powers appertaining to these divisions of government, the people themselves have vested the legislative power in the Legislature, the executive power in the Governor, and the judicial power in the courts, as by themselves established. That the whole people of the state could

assume this power may be unquestioned; but, having conferred that power upon their representatives in the Legislature, it seems to me clear that the Legislature has no right to vest this power in a small body of voters, any more than it would in individuals or corporations. If the Legislature has the power to determine whether or not a valid law shall thereafter become "inoperative and void" by a vote of the borough of the Bronx, I see no reason why it could not make the whole provision dependent upon the vote of any other city or town in the state, or of the directors of a corporation or voluntary association. If the power exists, the method of its exercise is in the discretion of the Legislature.

Section 16 of article 3 of the Constitution provides that no bill shall be passed or become a law, except by the assent of a majority of the members of each branch of the Legislature; and section 9 of article 4 provides that before a bill which has passed the Legislature shall become a law it must be presented to the Governor for his approval, but, if he refuses to approve it, it shall become a law notwithstanding the objection of the Governor by a vote of two-thirds of the members elected to each of the branches of the Legislature. The question of the power of the Legislature to refer to the electors the question as to whether a bill passed by the Legislature should or should not be a law was first raised in this state in the case of *Barto v. Himrod*, 8 N. Y. 483, 59 Am. Dec. 506. That act was to establish free schools throughout the state, and provided that the electors of the whole state should say whether the act should or should not become a law; and it was held by the Court of Appeals that this provision rendered the whole act unconstitutional, and the reasoning of that decision, it seems to me, necessarily applies to the act now under consideration. Now, this decision, although criticised by some text-writers and by judges in other states, has never been directly questioned in this state. The Court of Appeals has stated that they would not push the doctrine determined in the *Barto Case* beyond the point which it had decided, and those cases are referred to in the opinion of Mr. Justice SCOTT; but as I read the authorities in this state the principle established in the *Barto Case* has been consistently approved.

In *People v. Fire Association of Philadelphia*, 92 N. Y. 311, 44 Am. Rep. 380, the court, in discussing the *Barto Case*, said that by the act then under consideration the people were made the Legislature and left to decide whether the bill proposed should or should not become a law. The court held that the Legislature, under the Constitution, could not so delegate its power, but was bound to determine for itself the expediency of the measure and either enact or reject it; and the court then distinguished the statute then before it from the statute under consideration in the *Barto Case* by saying:

"But nothing in that decision denied to the Legislature the right to pass a law, whose operation might depend upon, or be affected by a future contingency."

And in *Stanton v. Board of Supervisors*, 191 N. Y. 428, 84 N. E. 380, the act under consideration was one submitted to the electors of a county, and that was upheld as a recognition by the Legislature that

the electors of a county had a right to select and locate their own county buildings; that there is a manifest propriety in making a change dependent upon the affirmative vote of a majority of the electors. But in neither of the laws under consideration in the cases subsequent to the Barto Case so far as my investigation has gone, was the question as to whether a law lawfully adopted by the Legislature with the approval of the Governor was repealed if a majority of the electors of a locality voted for its repeal. Therefore, unless we are prepared to reverse the Court of Appeals in the Barto Case, it seems to me that we are bound to declare such an act repugnant to the clear provisions of the Constitution.

[2] It has been suggested, however, that although this provision is void, it would leave the act as passed by the Legislature and approved by the Governor still in full force and effect; that the only portion of the act which was void would be the portion allowing the voters of the borough of the Bronx to repeal it. I think, however, in this case, that we must hold that this provision submitting the question to the people is a substantial part of the act. It appears that this bill was originally introduced in both houses of the Legislature without this provision for a vote of the electors of the borough of the Bronx, and that section 16 of the act was added by the Legislature. It may be assumed, therefore, that the Legislature would not have passed this bill in its original form, and only allowed it to become a law by adding the provision that the voters of the borough of the Bronx should have the liberty of repealing it—a provision, as I view it, which the Legislature has no power to enact, even if it should be held that the Legislature had the power to submit a bill to the locality particularly affected by it before it became a law. Care was taken to prevent this bill from being submitted to the electors of those interested.

The present county of New York includes the territory which by this bill is created the county of the Bronx. The county officers of the county of New York are elected to perform their duties over the whole territory. Their salaries are based upon the duties which are thus required to be performed, and they are authorized to appoint the necessary number of assistants to properly perform those duties, and the property in the borough of the Bronx is, under the law as it existed before the passage of this act, required to contribute its proportion to the necessary county charges in conducting the affairs of the county; but by this act the territory within the boundaries of the county of Bronx is taken from the county of New York. There is taken from the county of New York the power to tax the property within the borough of the Bronx for county purposes. It seems to me that the whole county of New York as it existed before the passage of this act had a right to vote upon the question as to whether the territory of the borough of the Bronx was to be created as a separate county; but I am willing to assume that, if the Legislature had the power to submit the question to the electors of the whole county of New York, they had the power to submit it to a portion of the electors of the county of New York, to the electors of the county of Erie, or to any other political subdivision of the state.

My view, therefore, is that for both of the reasons heretofore expressed this act must be considered as a violation of the Constitution, and is therefore void, and I am therefore in favor of affirming the order appealed from.

McLAUGHLIN, J. I concur in the opinion of Presiding Justice INGRAHAM, in so far as he holds that the effect of section 16 of the act under consideration is to render the whole act unconstitutional.

CLARKE, J., concurs.

SCOTT, J. The relator is held by the defendant under a warrant issued out of the Court of General Sessions. He was convicted in that court on October 25, 1912, of the crime of murder, committed on June 6, 1912, within the territory constituting the borough of the Bronx, and which has, as it is asserted, been constituted the county of Bronx by virtue of an act of the Legislature passed on April 19, 1912, and known as chapter 548, Laws 1912.

The relator's contention is that the effect of that act was to deprive the Court of General Sessions in the County of New York of jurisdiction to try him for the crime of which he was accused. This question of jurisdiction can properly be raised by a writ of habeas corpus, and is the only question that can be so raised after conviction. *People v. Kaiser*, 206 N. Y. 52, 99 N. E. 195. The question of the validity of the act is therefore called directly into question and will be first considered. This question is an important one, which should be promptly decided, not only by reason of its relation to the rights of this relator, but also because it is one of great public consequence, since the act calls upon public officers to do certain things in the near future which it will be their duty to do if the act is valid, but not if it is invalid.

The title of the act is:

"An act to erect the county of Bronx from the territory now comprised within the limits of the borough of the Bronx; in the city of New York, as constituted by chapter 378 of the Laws of 1897 and all acts amendatory and supplemental thereto."

The erection of a new county is essentially a legislative act, and the first, and perhaps the most serious, objection to the validity of the act under consideration is that which is based upon the sixteenth section, which reads as follows:

"Sec. 16. At the general election in November, nineteen hundred and twelve, there shall be submitted to the voters of the borough of the Bronx the question, 'Shall the territory within the borough of the Bronx be erected into the county of Bronx?' If it shall appear that the majority of the votes cast on said question at said general election were against the erection of the county of Bronx, then this act shall be inoperative and void."

The Constitution of the state (article 3, § 1) provides that:

"The legislative power of the state shall be vested in the Senate and Assembly."

And the argument against the validity of the Bronx County Act is that by its sixteenth section, quoted above, the Legislature relinquished its constitutional power and duty, and has delegated to the people of the territory proposed to be embraced in the new county the determination of a question which by the Constitution has been committed to the Legislature alone. The question how far, and in what cases, the Legislature may make a statute contingent on approval by a vote of the people, is one which has been much discussed by the courts and by writers of text-books, and cannot as yet be said to have been generally agreed upon. Some point has been made as to the form of the question to be submitted to the people in the present case; but I consider that, so far as it concerns the power of the Legislature, it is immaterial. The point is that it is left to the people to determine by their votes whether or not the act shall be effective.

One of the earliest cases dealing with this question was *Barto v. Himrod*, 8 N. Y. 483, 59 Am. Dec. 506. That case dealt with an act of the Legislature of this state entitled "An act establishing free schools throughout the state," and provided that the electors of the whole state should say whether "this act shall or shall not become a law." It was held that the statute had not been constitutionally enacted. After quoting the provisions of the Constitution imparting all legislative power to the Senate and Assembly, and noting the single case in which the Constitution itself had provided for a reference to the people, the court said:

"The exercise of this power by the people in other cases is not expressly and in terms prohibited by the Constitution; but it is forbidden by necessary and unavoidable implication. The Senate and Assembly are the only bodies of men clothed with the power of general legislation. They possess the entire power, with the exception above stated. The people reserved no part of it to themselves, except in regard to laws creating a public debt, and can, therefore, exercise it in no other case."

After referring to some features of the act, the court proceeded:

"It results, therefore, unavoidably from the terms of the act itself that it was the popular vote which made the law. The Legislature prepared the plan or project, and submitted it to the people to be passed or rejected. The Legislature had no power to make submission, nor had the people the power to bind each other by acting upon it. They voluntarily surrendered that power when they adopted the Constitution. * * * It is not denied that a valid statute may be passed, to take effect upon the happening of some future event, certain or uncertain; but such a statute, when it comes from the hands of the Legislature, must be law in present, to take effect in futuro. * * * But if by the terms of the act it had been declared to be the law from the time of its passage, to take effect in case it should receive a majority of votes in its favor, it would nevertheless have been invalid, because the result of the popular vote upon the expediency of the law is not such a future event as the statute can be made to take effect upon, according to the meaning and intent of the Constitution."

This case stands to-day as a binding authority upon the precise question which it decided, and its reasoning is, in fact, generally followed throughout the country, in so far as concerns general statutes made to be dependent upon the popular vote of all the electors of the state, although very eminent jurists, such as Judge Redfield and Judge

Cooley, have expressed dissent from its reasoning. *State v. Parker*, 26 Vt. 357; *Cooley's Const. Lim.* (7th Ed.) p. 167 et seq. It has, however, been followed by a majority of the justices comprising the Supreme Court in Massachusetts. In re Opinion of the Justices, 160 Mass. 586, 36 N. E. 488, 23 L. R. A. 113.

The language used in *Barto v. Himrod* was sufficiently strong to invalidate any attempt on the part of the Legislature to submit to the people the question whether any proposed act should or should not go into effect. It soon began to be limited, however, to the precise question decided; the Court of Appeals saying in *People v. Fire Association of Philadelphia*, 92 N. Y. 311-318 (44 Am. Rep. 380):

"This court has steadily declined to push the doctrine of *Barto v. Himrod* beyond the point which it decided."

Acts were passed authorizing certain towns and villages to incur obligations in behalf of projected railroads; the question whether they should or should not incur such obligations being left to the determination of the electors, or local authorities of the several municipalities. These acts were easily distinguished from *Barto v. Himrod*, on the ground that the acts themselves took effect and became law solely by act of the Legislature, which did no more than to leave it to the determination of the parties interested whether or not they would bring themselves within the law. *Bank of Rome v. Village of Rome*, 18 N. Y. 38; *Starin v. Town of Genoa*, 23 N. Y. 439; *Clarke v. City of Rochester*, 28 N. Y. 605.

In *People v. Fire Association of Philadelphia*, 92 N. Y. at page 317, 44 Am. Rep. 380, the court explained what it understood to have been the specific point decided in *Barto v. Himrod*. Speaking of that case it said:

"What was then denominated the School Law came from the hands of the Legislature, not as a law, but as a proposition. Whether it should be a law or not was precisely the question submitted to the popular vote. The Legislature proposed the law, but left it to the people to enact. The process, carried out and applied to all bills, would have resulted in a complete abdication by the Senate and Assembly of their authority and function. Instead of making laws, they would simply have suggested them, reported them for consideration, but left the judgment upon them—the determination of their expediency and wisdom—to an authority outside their own. As to the School Law, the people were made the Legislature, and left to decide whether the bill proposed should or should not become a law. This court held that the Legislature, under the Constitution, could not so delegate its power, but it was bound to determine for itself the expediency of the measure and either enact or reject it. But nothing in that decision denied to the Legislature the right to pass a law whose operation might depend upon, or be affected by, a future contingency. The opinions expressly conceded the existence of this power. It was not denied that a valid statute may be passed to take effect upon the happening of some future event, certain or uncertain."

Later cases in the Court of Appeals have discussed *Barto v. Himrod* along the same lines as in those already cited. It will be necessary to refer here to only one, and that the latest expression of the court upon the subject. The act under consideration was one requiring the question of the removal of a county seat and county buildings in the county of Essex to be submitted to the electors of the

county. The validity of the act was challenged upon the ground that it involved an unconstitutional delegation of the power of the Legislature. The court referred to and discussed *Barto v. Himrod* and the other cases hereinbefore referred to. It pointed out the fact that the Legislature possessed very wide powers, some not strictly legislative, but covering all departments of the government, including the administrative and executive, and, as well, in a limited sense, the judicial department. As to the latter class of powers, it quoted Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat. 1-42 (6 L. Ed. 253), in which he said:

"It will not be contended that Congress can delegate to the courts or any other tribunal powers which are strictly and exclusively legislative; but Congress may certainly delegate to others powers which the Legislature may rightfully exercise itself"

—citing as illustrative the power of the Congress either to itself prescribe rules of procedure in judicial actions or to leave the power to make such rules to the courts. The Court of Appeals then said:

"But, while general statutes must be enacted by the Legislature, it is plain the power to make local regulations having the force of law in limited localities may be committed to other bodies representing the people in their local divisions, or to the people of those districts themselves. Our whole system of local government in cities, villages, counties, and towns depends upon that distinction. The practice has existed from the foundation of the state, and has always been considered a prominent feature in the American system of government. It is recognized in the Constitution itself, in that section which prescribes to the Legislature the duty to provide for the organization of cities and incorporated villages, etc., restricting their power of taxation and borrowing. We have thus distinctly presented the differences between enactments pertaining to the whole state and those pertaining to localities, and such distinction is not left to those which are local or general laws; for general laws may be, and in certain cases must be, enacted which pertain to localities only. * * * While it may not be necessary, the Legislature has generally recognized the right of the electors of a county to select and locate their own county buildings. They, of all persons, can best determine the place that would be most accessible and convenient for the transaction of the business of a county. There is, therefore, a manifest propriety in making a change dependent upon the affirmative vote of a majority of the electors." *Stanton v. Board of Supervisors*, 191 N. Y. 428, 84 N. E. 380.

The question whether or not, and under what circumstances, the Legislature may lawfully commit to the determination of the electors the question whether an act shall become operative, has been considered in innumerable cases in other jurisdictions. The general rule to be deduced from the decisions of our own state, and from the best considered decisions in other states, appears to be that the Legislature may not lawfully so submit a mere proposition for a law, or a statute affecting the whole state and establishing the general policy of the state, but that it may lawfully so submit statutes, whether local or general in form, which affect only the people of a separate district, locality, or municipal corporation, and as to the desirability of which the people of the locality are best able to judge. This is subject to the condition that the statute when it leaves the Legislature must be a complete act, ready to go into full operation when accepted by the electors of the district to be affected, to whom is submitted

only the question whether or not the act as framed by the Legislature shall become operative.

In my opinion, the act under consideration falls within the class of laws which may constitutionally be submitted for acceptance or rejection by the people of the territory proposed to be erected into a county. It directly affects only the people of that territory. Upon them is to fall the increased burden imposed by the act, and to them will accrue the advantages, if any, attendant upon the establishment of a separate county government. The Legislature has the undoubted right under our Constitution to erect a new county without consulting the wishes of the persons most directly interested; but it is not unreasonable, and not, I think, an abdication of legislative duty and power, to consult the preference of the persons directly interested.

It is not unreasonable that the Legislature should be unwilling to impose added burdens upon the residents of a particular district, or, on the other hand, to withhold supposed benefits, except with the consent of those to be affected. The precise question has not heretofore arisen in this state, but the solution at which I have arrived is not only in harmony with the trend of decisions in this state, but is the rule that has been universally applied in other states where the precise question has arisen. *People v. McFadden*, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66; *People v. Nally*, 49 Cal. 478; *Erlinger v. Boneau*, 51 Ill. 94; *People v. Salomon*, 51 Ill. 37; *People v. Reynolds*, 10 Ill. (5 Gilm.) 1; *State v. Elwood*, 11 Wis. 17.

It has been suggested that the reference should have been to the electors of the whole county of New York, out of which the new county is to be carved. I am unable to see that the electors of that part of New York county not set apart have any interest in the question whether or not the borough of the Bronx shall be erected into a separate county, or at least any interest that is comparable to that which the electors of the Bronx may be presumed to have. At all events, the determination whether the matter should or should not be referred to popular vote, and, if so referred, to whom the reference should be made, was one which rested alone in the discretion of the Legislature, which we have no power to review. Assuming, then, that the act was not rendered invalid by the reference to a vote of the electors contained in its sixteenth clause, there are still other questions to be considered, depending upon when the act became or will become fully operative.

The first section of the act provides that the territory now comprising the borough of the Bronx—

"Is hereby set off from the county of New York and is erected into the county of Bronx as a separate and distinct county of the state of New York from and after the date of taking effect of this act."

And the last section provides that:

"This act shall take effect immediately."

The act provides for an election of county officers in November, 1913, who are to take office on January 1, 1914, and further provides that:

"In the meantime in order that no existing rights may be prejudiced and to prevent an interregnum the county officers of New York county shall continue to have their present jurisdiction, powers and duties in the territory within the county of Bronx until the first day of January, 1914, except as herein otherwise provided."

The objection to the act based upon these clauses is that creating the county to become such at once, and providing that the officers of other counties shall continue to have jurisdiction therein, is equivalent to an appointment by the Legislature of county officers who are required by the Constitution to be chosen by the electors. In my opinion this objection is not tenable. It is impossible in the nature of things that a new county can be created, ready equipped with the necessary county government. Some time must necessarily elapse before the erection of territory into a new county, and the election and qualification of the constitutional officers and courts to carry on its business. In such a case the county is created as a geographical division on the passage of the act erecting it, but does not become a county for political and administrative purposes until its officers have been selected and have qualified. Otherwise there would be an interregnum, during which there would be no county government. The rule in such cases is that the erection of the new county by the division of an old county does no more than provide for the organization of such counties, and until the new county is actually organized and its officers qualified the territory remains subject to the jurisdiction of the old county. *Meehan v. Zeh*, 77 Minn. 63, 79 N. W. 655; *Clark v. Goss*, 12 Tex. 395, 62 Am. Dec. 531; *O'Shea v. Twohig*, 9 Tex. 336; *Milk v. Kent*, 60 Ind. 226. See, also, *Nassau County v. Phipps*, 43 App. Div. 595, 60 N. Y. Supp. 249. In such a case the county officers of the old county exercise jurisdiction over the territory comprising the new county, not as officers of the new county, but because their original authority over the territory is preserved until the officers of the new county are properly selected. Obviously it was this result that the draftsman of the Bronx County Act intended to effect by the inclusion of the sentences quoted from the fifth section of the act.

The act is not a "special city law," and consequently was not one which should have been submitted to the mayor of the city of New York. *McGrath v. Grout*, 171 N. Y. 7, 63 N. E. 547. I am therefore of the opinion that the act under consideration is valid and free from constitutional objection.

It remains to consider the relator's contention that, assuming the act to be valid, the Court of General Sessions was without jurisdiction after its passage to try persons accused of crimes committed within the territory set apart to form Bronx county. The Legislature has attempted, and as I think successfully, to preserve to the Court of General Sessions, and other courts now established within the county of New York, jurisdiction until January 1, 1914, over all matters, civil and criminal, arising within the confines of

Bronx county that they had before the passage of the act. The ninth section of the act reads as follows:

"From and after the time of the taking effect of this act the Supreme Court, and on and after the first day of January, nineteen hundred and fourteen, the County Courts shall have jurisdiction over all crimes and misdemeanors committed within the territory of the county of Bronx, except as herein otherwise provided; within the county of Bronx the Courts of Special Sessions and Magistrates' Courts as now constituted by law shall have jurisdiction of such offenses as may be tried and determined by such Courts of Special Sessions and by such Magistrates' Courts as now constituted under and by virtue of chapter three hundred and seventy-eight of the Laws of eighteen hundred and ninety-seven, and all acts amendatory thereof and supplemental thereto, the same as if this act had not been passed: Provided, however, that the several courts within the county of New York and within the First judicial district of the Supreme Court of the state of New York shall have and retain jurisdiction of all actions, proceedings and matters that shall have been rightfully commenced in said courts prior to the said first day of January, nineteen hundred and fourteen, and the several courts of the county of Bronx having criminal jurisdiction on and after the first day of January, nineteen hundred and fourteen, shall have the same jurisdiction of crimes, offenses and misdemeanors that shall have been committed in the said territory that the courts of the county of New York having criminal jurisdiction now have in the county of New York, provided proceedings shall not have been already rightfully commenced in any of the courts of the county of New York for the prosecution of the said crimes, offenses and misdemeanors, in which case, the said courts within the county of New York shall have and retain jurisdiction of the same for the full, complete and final disposition thereof, and until the said first day of January, nineteen hundred and fourteen, the said courts of the county of New York, and in the said First judicial district, shall retain and exercise in all civil and criminal proceedings the same jurisdiction they now have."

Much that has already been said as to the preservation of the jurisdiction and authority of county officers applies with equal force to the preservation of the jurisdiction of the local courts of the county.

Reading the act as a whole, it is not difficult to find in it an intention on the part of the Legislature that parts of the act shall not become operative until January 1, 1914, notwithstanding the act itself is declared to take effect immediately upon its passage. That means no more than it becomes a part of the statute law of the state on the day of its passage. When its various provisions are to become operative must be ascertained from the body of the act itself. There is no constitutional reason why the Legislature may not enact that different parts of the same statute shall take effect at different times, and this is precisely what the Legislature has done in the present case. The clear intent of the statute is that the jurisdiction of the Court of General Sessions to try indictments for offenses committed within the city and the old county of New York shall continue unimpaired until January 1, 1914, when a County Court is to be established in Bronx county, which will thereafter have jurisdiction over crimes committed in that territory and as to which proceedings have not then been rightfully commenced in the county of New York. I see nothing ambiguous

about this provision, and nothing that is beyond the constitutional power of the Legislature to enact.

It follows that the order appealed from should be affirmed.

DOWLING, J., concurs.

(70 Misc. Rep. 220.)

FOLEY v. NEW YORK SAVINGS BANK.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

1. **BILLS AND NOTES (§ 70*)—ORDER TO PAY—"ACCEPTANCE"—EVIDENCE.**

The mere retention by the drawee of an order to pay money is not an acceptance, unless it be under circumstances from which a promise to pay may be presumed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 120, 121; Dec. Dig. § 70.*]

For other definitions, see Words and Phrases, vol. 1, pp. 53-57.]

2. **GIFTS (§ 30*)—MONEY ON DEPOSIT—TITLE.**

The delivery of an order for money on deposit, as a gift, does not pass title until the order is accepted or paid; and where it is necessary to present a bank book, as well as the order, it is necessary to show that the book was delivered with the intent that title to it pass also.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 52-57, 65; Dec. Dig. § 30.*]

3. **GIFTS (§ 41*)—BILLS AND NOTES—TITLE—REVOCATION.**

Unless title has passed, the death of the donor of an order to pay money revokes it.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 20; Dec. Dig. § 41.*]

4. **WITNESSES (§ 150*)—TRANSACTIONS WITH DECEASED PERSONS—"INTEREST DERIVED FROM DECEASED PERSON."**

Where a depositor in a bank dies leaving an order to the plaintiff for the deposit, but the title to the gift did not pass, the bank's interest in the deposit is an interest derived from, through, or under the deceased person, within Code, § 829, relating to evidence of transactions with deceased persons, and the plaintiff could not testify to transactions between himself and deceased.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 653-657; Dec. Dig. § 150.*]

Appeal from City Court of New York, Trial Term.

Action by James Foley against the New York Savings Bank. Judgment for plaintiff, and defendant appeals. Reversed.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Webber & Webber, of New York City (Edgar L. Ryder, of New York City, of counsel), for appellant.

Thomas J. Meehan, of New York City (Frederick W. Hamberg, of New York City, of counsel), for respondent.

LEHMAN, J. The complaint in this action alleges two causes of action. The first cause of action is based upon an alleged acceptance and promise to pay by the defendant of an order or draft drawn by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Timothy Murphy upon the defendant. The second cause of action is based upon an alleged assignment by Murphy of his account in the defendant bank.

At the trial it appeared that Murphy upon his deathbed had executed a writing as follows:

"\$1,529.85.

New York, May 14, 1912.

"New York Savings Bank: Pay to James Foley, or bearer, balance of account dollars on account of Bank Book No. 202670.

"Present residence: 201 W. 141.

"Signature: Timothy X Murphy."
his
mark

This order was made and acknowledged before a notary public, who had been sent for that purpose by the bank upon the plaintiff's request. The plaintiff testified, over objection and exception, that previous to the making of the draft Murphy stated to him that he wished him to get the money, saying:

"If I live, well and good; and if I do not, you can have it, and see after me, and bury me decently, and have a mass in church, and put a stone over my head."

After Murphy made out this order, the notary delivered it to the plaintiff, who presented it to the bank. The bank retained the order until after Murphy's death, and then refused to pay it. At the close of the testimony both sides moved for the direction of a verdict, and the trial justice directed a verdict in favor of the plaintiff.

[1] It seems to me that the plaintiff has failed to sustain the first cause of action, because the evidence does not justify a finding that the bank ever accepted the order before Murphy's death. It is true that they retained the order, but apparently they retained the order because they were not convinced that they should pay it. It is also true that the draft and bank book were both marked "Closed by payment;" but apparently this notation was placed upon the papers by mistake, and stricken off before the papers were returned to the plaintiff. In order that a retention of an order should give rise to an acceptance, which will raise a primary obligation on the part of the drawee, the retention must be under circumstances from which a promise to pay may be presumed.

[2] I think that the plaintiff has failed to sustain his second cause of action, because the evidence is insufficient to show any valid or complete gift of the bank account. The decedent concededly made no absolute gift of the account to the plaintiff, and the plaintiff has no claim upon this account, unless the attempted gift is good as a gift causa mortis. A gift, whether inter vivos or causa mortis, becomes complete only when title to the subject-matter has actually passed. Until that time the gift is revocable, and the death of the donor acts as a revocation. For this reason it has been generally held that the delivery of a check or order to pay constitutes no valid gift which becomes complete before the check or order is accepted or paid, while the delivery of a bank book or certificate of deposit with intent to pass title to the indebtedness evidenced by the book or certificate does constitute a complete gift. See *Glennan v. Rochester Trust & S. Dep.*

Co., 152 App. Div. 316, 136 N. Y. Supp. 747; *Ridden v. Thrall*, 125 N. Y. 572, 26 N. E. 627, 11 L. R. A. 684, 21 Am. St. Rep. 758.

In this case the evidence is at most sufficient to show only such a delivery of an order drawn on the bank; but that order was certainly revocable by notice to the bank, and even knowledge that such an order was drawn does not render it obligatory on the bank to retain all or part of the deposit to meet it. See *Attorney General v. Continental Life Insurance Co.*, 71 N. Y. 325, at page 331, 27 Am. Rep. 55. Under the contract between the bank and its depositor, the order was not even a valid order, unless presented with the bank book. The bank book is therefore made the actual evidence of the debt from the bank, and no title to the debt can pass, except by actual assignment, or through some form of delivery of the bank book with intent to pass this title.

[3] Unless such title has passed, the death of the donor revokes the order. I do not mean by this statement, of course, that no delivery of an order to pay can of itself constitute a valid assignment; for there are many cases in this state in which orders drawn upon a particular fund have been held to constitute assignments either *pro tanto* or of the entire fund. In all those cases, however, the order was complete in itself and given for value, and the circumstances clearly showed an intent by the assignor to divest himself of title to the subject-matter covered by the order. Where, however, the title to the particular fund is evidenced by particular indicia of title, and the owner of the fund can obtain the fund only by an order and the presentation of these indicia of title, an order constitutes practically only a power to draw the fund, and title to the fund passes only when the fund is reduced to possession or the indicia of title are delivered with intent to pass title to the fund. It is true that in this case the plaintiff did present the bank book with the order; but the mere possession of the bank book is but one of several elements necessary to the establishment of the plaintiff's cause of action. In addition, the plaintiff must show that he came into possession of the bank book by delivery from the decedent, with intent on the decedent's part to divest himself of all right and title to the bank book. See *Dinley v. McCullagh*, 92 Hun, 454, 36 N. Y. Supp. 1007.

[4] The trial justice erred, also, in the admission of plaintiff's testimony of personal transactions with the decedent. The bank's interest in the deposit fund is clearly an interest derived from, through, or under the deceased person, within the meaning of section 829 of the Code, and this fact appears, not only from the evidence, but from the pleadings.

Judgment should therefore be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

(79 Misc. Rep. 260.)

IVY COURT REALTY CO. v. KNAPP.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

1. LANDLORD AND TENANT (§ 109*)—LEASE—SURRENDER AND ACCEPTANCE.

That a tenant informed the landlord's agent that he had a lot of sickness, and was financially embarrassed and unable to pay the rent, and asked to be released from the lease and moved from the premises, did not constitute a surrender of the lease and an acceptance, where the agent declined to release him.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 350-360, 363-365, 368-371; Dec. Dig. § 109.*]

2. ACCORD AND SATISFACTION (§ 8*)—PAYMENT OF JUDGMENT—INDEPENDENT CLAIM FOR RENT.

A tenant's payment of a judgment for one month's rent was not an accord and satisfaction of an independent liability for rent subsequently accruing.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 60-65, 84, 87; Dec. Dig. § 8.*]

3. ACCORD AND SATISFACTION (§ 7*)—PAYMENT WITH BORROWED MONEY.

That the payment of an admitted liability on a judgment for rent was made with money borrowed by the tenant did not make it a payment by the lender, so as to render it an accord and satisfaction of the liability for rent subsequently accruing.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 46-59, 66; Dec. Dig. § 7.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by the Ivy Court Realty Company against Robert Russell Knapp. From judgment for defendant, plaintiff appeals. Reversed, and judgment directed for plaintiff.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Louis E. Felix, of New York City, for appellant.

Harold C. Knapp, of New York City, for respondent.

PAGE, J. This action was brought to recover rent for the months of June, July, August, and September, 1911, at the rate of \$55 a month. The answer denies that the defendant ever entered into any agreement of lease as alleged in the complaint, and that he still remains in possession of the premises, and sets up as separate defenses an accord and satisfaction and a surrender and acceptance. The trial justice gave judgment for the defendant. The facts are substantially as follows, treating every contested fact as settled in the defendant's favor:

[1] The written lease signed by the defendant was received in evidence, and no attempt made to substantiate the denial thereof in the answer. During the month of April or May the defendant informed the plaintiff's agent that he had "a lot of sickness," that he was financially embarrassed and unable to pay the rent, and asked to be released from the lease. The agent declined to release him, and he moved. An action was brought against him for the May rent, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

judgment was recovered for \$55 rent, together with interest and costs, on June 15, 1911. The exact amount of the judgment was not stated upon the record in this trial. In February, 1912, the plaintiff's attorney threatened to issue a garnishee execution against the salary of the defendant, and defendant proposed to pay \$50 in settlement of all claim against him. This proposition the attorney accepted, and the following receipt was prepared:

"Received from Russell R. Knapp the sum of fifty (\$50) dollars, receipt whereof is hereby acknowledged, in full payment and settlement of the judgment heretofore entered by the Ivy Court Realty Company against the said Russell R. Knapp by reason of the amount due therein for rent, etc., said payment being in full settlement of same.

"[Signed] Ivy Court Realty Co., by Sophian, Manager."

When plaintiff's attorney produced this receipt, defendant objected, and the attorney struck out the word "same," and inserted "all rent." What authority he had to alter a receipt signed by another is not obvious; and he testifies that at that time he knew of no other claim for rent against the defendant than that merged in the judgment. It is this payment upon which the defendant relies to establish an accord and satisfaction of the claim for \$220, the four months' rent in this suit, which was subsequently brought.

[2] It is conceded that there was more than \$50 due at the time of this payment upon the judgment. Therefore, giving the defendant's testimony full effect, the transaction would not constitute an accord and satisfaction. The judgment was a fixed and liquidated claim, which the defendant was under obligation to pay, entirely separate and distinct from the claim for the four months' rent, and it is well settled, as stated in *Mance v. Hossington*, 205 N. Y. 33, 36, 98 N. E. 203, 204, that:

"The payment of an admitted liability is not a payment or a consideration for an alleged accord and satisfaction of another independent alleged liability. *Ryan v. Ward*, 48 N. Y. 204 [8 Am. Rep. 539]; *Nassoly v. Tomlinson*, 148 N. Y. 326 [42 N. E. 715, 51 Am. St. Rep. 695]; *Laroe v. Sugar Loaf Dairy Co.*, 180 N. Y. 367 [73 N. E. 61]. An accord and satisfaction requires a new agreement and the performance thereof. It must be an executed contract, founded upon a new consideration. *Nassoly v. Tomlinson*, supra; *Jaffray v. Davis*, 124 N. Y. 164 [26 N. E. 351, 11 L. R. A. 710]; *Kromer v. Helm*, 75 N. Y. 574 [31 Am. Rep. 491]; *Fuller v. Kemp*, 138 N. Y. 231 [33 N. E. 1034, 20 L. R. A. 785]."

In the case of *Mance v. Hossington*, a receipt had been given in the following form:

"Received of G. A. Hossington \$17.00 in full of all accounts and demands to date."

It was shown that there was a conceded balance due and unpaid for services of that amount, and it was held that such payment was not an accord and satisfaction of another disputed and unliquidated claim existing prior to the date of the receipt.

[3] Defendant in the case at bar testified that he borrowed the money from his employer, and from this his counsel seeks to argue that the payment was made by a third person. There is nothing in this contention. It makes no difference from what source the defendant procured the money. It was his payment of an obligation which he

was bound to pay. The evidence does not establish a surrender and acceptance thereof. On the contrary, defendant's own testimony establishes a refusal to accept a surrender.

The judgment should therefore be reversed, with costs to appellant, and judgment directed for the plaintiff for \$220, with interest and costs. All concur.

(78 Misc. Rep. 563.)

GINSBURG v. WOLF et al.

(Supreme Court, Trial Term, New York County. December, 1912.)

MASTER AND SERVANT (§ 287*)—INJURIES TO SERVANT—INCOMPETENT FELLOW SERVANT—PROMISE TO DISCHARGE.

Where neglect of a fellow servant working with plaintiff, a minor, at a machine, was the cause of plaintiff's hand being caught and injured, and defendant prior to the accident had promised to discharge the incompetent fellow servant, motions to dismiss the complaint on the evidence and, after verdict for plaintiff, for a new trial, will be denied.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1051–1067; Dec. Dig. § 287.*]

Action by Harry Ginsburg, by Rachel Ginsburg, guardian ad litem, against Harry Wolf and Charles Wolf, copartners doing business under the firm name and style of the New York Embossing Company. On motions to dismiss complaint on the evidence and, after verdict for plaintiff, for a new trial. Motions denied.

I. Hershfield, of New York City, for plaintiff.

B. L. Pettigrew, of New York City, for defendants.

PENDLETON, J. The action was for negligence. Plaintiff's hand was caught between the two plates of the machine. Motions were made to dismiss the complaint on the evidence and, after a verdict for the plaintiff, for a new trial. There was evidence to support the contention, and it must be assumed that the promise to discharge the incompetent fellow servant was made and plaintiff was requested to continue work, and that the fellow servant was negligent in failing to push the leather through, and that plaintiff was free from negligence, all as claimed by plaintiff. The danger was due to the risk involved in plaintiff's putting his fingers between the plates, necessitated by the failure to push the leather through. If the promise had been to relieve the risk by supplying a tool or appliance for pulling out the leather without inserting the fingers, the case would have been on all fours with the case of *Rice v. Eureka Paper Co.*, 174 N. Y. 385, 66 N. E. 979, 62 L. R. A. 611, 95 Am. St. Rep. 585, where the promise was to supply a band shifter. The promise to relieve the risk by substituting a competent man, who would push the leather through, involves no different principle. In both cases the promise was to furnish relief from the risk, and the injury was due to the failure to do so.

Defendant contends the risk was both known and obvious. In cases such as this, that the risk was known or obvious is not ma-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

terial. The danger in cases of complaint by an employé and promise of remedy by an employer is always known; otherwise the complaint and promise would have no meaning. The promise by the employer, or request or other inducement to continue after notice, constitutes an agreement by the employer not to claim, or a waiver of the assumption of risk by the employé growing out of the fact that it is known or so obvious as to be the equivalent of actual knowledge, and shifts the assumption of risk from the employé to the employer. *Rice v. Eureka Paper Co.*, 174 N. Y. 385, 66 N. E. 979, 62 L. R. A. 611, 95 Am. St. Rep. 585; *Citrone v. O'Rourke Eng. Const. Co.*, 113 App. Div. 518, 99 N. Y. Supp. 241, reversed on another ground 188 N. Y. 339, 80 N. E. 1092, 19 L. R. A. (N. S.) 340; *Lobasco v. Moxie Nerve Food Co.*, 127 App. Div. 677, 111 N. Y. Supp. 1007; *Stokes v. Barber Asphalt Paving Co.*, 134 App. Div. 363, 119 N. Y. Supp. 37; *Leaux v. City of New York*, 87 App. Div. 405, 84 N. Y. Supp. 511.

Defendant urges that the promise was to discharge Gramitsky on Saturday, i. e., the day following, and that until time for performance of the promise and default the risk was the employé's. The rule is, however, that the promise by the employer is in effect an agreement to waive any claim of assumption of risk by the employé *for the period set by the promise*, or, if no time for performance is fixed, until the expiration of a reasonable time for performance after the making of the promise. See cases *supra*. The inducing of the employé to continue is the foundation of the inference of the employer's agreement to assume the risk.

Defendant also contends that the act of Gramitsky was not the proximate cause of the injury, but the failure of the plaintiff to take his fingers out in time. The plaintiff was placed by Gramitsky's act in a place of danger, to wit, inserting his fingers between the plates. In that position he was required to exercise due care. This he did, as the jury has found. It is doubtless true that, if plaintiff had withdrawn his fingers in time, the injury would not have occurred. This might be regarded as the immediate cause, but the originating cause was the act of Gramitsky. When there is a break in the chain of causes by the intervening of a new agency, the question as to whether the original cause is the proximate cause, as the term is used in law, depends on whether the accident is within the ken of reasonable prudence or foresight, that is, might reasonably be apprehended as a result of the original cause. If so, it is deemed the natural consequence, and the original cause is the proximate cause. *Gibney v. State of New York*, 137 N. Y. 1, 33 N. E. 142, 19 L. R. A. 365, 33 Am. St. Rep. 690; *O'Brien v. Erie R. Co.*, 139 App. Div. 291, 123 N. Y. Supp. 1040; *Leeds v. New York Tel. Co.*, 178 N. Y. 118, 70 N. E. 219; *Rowley v. Newburgh Light, Heat & Power Co.*, 151 App. Div. 65, 135 N. Y. Supp. 944.

In this case the original cause was the act of Gramitsky in not pushing the leather through. That the plaintiff would be compelled to put his fingers between the plates of the machine and might

be caught is certainly within the above rule, and under the above authorities the act of Gramitsky must be deemed the proximate cause of the accident. In *Gibney v. State of New York*, 137 N. Y. 1, 33 N. E. 142, 19 L. R. A. 365, 33 Am. St. Rep. 690, a father and a child were on a defective bridge. The child fell through, and the father, in an effort to save the child, was drowned. It is urged that, while the negligence in maintaining a defective bridge was the cause of the child's death, it could not be regarded as the cause of the father's death. The court says:

"But while the immediate cause of the peril to which the father exposed himself was the peril of the child, for the purpose of administering legal remedies, the cause of the peril in both cases may be attributed to the culpable negligence of the state in leaving the bridge in a dangerous condition. There is great difficulty in many cases in fixing the responsible cause of an injury. When there is a break in the chain of causes by the intervention of a new agency, and then an injury happens, is it to be attributed to the new element; and is this to be treated as the originating cause, to the exclusion of the antecedent one, without which no occasion would have arisen for the introduction of a new element? It is impossible to formulate a rule on the subject capable of definite and easy application. The general rule is that only the natural and proximate results of a wrong are those of which the law can take notice. But where a consequence is to be deemed proximate within the rule is the point of difficulty. In this case these elements are present: Culpable negligence on the part of the state; the falling of the child into the canal through the opening which the state negligently left in the bridge; the natural and instinctive act of the father in plunging into the canal to rescue the child; the drowning of both; the fact that such an accident as that which befell the child might reasonably have been anticipated as the result of the condition of the bridge; and the further consideration that a parent or other person, seeing the child in the water, would incur every reasonable hazard for its rescue. We think it may be justly said that the death both of the child and parent was the consequence of the negligence of the state, and that the unsafe bridge was in a legal and juridical sense the cause of the drowning of both."

In the case of *O'Brien v. Erie R. Co.*, 139 App. Div. 291, 123 N. Y. Supp. 1040, decedent, who was working upon the tracks of the railroad company, tried to warn a fellow workman of the danger from an approaching train. For that purpose he went upon the track and was killed. It was held that the negligence of the defendant in the operation of the train was the proximate cause of the death, citing above case of *Gibney v. State of New York*, 137 N. Y. 1, 33 N. E. 142, 19 L. R. A. 365, 33 Am. St. Rep. 690. In the case of *Burns v. City of Yonkers*, 83 Hun, 211, 31 N. Y. Supp. 757, the injury was due to a balking horse backing over a defective embankment. Held, the negligence in maintaining the defective embankment was the proximate cause of the accident.

Motions denied, 30 days' stay, and 30 days to make a case.

Motions denied.

PEOPLE *ex rel.* WHEELER *et al.*, Election Com'rs, *v.* HOLMES,
County Treasurer.

(Supreme Court, Special Term, St. Lawrence County. June, 1912.)

1. COUNTIES (§ 134*)—ELECTION OFFICERS—COMPENSATION.

Under Election Law (Consol. Laws 1909, c. 17) § 193, as amended by Laws 1911, c. 649, providing that the salaries of commissioners of elections outside of the city of New York shall be fixed by the board of supervisors appointing the commissioners, and section 197, as amended by the same act, providing that the board of elections shall have power to fix the number, salaries, etc., of clerks and employes, and to appoint and remove them at pleasure, an agreement between the board of supervisors and the board of elections that the salary fixed by the board of supervisors should include all expenses for necessary labor and clerk hire was valid, and, while it did not limit the power of the board of elections to appoint and remove employes, it prevented such board from making their salaries a county charge.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 202; Dec. Dig. § 134.*]

2. COUNTIES (§ 132*)—ELECTION OFFICERS—COMPENSATION.

An agreement between a board of supervisors and a board of elections that the salaries of commissioners of election, fixed by the board of supervisors, should include all expenses for labor and clerk hire, was not annulled, or its performance rendered impossible, by the subsequent enactment of Laws 1911, c. 891, increasing the duties of the board of elections.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 208; Dec. Dig. § 132.*]

3. COUNTIES (§ 134*)—ELECTION OFFICERS—COMPENSATION.

An agreement between a board of supervisors and a board of elections that the salaries of the commissioners of election, fixed by the board of supervisors, should include all expenses for labor and clerk hire, could not be terminated by the board of elections without the consent of the board of supervisors.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 202; Dec. Dig. § 134.*]

4. COUNTIES (§ 134*)—ELECTION OFFICERS—COMPENSATION.

Even if Election Law (Consol. Laws 1909, c. 17) § 193, as amended by Laws 1911, c. 649, providing that the salaries of commissioners of elections outside New York City shall be fixed by the board of supervisors appointing the commissioners, and may be changed from time to time by resolution of that board, should be read in connection with County Law (Consol. Laws 1909, c. 11) § 12, subd. 5, as amended by Laws 1911, c. 359, authorizing boards of supervisors to fix the salary of county officers, but providing that the salary or compensation of an officer or employe elected or appointed for a definite term shall not be increased or diminished during the term, the board of supervisors could grant an allowance for clerk hire to a board of elections, who had agreed that the salaries of the commissioners of election should include expenses for clerk hire.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 202; Dec. Dig. § 134.*]

Mandamus by the People, on relation of Fred J. Wheeler and another, as Commissioners of Election of the County of St. Lawrence, against George M. Holmes, as County Treasurer. Peremptory writ denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Lawrence Russell, of Canton, for relators.

George H. Bowers, of Canton, for defendant.

WHITMYER, J. The relators were appointed commissioners of election of the county of St. Lawrence by the board of supervisors of said county on the 1st day of August, 1911, for a term to expire on the 1st day of January, 1913, under the provisions of chapter 649 of the Laws of 1911, which amended the Election Law (Laws of 1909, c. 22 [Consol. Laws 1909, c. 17]) generally. As such commissioners, they constituted the board of elections of the county. Laws 1911, c. 649, § 190. Under the law, the board of supervisors of the county had the power to fix the salaries of the commissioners and to change them from time to time by resolution (Id. § 193), and the board of elections had the power to fix the number, salaries, duties, and rank of its chief clerks, clerks, assistant clerks, and stenographers, and to appoint, and at pleasure remove, and to fix the salaries of, all employes of the board (Id. § 197). The appointments were made and the salaries were fixed by the board of supervisors under an agreement with the commissioners that such salaries, \$800 per year for each commissioner, were to include all their expenses for necessary labor and clerk hire.

On October 18, 1911, after the commissioners had entered upon the performance of their duties, chapter 891 of the Laws of 1911, entitled "An act to amend the Election Law in relation to nominations and primaries," was passed. The act became effective November 15, 1911. It did not repeal the law under which relators were appointed commissioners, but added to their duties as such. They continued in office, and on December 10, 1911, sent a report to the board of supervisors, as required by the law under which they were appointed, which, so far as material here, contained the following:

"Owing to the enactment of the Primary Law, which was not anticipated when the salary and agreement with the board was made, and the very large amount of labor added to the board's duties, and it being impossible for the board to do this additional work without help, we have employed a clerk at a salary of \$600 per year and a stenographer at an expense of \$400 per year. The board would be pleased if your board would make provision for the payment of the salaries of the clerk and stenographer monthly."

The board did not make such provision. It is conceded that the county treasurer has sufficient funds to pay. Relators have continued in office, and have brought this proceeding to compel payment.

[1] The board of supervisors had the power, under the law, to fix the salaries of the commissioners, and the latter had the power to appoint and remove clerks and stenographers and to fix their salaries. The board of supervisors at first fixed such salaries by resolution at the sum of \$500 per year for each commissioner, without agreement. That resolution was rescinded on the day after its adoption, and another was adopted by which such salaries were fixed at the sum of \$800 per year each, upon the agreement between the parties that the same should include all expenses for nec-

essary labor and clerk hire. It is apparent that the parties contemplated that assistance might be required, and that the board of supervisors adopted the second resolution, so as to control or limit the amounts to be expended in this way.

The agreement was made and was valid. *Larkin v. Village of Brockport*, 87 Hun, 573, 34 N. Y. Supp. 551. Its effect was to limit the powers of the commissioners. Under the law they had the power to appoint and at pleasure to remove all clerks, stenographers, and employes, and to fix their salaries. While their right to appoint was not affected by the agreement, yet they could not, as between themselves and the board of supervisors, make the salaries of their appointees a county charge. So that, unless the agreement has been modified or annulled, the proceeding here cannot be maintained.

[2] It is claimed that the agreement was made with reference to the Election Law as it stood at the time, and that the passage thereafter of the Primary Law rendered performance thereof impossible, thereby annulling the agreement. The Primary Law did not repeal the Election Law as it stood at the time, but simply amended that law in relation to nominations and primaries, and thereby increased the duties of the commissioners. The increase in their duties would not have entitled them to increased compensation, if the agreement had not been made (*People v. Supervisors*, etc., 1 Hill, 362, 367; *Wendell v. City of Brooklyn*, 29 Barb. 204, 207; *Palmer v. Mayor*, 2 Sandf. 318; *Matter of Palmer*, 21 App. Div. 180, 47 N. Y. Supp. 433; *Bernardi v. Fonda*, 133 App. Div. 510, 117 N. Y. Supp. 727), and the Primary Law did not render performance of the agreement impossible.

[3] The commissioners recognized the agreement in their report to the board. In it they stated, in effect, that the additional work entailed by the passage of the Primary Law could not be performed by them without help, so that a clerk and stenographer had been "employed," and that they "would be pleased" if the board would provide for their compensation monthly. It is claimed that this was a termination of the agreement, or notice thereof, on the part of the commissioners. The language, however, indicates rather that it was intended as a request, and this is borne out by the fact that one of the commissioners addressed the board in relation to the matter on the following day. Even if it was intended as a termination of the agreement, that will not aid the relators here, because that result could not be effected and another agreement substituted without the consent of the board, and that consent was not given. The communication was received, ordered placed on file, and appears in the minutes. No other action was taken, and the board did not make the provision asked for, although it did provide for the salaries of the commissioners, in accordance with the agreement, and for contingent expenses.

[4] The request was not granted. In effect, it was denied. There was no express consent, and consent cannot be implied merely from the silence of the board, or from its failure to act. While

it may be that the words "from time to time," as used in section 193 of the Election Law, must be construed in the sense of "from term to term," when that section is read in connection with section 12, subd. 5, of the County Law (Consol. Laws 1909, c. 11), as amended by Laws 1911, c. 359, thus prohibiting an increase or decrease in the salary or compensation of the commissioners during their term of office, their appointments being for a definite term under the statute, yet their request, being for clerk hire, and not for increase of salary, could have been granted. The board of supervisors, however, relied upon the agreement, as it had the right to do.

The work of the relators has been materially increased, but the agreement, unwisely made, has not been annulled or modified, and relators have continued in office under it, so that their application must be denied, but, under the stipulation filed, without costs.

WIERTZ SILK MFG. CO. v. LOUIS METZGER & CO.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

1. WORK AND LABOR (§ 30*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action for charges for manufacturing silk thread delivered to plaintiff into cloth of gold, in which defendant counterclaimed for the value of thread delivered and not used, evidence *held* to make it a jury question whether any of the thread delivered was not used by defendant and retained.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 59-65; Dec. Dig. § 30.*]

2. WORK AND LABOR (§ 27*)—ACTIONS—ADMISSION OF EVIDENCE.

In an action for charges for manufacturing silk thread delivered to plaintiff into cloth of gold, in which defendant counterclaimed for the value of thread delivered and not used, evidence as to the number of yards of cloth delivered to defendant, and that its weight was equivalent to the thread delivered, was admissible.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 50-54; Dec. Dig. § 27.*]

Appeal from City Court of New York, Trial Term.

Action by the Wiertz Silk Manufacturing Company against Louis Metzger & Co. From a judgment for plaintiff, less the amount of defendants' counterclaim, plaintiff appeals. Reversed, and new trial ordered.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Reuben S. Lind, of New York City, for appellant.

L. & I. J. Joseph, of New York City (Louis Joseph, of New York City, of counsel), for respondent.

PAGE, J. The parties to this action made an agreement whereby the defendant delivered to the plaintiff a quantity of gold thread to be manufactured into cloth of gold and returned to the defendant at

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a stipulated price per yard. After the contract was performed the plaintiff billed the goods to the defendant. The defendant refused to pay the bill unless the plaintiff would credit it with 24 kilos of gold thread, which it claimed had not been used in making the cloth and had never been returned. This action was brought to recover the amount of the bill, and the defendant counterclaimed for the value of the thread claimed to be short.

At the trial the plaintiff's claim was conceded. The defendant, in support of the counterclaim, placed one of its officers on the stand, who testified that he had weighed the cloth returned by the plaintiff and found that it was 24 kilos less in weight than it should have been after allowing 9 per cent. for waste, which was conceded to be a proper allowance. To rebut this testimony the plaintiff attempted to prove the weight of gold returned, by showing the number of yards of cloth delivered to the defendant and the average weight per yard. There was already in evidence an admission, made by the defendant in a letter to the plaintiff, that "12 yards of 18 inch" was equal to 1 pound $6\frac{3}{10}$ ounces, and that 12 yards of "24 equals 1 pound $14\frac{1}{3}$ ounces." Using this as a basis, the plaintiff offered to prove the number of yards delivered, and show that the weight returned was equivalent to that delivered. This proof the learned trial justice refused to receive, and insisted upon the production of witnesses who had weighed the cloth and could testify as to its weight. The plaintiff was forced to concede that it had not weighed the goods, whereupon a verdict was directed for the defendant upon the counterclaim.

[1] There was nothing to support the defendant's counterclaim, except the uncorroborated word of one of its officers that he weighed the cloth. Opposed to this were the oaths of the plaintiff's officer and servant that all the material furnished by the defendant was used in making the cloth. There was presented a sharply contested question of fact, which should have been submitted to the jury as requested by the plaintiff's attorney.

[2] By reason of its relevancy to this question, and also as affecting the credibility of the defendant's testimony, the plaintiff should have been permitted to prove the weight of the goods which it delivered to the defendant, by the admitted ratio of yards to ounces.

Because of these errors, the judgment appealed from should be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

(79 Misc. Rep. 234.)

LEMBECK & BETZ EAGLE BREWING CO. v. CRUDO.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

JUDGMENT (§ 951*)—RES JUDICATA—BURDEN OF PROOF.

Where defendant pleads a prior judgment as a bar, the burden is on him to show that such judgment covers the cause of action sued on in the present suit, and hence that the check now sued on was not credited to defendant in reaching the balance then sued for.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1808-1812; Dec. Dig. § 951.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by the Lembeck & Betz Eagle Brewing Company against Louis M. Crudo. Judgment for defendant, and plaintiff appeals. Reversed.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

George Ryall, of New York City, for appellant.

Morris Kamber, of New York City, for respondent.

PAGE, J. This action was brought to recover upon a check for \$156, given by the defendant to the plaintiff upon December 13, 1905. The defenses are payment, and a former adjudication. On the first trial of this case a judgment between the same parties was offered in evidence, but excluded, and judgment was given for the plaintiff, which was reversed, and a new trial ordered. 134 N. Y. Supp. 576. On the second trial the judgment roll in the former action was received in evidence, and judgment was given for the defendant. From that judgment this appeal was taken.

The evidence is very unsatisfactory. The facts, as far as we have been able to deduce them from the record, are as follows: The defendant was a saloon keeper, buying draught and bottled lager beer from the plaintiff. On December 13, 1905, the defendant gave the plaintiff the check in suit, which, together with certain credits to which the defendant was entitled for discount on beer of \$44, was credited to his account. This check was protested for nonpayment. Thereafter further sales of beer were made by the plaintiff to defendant, and in July, 1906, an action was brought in Rockland county by the plaintiff against the defendant to recover \$247 for a balance due for goods sold and delivered between the 1st day of September, 1905, and the 1st day of January, 1906. Judgment was secured in August, 1906, and the judgment was paid. This period covers the time that the goods were sold for which the check in suit was given. But whether the price of those goods was included in the amount for which suit was brought does not clearly appear from the evidence. The burden is upon the defendant, as he claims the former judgment is a bar to this action, to show affirmatively that the balance due, for which suit was brought, was not arrived at by including in the credits the item of this check, so that the debt for which this check was given was actually embraced within the issue in that litigation and determined, and this could be shown by parol evidence. *Bell v. Merrifield*, 109 N. Y. 202, 211, 16 N. E. 55, 4 Am. St. Rep. 436; *Lewis v. O. N. & P. Co.*, 125 N. Y. 341, 348, 26 N. E. 301; *Carleton v. Lombard, Ayres & Co.*, 149 N. Y. 137, 152, 43 N. E. 422; *Reynolds v. Aetna Life Ins. Co.*, 160 N. Y. 635, 651, 55 N. E. 305.

The respondent in his brief states that this check, when dishonored, was charged back; but there is absolutely no evidence to sustain that contention. It will be necessary to determine whether this check was accepted as payment pro tanto of the indebted-

ness. If it was, the check constitutes a new obligation, and a cause of action, separate and distinct from the cause of action for goods sold and delivered, arose, and the judgment in the former action would not bar this action. The mere giving of the check would not have such an effect, for the substitution of one executory obligation for another does not extinguish the precedent debt, unless there is an express agreement to accept the new obligation for the old. If, therefore, this check was accepted as payment, credited on the account, and the balance of the account sued upon in the Rockland county action was struck with this credit allowed, and an agreement was entered into that this check should be paid by the defendant, either in cash or by the crediting thereon of subsequent discounts on beer purchased, the check would constitute a new obligation, the consideration of which would be the extinguishment of the precedent debt, and the amount remaining unpaid upon the check would be enforceable in this action, and the former adjudication would not be a bar. If, however, the credit of this check on the account was nullified by charging back the amount thereof before the balance was struck, the former adjudication in the Rockland county action would be a complete bar.

The judgment must therefore be reversed, and a new trial ordered; with costs to appellant to abide the event. It is hoped on the next trial that the evidence will be confined within the narrow limits indicated by this opinion. All concur.

COHEN et al. v. SIMON STRAUSS, Inc.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

1. LANDLORD AND TENANT (§ 152*)—LEASE—CONSTRUCTION—ALTERATION—"PREMISES."

A lease of the ground or first floor of a building allowing the tenant to make alterations on the "premises," did not permit the tenant to lower the floor three feet at one end for the purpose of making a moving picture house out of it, since that would be extending the alterations off the "premises"; the basement being rented to another tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 538-557; Dec. Dig. § 152.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5509-5513; vol. 8, p. 7761.]

2. EVIDENCE (§ 393*)—LEASE—WRITTEN INSTRUMENT—PAROL EVIDENCE.

In an action by a tenant, suing for a deposit, having canceled the lease on the ground that the owner would not let him lower the floor, where the lease provided that he could make alterations "on the premises," being the first floor, the basement being rented to another party, conversations had before the execution of the lease as to lowering the floor were not admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1736-1744; Dec. Dig. § 393.*]

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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Action by Lester D. Cohen and others against Simon Strauss, Incorporated. Judgment for plaintiffs, and defendant appeals. Reversed.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Arnold Lichtig, of New York City, for appellant.

Louis W. Osterweis, of New York City, for respondents.

PAGE, J. This action was brought to recover \$500 deposited by the plaintiffs, as tenants, upon the making of a lease with the defendant, as stated in the lease,

"to be held by the lessor for the punctual payment of the rent, and the faithful performance of the covenants, conditions, and agreements in this lease set forth."

The lease further provides that the lessee shall have the right to cancel this lease at any time prior to the 9th day of May, 1912, upon written notice to the lessor,

"whereupon the sum of \$500 mentioned in the preceding paragraph of this lease shall be retained by the lessor and become its absolute property, as liquidated and stipulated damages, against which the lessees shall have no claim of any kind whatsoever, and the parties hereto stipulate to treat the said sum as liquidated damages in such event, because the exact amount of damages which the lessor would sustain in that event is difficult, if not impossible, of ascertainment; and this lease, and the term hereby granted, shall thereupon cease and come to an end, and neither of the parties hereto shall have any further claim against the other."

The plaintiff on the 8th day of May, 1912, gave written notice of their election to terminate the lease, and demanded the return of the \$500. The theory on which the plaintiffs predicate their right to recover is that the defendant had refused to allow them to slope the floor of the premises three feet, and that without so doing they would be unable to use the premises for a "moving picture house," for which use they had hired the premises. The plaintiffs claim this right upon the terms of the lease and a conversation had with the defendant's president prior to the execution of the lease. The premises demised was:

"The ground floor or store floor of the premises commonly known as No. 225 West 116th street, together with additional space in the ground floor of four feet front and rear in the extreme westerly portion of the adjoining building known as 223 West 116th street."

[1] A clause of the lease provides that:

"The lessees shall have the right, upon complying with such conditions as the owner of the building may impose, to make alterations and improvements on the said premises, but at their own cost and expense, so as to make same more desirable for the business to be conducted by the lessees therein."

The plaintiffs thereupon had plans prepared for extensive alterations in the premises. The particular change to which objection was made by the defendant was a lowering of the floor three feet at one end of the building and by a gradual slope, bringing it to the former floor level at the entrance, thus appropriating that much

additional space from the basement, which had been leased to another tenant. The tenants claim that, as this would make the premises more desirable for their business, they had the right to make this alteration; and the learned trial judge seems to have agreed with their contention.

That this is an erroneous construction of the clause of the lease above quoted is too clear to require extended argument. The "premises" upon which the plaintiffs were permitted to make alterations and improvements were the demised premises—i. e., that portion of the building known as the ground or first floor—and did not give the plaintiffs a right to appropriate other portions of the building. It would have made the premises more desirable for the business that plaintiffs intended to conduct, if the ceiling was 22 feet high, instead of 12. Respondents would hardly urge that by reason thereof they had the right to appropriate the apartment over the store and tear out the floor, so that they might secure the additional height of ceiling. The principle is the same. If they had the right to take three feet of a portion of the building distinct from that demised, why not ten?

[2] The court properly excluded the conversation had before the lease was signed. The plaintiffs exercised the right they had under the lease to cancel it, and by that act the defendant was to retain the \$500 as liquidated damages, especially as it was conceded at the opening of the case that defendant's actual damage had exceeded that sum.

Judgment reversed, with costs, and complaint dismissed, with costs. All concur.

HERB et al. v. DAY.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

1. LANDLORD AND TENANT (§ 22*)—PAROL LEASE.

Where the parties only agreed in oral discussion on the term of a lease and the rental, without discussing other terms, except that it should be reduced to writing and other conditions added, there was a mere agreement for a lease, and not a parol letting.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 55-59; Dec. Dig. § 22.*]

2. LANDLORD AND TENANT (§ 23*)—CREATION OF LEASE.

A parol lease for a year arises when the parties agree upon all the terms, though they intend thereafter to reduce them to writing.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 60; Dec. Dig. § 23.*]

3. LANDLORD AND TENANT (§ 23*)—EXECUTION OF LEASE—PAROL LEASE.

Where the tenant knew that the landlord expected him to execute a valid lease for a year before taking possession, and the landlord stated the terms upon which he would lease when the printed lease was submitted, to which terms the tenant did not object, but took and continued in possession for several months without objection, there was a valid parol lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 60; Dec. Dig. § 23.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. LANDLORD AND TENANT (§ 231*)—ACTIONS FOR RENT—DEFENSES—SURRENDER AND ACCEPTANCE.

The defense of surrender of the premises and their acceptance by the landlord must be established by the tenant, when sued for rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 926-934; Dec. Dig. § 231.*]

5. LANDLORD AND TENANT (§ 194*)—SURRENDER OF PREMISES—EVIDENCE.

The delivery and acceptance of the keys to an apartment, though evidence of a surrender by the tenant, does not of itself constitute a surrender, relieving from liability for rent, unless delivered to one authorized to accept them, and under circumstances justifying an inference that the parties thereby intended to terminate the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 788, 789; Dec. Dig. § 194.*]

6. LANDLORD AND TENANT (§ 231*)—ACTIONS FOR RENT—SUFFICIENCY OF EVIDENCE—SURRENDER OF PREMISES.

Evidence in a landlord's action for rent *held* not to show that the keys to an apartment were delivered to the landlord's agent when the lease was claimed to be terminated, so as to constitute a surrender.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 926-934; Dec. Dig. § 231.*]

Appeal from Municipal Court, Borough of Manhattan, Fifth District.

Action by Jacob Herb and another against James R. Day. From a judgment for defendant, plaintiffs appeal. Reversed, and new trial ordered.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Milton S. Hoffman, of New York City, for appellants.

Bernard Gordon, of New York City, for respondent.

LEHMAN, J. In October, 1911, the defendant's wife agreed to lease an apartment for one year from November 1st at a rental of \$55 per month; the lease to be sent to and signed by her husband. On October 26th the defendant sent the plaintiffs the rent for one month. The check was inclosed in a letter which says:

"I came away without the lease this morning, and if I find the same satisfactory to-morrow I will sign and return. I presume it is the usual Polhemus form of flat lease used by this and other responsible offices."

Thereafter the defendant received a lease, not in the Polhemus form, and containing some clauses that were not entirely usual, and which had not been discussed between the parties. This lease was never signed. In November the defendant and his wife entered into possession of the apartment, and continued in possession until the end of April. They then vacated the apartment, leaving the keys with a woman in charge of the apartment house. This woman had complete charge of the house, including the renting of apartments and the collection of rents. As part of her duties she received the keys from outgoing tenants. After the defendant had vacated the premises, the landlord brought this action for the May rent.

[1] The plaintiffs claim that these facts show a valid parol lease

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for a year, and the defendant denies the making of a lease, and claims that, if a lease was made, it came to an end by surrender and acceptance. There is no doubt in my mind that no parol lease for a year was made by the defendant's wife. At that time the parties had agreed only on the term and the rental. No other terms were discussed. The parties agreed that the lease should be made in writing, and the writing thereafter proposed by the landlord contained additional terms. It is quite evident, therefore, that the parties had not then agreed upon all the terms of the lease.

[2] It seems to me, however, that thereafter the defendant did for himself enter into a valid parol lease for a year. A lease for a year comes into existence as soon as the parties have come to an agreement upon all the terms, even though they intend thereafter to enter into a written contract as evidence of the prior parol agreement. The same rules that govern the making of other parol contracts are applicable to the making of parol leases. Where one side has stated the terms upon which he will make the contract, and the other side has by words or acts shown an acceptance of those terms, a contract is made between the parties.

[3] In this case the defendant knew that the plaintiffs expected him to enter into a valid lease for one year before he entered into possession of these premises. The plaintiffs stated the terms upon which they would make the lease, when they submitted the printed lease. So far as the record shows, the defendant never objected to any of these terms, and never refused to sign because certain terms were in the lease, but entered without objection into possession, and continued in possession for several months. Knowing that the landlord had offered possession upon certain terms, the defendant, by accepting and retaining possession for months, has clearly evinced his acceptance of these terms, and is bound by his contract. This contract was made by him, and not by his wife, and no question of agency therefore need be considered.

[4, 5] The defense of surrender and acceptance is an affirmative defense, which the defendant must establish. The only evidence in the case of such a surrender and acceptance is the receipt of the keys by the agent. The delivery and acceptance of the keys to an apartment, while evidence of a surrender, does not in itself constitute a surrender. To show a surrender, the tenant must show that the delivery of the keys was made under circumstances justifying the inference that the parties thereby intended to terminate the outstanding term, and was made to a person with authority to terminate a valid lease.

[6] In this case the evidence does not even show that the keys were delivered at the time when it is claimed that the lease was terminated, for the agent was the only witness who testified on this point, and she testified, in answer to the question, "And she gave you the keys when she moved out, the day she moved out in April?" "No, she didn't; she gave me the keys before she moved out." Moreover, while the agent was shown to be authorized to receive the

keys from outgoing tenants, she was not shown to have any authority to terminate valid outstanding leases.

Judgment should therefore be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

(79 Misc. Rep. 252.)

GILDAY v. HENNEN.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

1. WORK AND LABOR (§ 4*)—RIGHT TO COMPENSATION.

Ordinarily one requesting another to perform services for him impliedly agrees to pay their reasonable value, unless the circumstances justify him in believing that the person requested would not expect compensation.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 3-7; Dec. Dig. § 4.*]

2. PHYSICIANS AND SURGEONS (§ 13*)—COMPENSATION—IMPLIED CONTRACT—PROFESSIONAL COURTESY.

Plaintiff and defendant were physicians on a hospital staff, and defendant, while performing an operation, telephoned to plaintiff, and when he arrived the patient was suffering from a hemorrhage, and defendant said to plaintiff: "I wish you would finish this operation for me. This woman is bleeding. I can't control it." Whereupon plaintiff finished the operation. The patient was in a private room paid for by defendant, who received a nominal fee of \$10. *Held*, that plaintiff is deemed to have rendered his services from the high sense of the professional obligation and courtesy which exists in the medical profession, and cannot recover on an implied promise by defendant to pay for such service; the fact that the operation was not performed in the charity ward and that defendant received a nominal fee for his own services not changing the rule.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 18-20; Dec. Dig. § 13.*]

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by Walter C. Gilday against William D. Hennen. From a judgment for plaintiff, defendant appeals. Reversed, and complaint dismissed.

Argued January term, 1912, before SEABURY, LEHMAN, and PAGE, JJ.

Hart & Tompkins, of New York City (Millard F. Tompkins, of New York City, of counsel), for appellant.

Frederick W. Sperling, of New York City, for respondent.

LEHMAN, J. The plaintiff and the defendant are both members of the staff of a hospital in the city of New York. While the defendant was performing an operation upon a patient, he desired the plaintiff's aid, and sent a telephone message requesting the plaintiff to come to the hospital to help him out. Plaintiff immediately came to the hospital and went into the private operating room. A woman was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on the operating table. Her abdomen was open, and she was suffering from a hemorrhage. The defendant said to him:

"Doctor, I wish you would finish this operation for me. This woman is bleeding. I can't control it."

Plaintiff then finished the operation. The defendant was performing the operation for a fee of \$10, and the patient was not strictly a charity patient, although the defendant was paying for the private room. The plaintiff thereafter brought this action to recover the reasonable value of his services.

[1] Ordinarily, of course, where a person requests another to perform services for him, he impliedly agrees to pay the reasonable value of the services rendered at his request. This rule is founded in common sense. Unless the circumstances in which the request is made justify him in the belief that the person requested to perform the services would not expect any compensation, the person requesting the services must reasonably have supposed that his request implied a promise to pay for the services. Such circumstances exist where the relation of the parties is such that the services might well be requested as a matter of personal or professional courtesy or duty.

[2] If, therefore, the plaintiff is entitled to recover upon an implied contract to pay for the services rendered, it must be upon the theory that there is no professional courtesy or duty requiring a physician to give aid to a brother practitioner associated with him in the same hospital, when the brother practitioner's skill or experience is insufficient to cope successfully with an emergency that has arisen and which may cause disastrous results to a patient under his care. I am absolutely unwilling to hold that the profession of medicine does not impose such an obligation upon its members, nor do I believe that even the plaintiff would seriously contend that the judgment in his favor should be sustained, if it can be sustained only upon such a theory.

He urges, however, that this obligation exists only in regard to charity patients in the hospital, and not in regard to private patients in a private room. The distinction which he tries to draw is, in my opinion, however, not logical. While a physician is entitled to reasonable compensation for his services from the person benefited, the services which he renders should not be measured by the compensation received. Physicians ordinarily recognize this rule and give the benefit of their skill free to persons who cannot pay for the services rendered, and as a matter of professional courtesy will give reasonable assistance to other physicians. The plaintiff has shown that he recognized this rule by joining the staff of a hospital, where it is the custom that physicians should treat patients gratis and aid each other in their treatment of public patients.

A physician who claims under an implied contract for his services should show, therefore, that the services were rendered, not as a part of his high professional obligations, or as a matter of professional courtesy, but because he expected to be paid for them. This is the test to be applied in every case where a physician sues upon an im-

plied contract. It seems to me that, where a physician requests the services of another physician to aid him in earning compensation for himself, he is bound to pay for these services; but he has a right to believe that a fellow practitioner in the same hospital will expect no compensation, if his services are sought merely to aid him in an operation from which he himself expects to derive no substantial profit. If the operation had been performed in the public operating room, the plaintiff concedes that he would have been reasonably expected to render the requested aid without compensation; but the true distinction, it seems to me, is not to be found in the place where the operation was performed, but is to be found in the nature and purpose of the services requested. Since the defendant requested the plaintiff's aid, not for the purpose of earning a fee for himself, but only for the purpose of alleviating suffering or removing an imminent danger, he had a right to expect that these services would be rendered freely and willingly.

Judgment should be reversed, with costs, and complaint dismissed, with costs. All concur.

GAMAGE v. LLEWELLYN.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

PLEADING (§ 312*)—EVIDENCE—WRITTEN INSTRUMENTS.

The mere fact that one suing on a written instrument under seal, which called for payments on certain dates, a copy of which was attached to the complaint, referred to it in the complaint as a promissory note, did not justify its exclusion from evidence, since what it was called is immaterial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 943, 948; Dec. Dig. § 312.*]

Appeal from City Court of New York, Trial Term.

Action by Harry C. Gamage against William H. Llewellyn. Judgment for defendant, and plaintiff appeals. Reversed.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Emile Schultze, of New York City (John R. Halsey, of New York City, of counsel), for appellant.

Simpson & Simpson, of New York City (Robert M. Simpson, of New York City, of counsel), for respondent.

SEABURY, J. The plaintiff sued upon a written instrument under seal, a copy of which was annexed to the complaint, wherein the defendant agreed to pay to the order of the plaintiff certain sums of money on specified dates as the purchase price of certain shares of stock. The plaintiff's cause of action was entirely predicated upon this written instrument. The plaintiff offered the instrument in evidence, and, upon the objection of the defendant, it was excluded, subject to the plaintiff's exception.

The reason for its exclusion seems to have been that it was de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

scribed in the complaint as a promissory note. The manner in which it was characterized in the complaint is immaterial. It was a written agreement, under the terms of which the plaintiff's cause of action arose. As such, it should have been received in evidence. The agreement itself contains all the elements necessary to constitute a promissory note. It follows that the instrument was improperly excluded, and that the court below erred in dismissing the complaint.

Judgment reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

(79 Misc. Rep. 237.)

GREENGRASS v. NORTH RIVER INS. CO.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

1. INSURANCE (§ 668*)—PROOF OF LOSS—WAIVER—QUESTION FOR JURY.

Whether insurer, by retaining, without objection to its form, an inventory furnished by insured after a fire and entering into negotiations for settlement, and finally disclaiming liability on the sole ground that insured had not properly protected the property after the fire, did not waive the service of a more formal proof of loss, is a question for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.*]

2. INSURANCE (§ 505*)—CONDITIONS OF POLICY—SEPARATING PROPERTY AFTER FIRE.

A condition of a fire policy, for separation by insured after a fire of the damaged goods from the undamaged, is given a liberal construction in favor of insured; and it is enough that there is such a separation that insurer can estimate the loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1291, 1292; Dec. Dig. § 505.*]

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by Morris Greengrass against the North River Insurance Company. From a judgment of nonsuit, plaintiff appeals. Reversed, and new trial ordered.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Arthur C. Mandel, of New York City, for appellant.

House, Grossman & Vorhaus, of New York City (Samson Selig, of New York City, of counsel), for respondent.

PAGE, J. This was an action to recover the value of household goods and clothing destroyed by fire. The defendant did not contest the fact that the goods as claimed by the plaintiff were upon the premises and that a fire occurred, nor did it offer evidence tending to show that the loss was different from that claimed; but they seek to escape liability on two technical grounds: First, that the assured had failed to prove that he had served on the defendant a sufficient proof of loss within the 60-day period limited by the policy; and,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

second, that the assured had failed to properly separate the damaged goods from the undamaged. The fire occurred on February 16, 1912. The exact date when the defendant was notified of the fire does not appear.

[1] The defendant's adjuster testified that he called at the premises on February 19th and discharged the fire patrol man, as he always did when he was notified of a loss; and when the plaintiff's adjuster called at the office of the defendant and notified them of the loss on February 21, 1912, the person in charge of that department stated that they already knew of the loss. The plaintiff prepared an inventory in Hebrew and gave it to his adjuster, who translated it into English, and on February 29, 1912, the inventory was given to the defendant's agent. This inventory contained a list of each article claimed to have been destroyed, with its value, and the total amount of such claim; but it was not signed, nor verified by the oath of the claimant. The next day the defendant's adjuster called at the premises with this inventory and with the plaintiff's adjuster went over the remnants, and offered first \$150, and then \$200. These offers were refused by plaintiff's adjuster, who offered to take \$400 on the claim of \$526.20. The defendant's adjuster left, and the next day sent a disclaimer of liability—

"for any loss or damage that may have been caused through your negligence to properly protect the damaged and undamaged property, as called for in lines No. 67, 68 and 69 of the printed conditions of your policy. * * *"

No mention is made of a claim that the inventory was not sufficient, and the requirement for a signed and verified statement of loss is not contained within the specified lines of the policy. Upon the facts it was clearly a question for the jury to determine whether the defendant, by retaining the inventory furnished by the plaintiff without objection as to its form and entering into negotiations of settlement, had not waived the service of a more formal proof of loss. *Glazer v. Home Ins. Co.*, 190 N. Y. 6, 82 N. E. 727; *Davis v. Grand Rapids Fire Ins. Co.*, 15 Misc. Rep. 263, 265, 36 N. Y. Supp. 792, affirmed 157 N. Y. 685, 51 N. E. 1090.

[2] On the second objection, that the goods were not kept separated, the testimony of the plaintiff's adjuster that they were so separated, and the defendant's adjuster that they were not, raised an issue of fact for the jury. That the landlord, for the purpose of repairing the building, had removed or required the removal of debris from the rooms in which they were at the time of the fire, does not in itself constitute a breach of the contract. If the undamaged property and the damaged were so separated that the company could estimate the loss, a reasonable and substantial compliance with this provision is all that is required. For, after the liability has been fixed by a loss, the insured may not be deprived of his rights to indemnity by a narrow and technical construction of the conditions and stipulations which prescribed formal requisites, by which that right is made available; on the contrary, a liberal and reasonable construction of them should

be given. *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389, 33 N. E. 475. The learned trial judge seems to have overlooked this requirement.

The judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

(79 Misc. Rep. 258.)

ELLIOTT v. BANK FOR SAVINGS et al.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

1. WITNESSES (§ 159*)—TRANSACTIONS WITH DECEASED PERSONS—COMPETENCY.

Plaintiff, suing a bank and the administrator of a deceased depositor to recover the deposit as a gift causa mortis, is not competent to testify to the transaction with decedent in which the latter gave to plaintiff the bank book representing the deposit.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 664, 666-669, 671-682; Dec. Dig. § 159.*]

2. GIFTS (§ 82*)—CAUSA MORTIS—EVIDENCE—SUFFICIENCY.

A gift causa mortis of a bank deposit is not established by the testimony of a third person that she witnessed the transaction between decedent and the donee, but did not notice the bank book which was delivered by decedent to the donee, and did not know whether it was the one sued on.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 154, 155; Dec. Dig. § 82.*]

3. COURTS (§ 188*)—MUNICIPAL COURTS—JURISDICTION.

Under Municipal Court Act (Laws 1902, c. 580) § 42, subd. 2, providing that any person may be made a defendant who has an interest in the controversy, adverse to plaintiff, and section 187, authorizing a defendant to apply for an order directing the bringing into court of a third person as a codefendant, the Municipal Court has jurisdiction of an action by a donee of a bank deposit, claimed as a gift causa mortis, against the bank and the administrator of the deceased donor; the latter being properly joined for the determination of his rights.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 437-468; Dec. Dig. § 188.*]

4. COURTS (§ 189*)—EFFECT—JURISDICTION ACQUIRED.

Where one made a defendant in the Municipal Court appeared generally by attorney, the court had jurisdiction to retain him as a party and determine his claim, as against the objection relating to the manner of bringing him into court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412; Dec. Dig. § 189.*]

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by Sarah E. Elliott against the Bank for Savings and William J. Doherty, as administrator. From a judgment of the Municipal Court for plaintiff, defendants appeal. Reversed, and new trial ordered.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Strong & Cadwalader, of New York City (Russell Wolfe, of New York City, of counsel), for appellant Bank for Savings.

James F. Donnelly, of New York City (T. J. Flynn, of Brooklyn, of counsel), for appellant Doherty.

Bennett E. Siegelstein, of New York City, for respondent.

PAGE, J. The action is brought to recover from the defendant bank a deposit of \$500, claimed by the plaintiff as a gift mortis causa from her deceased sister. William J. Doherty, as administrator of the sister's estate, was made a party defendant. No money judgment was demanded against him, but he appeared and defended, and the formal judgment entered contains an adjudication that the money on deposit in the bank is no part of the decedent's estate and the administrator has no bona fide claim against it.

[1] In the course of the trial the plaintiff was permitted to testify to conversations and transactions had with the deceased. On motion the testimony as to conversations was stricken out, but that as to the personal transactions allowed to remain, over the objections of counsel. An exception was duly taken. They include the very transaction in which the deceased is alleged to have given the bank book, representing the deposit sued for, to the plaintiff. This testimony was improperly received. *Griswold v. Hart*, 205 N. Y. 384, 98 N. E. 918; *Clift v. Moses*, 112 N. Y. 426, 20 N. E. 392; *Richardson v. Emmett*, 170 N. Y. 412, 63 N. E. 440.

[2] The only other evidence to substantiate the plaintiff's claim is the testimony of Catherine Hannah, an aunt of the plaintiff, who says that she witnessed the transaction; but she admits that she did not notice the bank book which was delivered by the deceased to the plaintiff, and did not know whether it was the one sued upon or not. Without the plaintiff's testimony, there was no evidence to identify the subject-matter of the gift. The judgment must therefore be reversed.

[3] As the case must be retried, it is necessary to pass upon the further claim of the appellants that the Municipal Court had no jurisdiction to entertain the action in the form in which it was brought. We are of opinion that there is no merit in this contention. The action is merely one at law to recover a sum of money. By section 42, subd. 2, of the Municipal Court Act (Laws 1902, c. 580):

"Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff or who is a necessary party defendant for the complete determination or settlement of a question involved therein. • • •"

It was proper practice, therefore, to join the administrator as a defendant and determine his rights. Furthermore, by section 187 of the Municipal Court Act, the bank, if sued alone, could have brought in the administrator as a party and interpleaded him with the plaintiff. In this case the plaintiff foresaw this contingency, and to save time joined the administrator as an original party. At the trial the plaintiff offered to discontinue as to the administrator; but on demand

of the bank he was retained as a party, after which he presented his case to the court.

[4] The pleadings were oral, so the objection only related to the manner of bringing him into court. As he appeared generally by attorney, the court had ample jurisdiction on that ground alone to retain him as a party and determine his claim.

The judgment appealed from is reversed, and a new trial ordered, with costs to appellants to abide the event. All concur.

(79 Misc. Rep. 255.)

JAMES v. MORTEN et al.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

MUNICIPAL CORPORATIONS (§ 706*)—INJURIES IN STREETS—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

In an action for damage to plaintiff's automobile by collision with defendant's horse, which was running away because of a prior collision with another automobile, evidence *held* not to sustain a finding of negligence by defendant, on the ground that his horse was not attended when it started to run away.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by Arthur C. James against Alexander Morten, impleaded with others. From a judgment for plaintiff, defendant Morten appeals. Reversed, and new trial ordered.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Hoadly, Lauterbach & Johnson, of New York City (Alfred H. Townley, of New York City, of counsel), for appellant.

Bertrand L. Pettigrew, of New York City (Everett W. Bovard, of Elmhurst, of counsel), for respondent.

LEHMAN, J. The plaintiff's automobile was damaged by collision with a horse and runabout owned by the defendant Morten. The record shows without dispute that the collision occurred through no negligence of the plaintiff. It also shows without dispute that at the time of the collision Morten's horse was running away and that there was no driver in the runabout. It further appears that before the horse ran into plaintiff's automobile it had been involved in a collision with another automobile, owned by defendant Breed. Plaintiff in his complaint alleged negligence on the part of Morten in driving and managing the horse and wagon, and on the part of the defendant Breed in managing and operating the automobile, in running into and colliding with said horse and wagon, and causing the said horse to run away.

At the trial the plaintiff called both Morten and Mrs. Breed, who was riding in the automobile at the time of the collision, as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

his witnesses, and the case really developed into a question as to the responsibility for the collision between Morten's horse and wagon and Breed's automobile; it being apparently assumed that that collision was the cause of the runaway, and hence of the damage to plaintiff's car. Morten testified that Breed's automobile ran into his wagon, that the impact threw him out, and that the horse then ran away. Mrs. Breed testified that the automobile passed Morten's horse and wagon, and shortly thereafter she felt a blow on the rear of the car, and then saw Morten thrown from the wagon and the horse run away. The defendants presented some evidence in their own behalf, but this evidence introduces no issue other than the issues presented by the testimony of the witnesses Morten and Mrs. Breed, produced by the plaintiff. If the jury believed Morten, they could find that Breed's automobile collided with his horse and wagon through the negligence of Breed's chauffeur. If they believed Mrs. Breed, they were bound to find that the collision was not due to any negligence on the part of her chauffeur; but in the latter case they were by no means bound to find that it occurred through the negligence of Morten, for it might well be that his horse had become unmanageable before the collision and not as a result of the collision.

The theory of the plaintiff and of the trial justice in submitting the case to the jury was that the plaintiff's testimony made out a *prima facie* case of negligence against Morten, by showing that at the time of the injury the horse was unattended; that this *prima facie* case could be met only by proof that at the time the horse ran away it was attended; that, if the jury believe Morten, then they were bound to hold that the horse was not unattended at the time it ran away, but, believing Morten's testimony, they were also bound to find that Breed's chauffeur was negligent. On the other hand, if they believed Mrs. Breed, then they were bound to discredit Morten's testimony, and if Morten's testimony that he was driving the horse until he was thrown out by the impact from Breed's machine is disregarded, then the original inference of negligence, by reason of the horse being unattended at the time it ran into plaintiff's automobile, still holds good. In accordance with this theory the trial justice charged at plaintiff's request that the fact of the horse running away without the driver is some evidence of negligence on the part of the defendants. The difficulty with this charge is that any possible presumption of negligence from the fact that the horse was running away without a driver is completely met by the undisputed proof that at the time the horse started to run away the driver was in the wagon and was thrown out. Upon this point Morten and Mrs. Breed, both witnesses produced by the plaintiff, are absolutely agreed, and no jury could be permitted to disregard this evidence.

Judgment must therefore be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

GOLDBERG v. LACKSHIN.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

LIMITATION OF ACTIONS (§ 195*)—BURDEN OF PROOF—ABSENCE FROM STATE.

Where plaintiff in an action for goods sold made a prima facie showing of defendant's absence from the state after the sale and delivery, the burden was on defendant to show his presence in the state after the indebtedness accrued for a sufficient time to bar the action by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 711-716; Dec. Dig. § 195.*]

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by Morris Goldberg against Hyman Lackshin. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Max Lessler, of New York City, for appellant.

Albert Gross, of New York City, for respondent.

LEHMAN, J. The plaintiff sued for goods sold and delivered to the defendant between October 6, 1905, and November 26, 1905. The answer of the defendant consists of a general denial and a plea of the statute of limitations. At the trial the plaintiff gave some testimony, very general in form, as to the sale and delivery of the goods in question, and also presented testimony which showed prima facie that the defendant had removed to Russia and resided there for some time after the goods were sold. At the close of the plaintiff's case the defendant moved to dismiss the complaint—

"on the ground that he failed to show a delivery of the goods, except the items of October 21st, October 19th, and October 23d, and upon the further ground that he has not proved facts sufficient to take it without the statute of limitations."

The trial justice then stated that he reserved decision on this motion. The defendant then rested, without introducing any evidence, and the trial justice gave judgment in defendant's favor. The defendant now seeks to sustain this judgment on the ground that the evidence is insufficient to show a delivery. The testimony on this point is very vague, but the defendant conceded that there was sufficient proof of delivery as to three items, and the plaintiff was entitled to judgment for the amount of these items at least, if the statute of limitations did not bar the action. The plaintiff—

"made a prima facie case of absence of the defendant from the state, and put the burden of proof upon him to show his presence in the state after the indebtedness to the plaintiff accrued for a sufficient time to bar the claim; that is, for six years." *Helmer v. Minot*, 75 Hun, 309, 27 N. Y. Supp. 79.

Judgment should therefore be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SEEMAN et al. v. CHAS. M. SCOTT PACKING CO.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

SALES (§ 173*)—REFUSAL TO DELIVER—SHIPPING DIRECTIONS.

The contract of sale by defendant to plaintiffs of tomatoes to be packed by defendant giving plaintiffs' address, providing for shipment "as soon as packed," and not providing for further shipping instructions, defendant could not refuse to deliver because further shipping instructions were not promptly given; the letter of the broker who made the sale, sent by him, with the contract, to defendant, stating that he had asked for immediate shipping instructions and hoped to have same in a day or two, being no part of the contract, and not being binding on plaintiffs.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 431-433; Dec. Dig. § 173.*]

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Joseph Seeman and others, doing business as Seeman Bros., against the Chas. M. Scott Packing Company. From a judgment for defendant, entered on a trial without a jury, and from an order, seeking review also of an intermediate order opening defendant's default, plaintiffs appeal. Judgment reversed, with directions for judgment.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Goldsmith, Cohen, Cole & Weiss (Harry J. Leffert, of New York City, of counsel), for appellants.

H. De F. Hilliard, of New York City, for respondent.

PAGE, J. This action was brought to recover damages for breach of a contract for the sale of 2,400 dozen cans of tomatoes. The contract, which was a broker's bought and sold note, provided:

"Delivery f. o. b. factory. Date of shipment: Promptly as soon as packed."

The broker, in the letter inclosing the bought note to the defendant, stated:

"We have asked for immediate shipping instructions on this sale, and hope to have same in a day or two."

It seems no shipping instructions were in fact given until September 10th, 11 days after the date of the contract. The plaintiffs were notified between the 15th and 20th of September that the defendant refused to deliver the goods. The market price of canned tomatoes of this grade had in the meantime increased 10 cents per dozen. The alleged reason for the defendant's refusal to deliver was that they had not been furnished with shipping instructions promptly, as we gather from the questions asked by defendant's counsel on cross-examination, for the defendant offered no evidence, having rested upon the court's refusal to direct a verdict for the defendant at the close of plaintiffs' case. There being no jury, now the court could comply with the motion is not obvious. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

contract did not provide for further shipping instructions, and the defendant could have shipped the goods to the address of the purchaser as given in the contract "as soon as packed," and thus made a complete delivery. The letter of the broker to the defendant was no part of the contract, and was not binding on the plaintiffs.

The judgment for the defendant was erroneous, and should be reversed, with costs, and judgment directed for the plaintiffs for \$240, with costs in this court and in the court below. It is not necessary to pass upon the orders sought to be reviewed, further than to say that we are of opinion that the default was properly opened, and the judgment should have been set aside. All concur.

(79 Misc. Rep. 247.)

GIBBS v. TITLE GUARANTY & SURETY CO.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

1. PLEADING (§ 362*)—STRIKING OUT SHAM DEFENSE.

Paragraphs of an answer containing denials of the complaint's allegations cannot be stricken out as sham.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1147-1155; Dec. Dig. § 362.*]

2. PLEADING (§ 346*)—JUDGMENT ON MOTION—FRIVOLOUS ANSWER.

A judgment for plaintiff can be granted on the ground that the answer is frivolous only where its frivolous character appears plainly on its face.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1060-1064; Dec. Dig. § 346.*]

3. PLEADING (§ 345*)—JUDGMENT ON MOTION—GROUNDS.

Where an answer contains denials of material allegations of the complaint, judgment for plaintiff on the pleadings is improperly granted.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.*]

4. UNDERTAKINGS (§ 6*)—EXTENT OF LIABILITY.

In an action on an undertaking given to secure a stay of proceedings in a former action, conditioned for the payment of all damages suffered or sustained by plaintiff by reason of such stay, plaintiff cannot recover the amount of the judgment in the first action, upon proof that the judgment debtor is a bankrupt and that execution has been issued and returned unsatisfied, without proving that the judgment debtor was solvent when the undertaking was given.

[Ed. Note.—For other cases, see Undertakings, Cent. Dig. § 3; Dec. Dig. § 6.*]

Appeal from City Court of New York, Special Term.

Action by Lippmann D. Gibbs against the Title Guaranty & Surety Company. From an order striking out certain paragraphs of the answer, and granting judgment to plaintiff, defendant appeals. Reversed, and motion to strike out and for judgment denied.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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Adrian T. Kiernan, of New York City, for appellant.

Goldsmith, Rosenthal, Mork & Baum, of New York City (Joseph M. Baum and Milton M. Goldsmith, both of New York City, of counsel), for respondent.

SEABURY, J. This is an appeal from an order striking out certain paragraphs of the answer as "sham" and granting judgment on the answer "as frivolous." The action is brought upon an undertaking given by the defendant. The complaint alleges that the plaintiff, on March 17, 1911, commenced an action in the City Court against one Kahn to recover \$549.35, and that on that date Kahn obtained an order staying proceedings on the part of the plaintiff upon giving an undertaking which is the subject of the present action. The condition of the undertaking was that the defendant did—

"undertake that the defendant will pay all damages which the plaintiff may suffer or sustain by reason of said stay of proceedings, not exceeding \$750."

The complaint alleges that, by virtue of the giving of said undertaking, the proceedings on the part of the plaintiff against Kahn were stayed until July 1, 1912, when judgment was entered in favor of the plaintiff against Kahn for \$644.37, and that execution was issued against Kahn and returned unsatisfied. The complaint further alleges that on July 1, 1912, said Kahn was duly adjudicated a bankrupt and was wholly insolvent, and that on March 17, 1911, and within three months thereafter, Kahn was solvent.

The answer admits that the action of the plaintiff against Kahn was pending, that the order staying proceedings in that action was made, that the defendant gave the undertaking referred to, that execution was issued and returned unsatisfied, and that Kahn was duly adjudicated a bankrupt on July 1, 1912. The other material allegations of the complaint are denied by the answer. As a separate and partial defense, the answer sets forth affirmatively the facts alleged in the complaint, which are not denied by the answer. The plaintiff moved to strike out the first, second, and fourth paragraphs of the answer as sham, and for judgment on the answer as frivolous, "and for such other and further relief as to the court may seem just and proper."

[1, 2] The first, second, and fourth paragraphs of the answer contain denials of the allegations of the complaint, and could not properly be stricken out as sham. *Wayland v. Tysen*, 45 N. Y. 281. Strictly speaking, a judgment can only be had on motion on the ground that the answer is frivolous, where its frivolous character appears plainly on the face thereof. *Rochkind v. Perlman*, 123 App. Div. 808, 108 N. Y. Supp. 224, 1151.

[3] If, however, we disregard these technical objections, and consider the motion as having been made under section 547 of the Code of Civil Procedure, it is nevertheless clear that it was improperly granted. The denials contained in the answer put in issue material allegations of the complaint, and could not be summarily disregarded.

[4] Moreover, the condition of the undertaking was that the defendant would pay "all damages which the plaintiff may suffer or sus-

tain by reason of said stay of proceedings." Such being the condition of the undertaking upon which the action is brought, it is incumbent upon the plaintiff, in order to recover, to prove that he has sustained damage as the result of the stay. The undertaking did not provide, as the plaintiff seems to assume, that the defendant would pay any judgment recovered against Kahn, but was limited to requiring the defendant to pay the damages sustained by reason of the stay. In order to prevail in the action, therefore, the plaintiff must prove that, at the time the stay was given, Kahn was solvent. It is not enough to rely on the fact, which is not disputed, that, on July 1, 1912, Kahn was adjudicated a bankrupt.

Order reversed with \$10 costs and disbursements to the appellant, and the motion is denied, with \$10 costs. All concur.

(78 Misc. Rep. 457.)

MENDELSON V. GAUSMAN.

(Supreme Court, Special Term for Trials, Kings County. December, 1912.)

INSURANCE (§ 777*)—BENEFIT POLICY—DESIGNATION OF BENEFICIARIES—CONFLICTING CLAIMS.

Where the laws of a fraternal order, authorizing the members to name an affianced wife as beneficiary of a death benefit on furnishing evidence of such relation, provide that the issuance of a certificate shall not be conclusive of such relation, and that, if any designation fails for illegality, the benefit shall be payable to the member's wife, where a deceased member left defendant, who was his lawful wife at the time when he attempted to designate plaintiff as his "affianced wife," she is entitled to the death benefit.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1944; Dec. Dig. § 777.*]

Action by Fannie Mendelson against the Royal Arcanum to determine conflicting claims to a benefit fund. Ella R. Gausman was interpleaded. Judgment for defendant.

Charles Burstein, of Brooklyn, for plaintiff.

Felix Reifschneider, of Brooklyn, for defendant.

KAPPER, J. If the laws of the society are to be given that force and effect which their plain reading demands, the fund in question should be awarded to the defendant. The decedent was entitled to name "an affianced wife" as beneficiary, upon furnishing to the Supreme Secretary of the order "written evidence of the affianced relation." General Laws of the Royal Arcanum, § 324. The next succeeding clause of the same section provides:

"Neither the decision of the Supreme Secretary nor the issuance of a benefit certificate shall be conclusive as to the fact of the affianced relation."

By section 330 it is provided that, "if any designation shall fail for illegality or otherwise, then the benefit shall be payable to the person or persons mentioned in class first, of section 324," who, by ref-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

erence to that class and section, we find to be, firstly, the "member's wife." It is conceded that the decedent left him surviving his widow, the defendant here, and that she was his lawfully wedded wife at and prior to the time when he attempted to designate the plaintiff as his "affianced wife." The latter relation neither did nor could exist at that time, and, the designation failing for illegality, the benefit became payable to the member's wife, as provided by section 330, *supra*.

"The laws of the association, as found in its constitution, must govern the rights of these parties. No member could dispose of his interest in the endowment fund contrary to those laws, nor except as permitted by them. * * * No designation could be valid unless made 'in accordance with the laws and rules' of the association." *Sanger v. Rothschild*, 123 N. Y. 577, 579, 26 N. E. 3.

The plaintiff's retort to the plain provisions of the laws of the society, above quoted, is that defendant is in no position to advance them, as such prerogative is reserved by the law of the state to the society alone. And the cases of *Luhrs v. Supreme Lodge*, 7 N. Y. Supp. 487;¹ *Maguire v. Maguire*, 59 App. Div. 143, 69 N. Y. Supp. 61; and *Coulson v. Flynn*, 181 N. Y. 62, 73 N. E. 507, are cited to support that contention. In the *Luhrs* Case, *supra*, it appeared clearly that, upon the naming of a beneficiary disentitled to the benefit, the laws of the society commanded a payment of such benefit either to the personal representative of the member or reverted it back to the relief fund, and it was held that, as the certificate under which the plaintiff claimed had been surrendered and canceled, her rights under it were ended.

The court then added to this ruling the following language:

"The association only can raise the question as to whether the beneficiary named in the certificate is entitled to claim, and this defense cannot be interposed by a person in whose favor no certificate exists and *who has no other claim.*"

In the *Maguire* Case, *supra*, the Appellate Division, citing the *Luhrs* Case, say that the contention that the designation of the beneficiary was *ultra vires* the council would be available to the council alone, and added:

"In any event, it cannot be maintained by the plaintiffs, who have no certificate, and who came into court *without any basis for any claim whatever.*"

In the *Coulson* Case, *supra*, the two cases last cited were approvingly referred to; but the court, as it seems to me, extended the scope of the phrases, "who has no other claim" and "without any basis for any claim whatever," when it said that those cases held that the claimants came "into court having no certificate at all and without a *contract* basis for any claim whatever." It may be that the possession of a certificate is to be deemed a *contract* basis for the claim, but that can hardly be so regarded when the nature of the liability is considered, based as it wholly is upon the member's membership and his relations to the society, and not at all upon the status of

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 54 Hun, 636.

the beneficiary. The Coulson Case held that the language of the certificate constituting Flynn (the defendant) the beneficiary was in conformity with the society's act of incorporation; and no other support of the rights of the beneficiary was necessary to uphold the judgment in his favor.

It is quite clear to my mind that the cases relied on in the Coulson Case in support of the holding that there was no *contract* basis for the claim did not so hold, but that they simply determined that the claimants there were in court without *any basis for any claim*. An examination of the record on appeal in the Maguire Case shows that the question involved was whether or not the defendant Kate Maguire, "niece," was one of the "family" of the member; and that record further shows that the laws of the society there involved did not provide that in the case of an illegally named beneficiary a reversion of the fund took place to one who could be legally named, such as is so explicitly provided for at bar. I do not understand the cases referred to hold as a definite proposition, applicable to every controversy between rival claimants, that perforce the interpleader the illegality of designation is waived. What they clearly do hold is that the defeated claimants had no *basis* whatever for their claims after their certificates had been canceled and surrendered, for the reason that nothing was saved to them under the laws of the respective societies. The effect of the interpleader in the case at bar, in my opinion, is well stated by Judge Pryor in *Di Messiah v. Gern*, 10 Misc. Rep. 30, 31, 30 N. Y. Supp. 824, 825, where in disposing of a similar contention he said:

"It is said that the lodge alone may avail of this fraud, and that by bringing the fund into court it signifies its assent to a payment to the plaintiff. Plaintiff's certificate is the sole muniment of her title, and if that be invalidated she has no claim to the money. By interpleading the parties the lodge brings the fund into court for the one to whom it shall be adjudged. This, surely, is no waiver of the fraud, but is a submission of its effect to the decision of the court."

See, also, *Kult v. Nelson*, 24 Misc. Rep. 20, 53 N. Y. Supp. 95.

Another ground upon which the judgment in the Coulson Case was upheld was that of an estoppel against the society itself which precluded it from questioning the validity of the certificate; and it is not pretended that the society at bar would have been estopped from interposing the defense of illegality of designation had it itself defended in lieu of interpleading the defendant. As the alleged "affianced wife" here could only have been so designated upon furnishing to the society evidence of the relationship, and as the proof of the existence of such relationship was expressly made inconclusive by its laws, the fraud is apparent and should not be sanctioned by a court of equity.

Complaint of the exclusion of evidence showing that plaintiff loaned money to the decedent is without merit. Plaintiff was designated as "the affianced wife," and not as one "dependent upon the member for maintenance." A loan by plaintiff to the decedent would not indicate her to be a "dependent."

Judgment for defendant.

McCARTHY et al. v. FITZGERALD.

(Supreme Court, Special Term, Schenectady County. April, 1912.)

1. SALES (§ 353*)—ACTION FOR PRICE—COMPLAINT.

A complaint, alleging that defendant was indebted to plaintiff in a specified sum on account of lumber sold and delivered to defendant at prices agreed upon, and for which he promised to pay, and that there was justly due and owing the plaintiff from defendant a specified sum, was insufficient, since it did not show that the lumber was sold by plaintiffs, or, if sold by another, that the claim had been assigned to plaintiffs, nor that defendant's promise to pay was made to plaintiffs, and a plaintiff must not only allege a cause of action in favor of some one, but must show that it exists in favor of himself.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 995-1004; Dec. Dig. § 353.*]

2. PLEADING (§ 214*)—DEMURRER—FACTS ADMITTED.

A demurrer admits the truth of all the facts alleged and such inferences as may reasonably and fairly be drawn therefrom, but does not admit conclusions of law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

3. PLEADING (§ 350*)—MOTION—EFFECT OF MOTION.

A defendant, by moving for judgment on the pleadings, admits every material allegation of the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1053, 1054, 1070-1077; Dec. Dig. § 350.*]

4. PLEADING (§ 8*)—FORM OF ALLEGATIONS—FACTS OR CONCLUSIONS.

An allegation of an indebtedness in favor of plaintiff, without stating any facts from which the inference or conclusion that defendant is so indebted may reasonably and fairly be drawn, is not an allegation of fact, but a conclusion of law, insufficient to sustain a cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

5. PLEADING (§ 350*)—MOTION FOR JUDGMENT ON THE PLEADINGS—AMENDMENT.

Where defendant moves for judgment on the pleadings, consisting of the complaint and a demurrer thereto, the court, in granting the motion, may permit plaintiff to plead over as if the cause had been brought on for hearing on the demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1053, 1054, 1070-1077; Dec. Dig. § 350.*]

Action by Dennis McCarthy and another against James P. Fitzgerald. On motion of defendant for judgment on the pleadings, consisting of the complaint and a demurrer thereto, on the ground that the complaint is insufficient. Motion granted.

James S. Kiley, of Glens Falls, for plaintiffs.

Slade, Harrington & Goldsmith, of Saratoga Springs, for defendant.

WHITMYER, J. [1] The complaint alleges:

"That the defendant is indebted to the plaintiff in the sum of \$1,609.78 on an account for goods, wares, and merchandise, consisting of lumber sold and delivered to the defendant at Saratoga, N. Y., on the 16th day of November,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

1907, and on the 17th day of December, 1907, at his special instance and request, at prices agreed upon and for which the defendant promised to pay."

It also alleges:

"That said lumber so sold and delivered as aforesaid was reasonably worth the said sum of \$1,609.78, so charged therefor; that no part of said account has been paid, except that there has been credited to said defendant to apply on said account the sum of \$1,457.36, and there is now justly due and owing this plaintiff from said defendant the sum of \$152.42, with interest thereon since the 3d day of October, 1908."

The complaint does not state facts showing that the lumber was sold and delivered by the plaintiffs to the defendant, or, if sold by another, that the claim therefor has been assigned to plaintiffs, nor does it state that defendant's promise to pay therefor was made to plaintiffs. It does not show any connection between the parties, except that it states that the defendant is indebted to the plaintiffs.

The complaint in an action must contain a plain and concise statement of the facts constituting the cause of action. Code Civ. Proc. § 481, subd. 2. It is incumbent upon a plaintiff to allege sufficient facts to show that he is concerned with the cause of action averred, and is the party who has suffered injury by reason of the acts of defendant. In other words, it is not enough that he alleges a cause of action existing in favor of some one. He must show that it exists in favor of himself. Cyc. vol. 31, p. 102; *Weichsel v. Spear*, 47 N. Y. Super. Ct. 223, affirmed 90 N. Y. 651; *Ralli v. Equit. Mut. Fire Ins. Co.*, 16 Misc. Rep. 357, 38 N. Y. Supp. 87.

[2, 3] A demurrer admits the truth of all the facts alleged and such inferences as may reasonably and fairly be drawn therefrom, but does not admit conclusions of law. Baylies on Code Pleading and Practice, p. 340; *Greeff v. Equitable Life Assurance Society*, 160 N. Y. 19, 29, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. Rep. 659. And a defendant, by moving for judgment on the pleadings, admits every material allegation of the complaint. *Clark v. Levy*, 130 App. Div. 389, 114 N. Y. Supp. 891.

[4] The allegation here is one of indebtedness only, and no facts are stated from which the inference or conclusion that defendant is indebted to plaintiff may reasonably and fairly be drawn. An allegation of indebtedness, however, is not an allegation or statement of a fact, but of a conclusion of law, and is insufficient to sustain a cause of action. *Sampson v. Grand Rapids School Co.*, 55 App. Div. 163, 66 N. Y. Supp. 815; *Tate v. American Woolen Co.*, 114 App. Div. 106, 99 N. Y. Supp. 678; *Nealis v. Marks* (Sup.) 96 N. Y. Supp. 740.

[5] The court may permit plaintiff to plead over in the same way as if the case had been brought on before it on the argument of the demurrer. *National Park Bank v. Billings*, 144 App. Div. 536, 129 N. Y. Supp. 846.

The motion for judgment must therefore be granted, with \$10 costs, but with leave to plaintiff to serve an amended complaint within 10 days after service of the order to be entered herein, entry of judgment in the meantime to be suspended.

(78 Misc. Rep. 453.)

In re PETERS.

(Supreme Court, Special Term for Motions, Kings County. December, 1912.)

RECEIVERS (§ 110*)—SUPERINTENDENT OF BANKS—LIQUIDATION—PAYMENTS TO DEPOSITOR—JURISDICTION.

An application by an executor for an order directing the Superintendent of Banks to pay, out of the moneys in his possession as liquidator of a bank, the amount of his decedent's deposit therein, with interest, the return of which decedent had demanded on learning that the institution was not a savings bank, would be denied for want of jurisdiction.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 195-197; Dec. Dig. § 110.*]

Application by William Peters, executor, for an order directing George C. Van Tuyl, Jr., Superintendent of Banks, to pay over certain moneys in his possession as liquidator of the Union Bank of Brooklyn. Motion denied.

Stroock & Stroock, of New York City (Edward F. Spitz, of New York City, of counsel), for the motion.

Louis Goldstein, of Brooklyn (Rufus O. Catlin, of Brooklyn, of counsel), for Superintendent of Banks, opposed.

STAPLETON, J. This is an application for a summary order directing the Superintendent of Banks to pay over, out of moneys in his possession as liquidator of the Union Bank of Brooklyn, the sum of \$1,100, with interest from the 4th day of April, 1910. The applicant presents a petition and supporting affidavits. The respondent interposes an answer denying the material allegation of the petition, and rests his opposition as to the facts upon that document.

The petitioner alleges that he is the executor of the last will and testament of Carl Peters, deceased; that the Union Bank of Brooklyn, at all the times mentioned in the petition, was a banking corporation; that on April 4, 1910, the Superintendent of Banks, by virtue of the authority vested in him under the banking law of the state, assumed control of the Union Bank, but not actual charge of the branch in which decedent made his deposit; that on the 5th day of April, 1910, the Superintendent designated a special deputy to take charge of the liquidation of the bank, and that that special deputy has ever since been in charge; that the testator of the petitioner was of German birth and limited education, being unable to read English and speaking the English language with difficulty; that on the 4th day of April, 1910, he was upwards of 70 years of age and laboring under a general impairment of the faculties, due to advancing years; that on the 4th day of April, 1910, the decedent withdrew from the Hamilton Trust Company the sum of \$2,600, his sole means of support, which had been acquired by him from the estate of his deceased wife; that he withdrew said sum in two checks, one for \$1,500 and the other for \$1,100, in order to deposit them in savings banks and thereby to secure a higher rate of interest; that the decedent deposited one of the checks—the one for \$1,500—in a savings bank, to wit, the East New

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

York Savings Bank, on the 4th day of April, 1910; that thereafter, on the same day, the decedent entered a branch of the Union Bank of Brooklyn and was referred to the manager thereof; that he informed the manager of the withdrawal of his money and the deposit in a savings bank of a part thereof; that he asked the manager what rate of interest was paid by the Union Bank, and that the manager stated it allowed $3\frac{1}{2}$ per cent. per annum on deposits; that the decedent thereupon stated that that was not sufficient, "because the other savings bank in which I have deposited my money allows me 4 per cent."; that the manager said in reply, "Well, what we pay amounts to about the same thing, because we allow interest on deposits every month, and so, by the compounding of interest, it will amount to the same as your other bank pays you;" that by its answer to the questions of the decedent, and especially by the failure of the manager to state, when the testator referred to the other savings bank, that the Union Bank of Brooklyn itself was not a savings bank, the decedent was led to believe that the Union Bank of Brooklyn was in fact a savings bank; that at no time was decedent informed by the manager that the Union Bank of Brooklyn was not a savings bank; that testator thereupon, and after 3 o'clock on the afternoon of April 4, 1910, deposited in the Union Bank of Brooklyn the sum of \$1,100; that upon learning that the Union Bank of Brooklyn was not a savings institution he demanded the return of his money from the Superintendent of Banks, as liquidator of the Union Bank of Brooklyn, through attorneys whom he had in the meantime consulted; that a new Superintendent of Banks was appointed; that the counsel for the former Superintendent stated that they were of the opinion that decedent was entitled to the return of his money and that they would so recommend to the banking department; that the claim was presented to the new Superintendent through his deputy; that the deputy did not affirmatively dispute the claim; that the claim was referred to the counsel for the new Superintendent, who insisted that it should be established in a proper judicial proceeding.

It appears from the affidavits that Carl Peters, the testator of the applicant, presented to the counsel of the former Superintendent, on or about the 10th day of December, 1910, a claim, verified in form, wherein he set forth what he claimed to be the facts, supported by a statement in the form of an affidavit, by the former manager of the Union Bank, to some extent corroborating his claim. Said Carl Peters died on the 12th day of June, 1912, leaving a last will and testament, which was duly probated, and letters testamentary were, on the 2d day of August, 1912, issued to the petitioner.

The applicant advances the proposition that an estoppel may be predicated upon the following state of facts: An opinion vouchsafed to the attorneys for the original claimant, by the counsel to the former Superintendent of Banks, that the claim of the decedent was entitled to preference; the failure of the deputy of the Superintendent of Banks affirmatively to repudiate the claim for preference; and the death of the original claimant pending the progress

of the negotiations. It is clear to me that the elements which bring a situation within the doctrine of estoppel are not present in that association of facts. *Williams v. Supreme Council*, 80 App. Div. 402, 406, 80 N. Y. Supp. 713.

The facts disclose an unfortunate situation, but no departure from the established rules of law should be made to meet a particular case of supposed hardship. The respondent is in possession of the assets of the bank for the benefit of all the creditors, and, unless a legal or equitable right to preference in payment is made out in an appropriate action or proceeding, the general rule, firmly established, which secures equality of payment among creditors, should be adhered to strictly. I have been pointed to no case in which a preference of the kind claimed by the applicant has been established in a summary way upon the application of the person claiming the preference, and, indeed, we have been admonished that the party should be remitted to his action, upon the trial of which the witnesses could be duly examined and cross-examined, and the truth of the claim established in the usual manner. *Matter of North River Bank*, 60 Hun, 91, 14 N. Y. Supp. 261.

I am aware that in *People v. St. Nicholas Bank*, 77 Hun, 159, 175, 28 N. Y. Supp. 407, the General Term in the First Department entertained an appeal taken by a receiver from an order made in a pending action, upon the application of a depositor and entitled in the action, which directed the receiver appointed therein to pay a creditor an alleged preferred claim. The General Term reversed the order of the Special Term. The theory upon which the appeal was entertained was that, that court, having theretofore, in *People v. St. Nicholas Bank (Matter of Kursman)* 76 Hun, 522, 28 N. Y. Supp. 114, held that a temporary receiver, as an officer of the court, had a right, pursuant to the provisions of the Code of Civil Procedure, to apply from time to time to the court for instructions, it followed that the court had the right and power to entertain an application on the part of a depositor for a direction to the receiver to pay a preferred claim. The court was careful to state, however, that even there a proper case was presented for the court to refuse to entertain a summary application and to remit the claimant to his remedy by action.

That case, however, is no authority for this application. I know of no warrant for an order except in a pending action or special proceeding, and it is not pretended that this application is made in an action, or that any proceeding known to the common or prescribed by the statute law has been instituted. As I feel constrained to deny this motion for lack of power and want of jurisdiction, it is unnecessary to determine whether, if the facts alleged were properly proved, in an authorized remedy, the applicant could or could not succeed, and I deem it needless, if not improper, to discuss the merits and pass upon the probative character of the evidence and sufficiency of the papers upon which the application has been presented, although I have very decided views regarding those features of the application.

Motion denied for lack of power, and upon the ground that the court is without jurisdiction to entertain it at the instance of the applicant.

Motion denied.

SAWYER v. DEARSTYNE et al.

(Supreme Court, Trial Term, Washington County. April, 1912.)

1. CHARITIES (§ 12*)—CERTAINTY AS TO PURPOSES—EDUCATION—"NEEDY"—"NEED."

Testator bequeathed property to a graduate association of Cornell University, to be used by it "in aiding and assisting needy young women students at said Cornell University as in the judgment of the officers and directors of the association may seem best and proper." *Held*, that the word "needy" was used as an adjective, from the noun "need," defined as urgent want or necessity, and that, construed with the words "aiding and assisting," it indicated a charitable and benevolent purpose, educational in character, and as such enforceable.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 36; Dec. Dig. § 12.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4738, 4739.]

2. CHARITIES (§ 10*)—PURPOSES OF GIFT—PUBLIC CHARACTER—"NEEDY YOUNG WOMEN STUDENTS."

"Needy young women students" constitute a class, public in character, and the limitation of a charitable bequest to the use of such students at a certain university, which is a public institution, does not affect such public character or purpose.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 34; Dec. Dig. § 10.*]

3. CHARITIES (§ 21*)—CREATION—DEFINITENESS AS TO BENEFICIARIES.

Under Personal Property Law (Consol. Laws 1909, c. 41) § 12, and Real Property Law (Consol. Laws 1909, c. 50) § 113, declaring that a charity shall not be invalid because of the indefiniteness of the beneficiaries, a charitable bequest for the aid of "needy young women students" at a university, leaving their selection and the character of the aid to the discretion of the trustees, was sufficiently definite as to the beneficiaries.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 44-50; Dec. Dig. § 21.*]

4. CHARITIES (§ 18*)—FAILURE TO DESIGNATE TRUSTEE—EXECUTION BY SUPREME COURT.

Since, under Personal Property Law (Consol. Laws 1909, c. 41) § 12, and Real Property Law (Consol. Laws 1909, c. 50) § 113, a trust for which no proper trustee has been designated vests in the Supreme Court, failure to designate a trustee does not invalidate a charitable trust.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 18, 42, 73; Dec. Dig. § 18.*]

Action by Willoughby L. Sawyer, as executor of the last will and testament of Florence E. Dearstyne, against Charles Dearstyne and others to construe the will. Will construed, and findings to be prepared accordingly.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Rogers & Sawyer, of Hudson Falls, for plaintiff.

Sherman Peer, of Ithaca, for Cornell Alumnae House Ass'n and another.

A. N. Richards, of Hudson Falls, guardian ad litem, for infant defendants.

George A. Ingalls, of Hudson Falls, for defendant Gifford.

Thomas Carmody, Atty. Gen., for the State.

Bratt & Van Wormer, of Argyle, for defendant Keller.

WHITMEYER, J. [1] Florence E. Dearstyne, testatrix, died October 10, 1910, leaving a last will and testament, duly admitted to probate by the surrogate of Washington county, the ninth or residuary clause of which is as follows:

"I give, devise and bequeath all the rest, residue and remainder of my property of every kind and nature to the Woman's Graduate Association of Cornell University at Ithaca, N. Y., to be used by said Association in aiding and assisting needy young women students at said Cornell University as in the judgment of the officers and directors of said Association may seem best and proper."

The Woman's Graduate Association was not a corporation, and was not in existence at the time of the death of testatrix. It is claimed that the residuary clause is invalid. In view of the decision by the Court of Appeals in *Matter of Robinson*, 203 N. Y. 380, 96 N. E. 925, 37 L. R. A. (N. S.) 1023, it seems to me that the clause in question should be declared valid and enforceable. The purpose of the gift, as set forth in the will, was to aid and assist needy young women students at Cornell University. The words "aiding" and "assisting" have a well-defined meaning. The word "needy" is used as an adjective. The noun "need" is defined to mean "a state requiring supply or relief; pressing occasion for something; urgent want; necessity; exigency." Webster's International Dictionary, 1910 Ed.; *Matter of Robinson*, *supra*. These words, construed together, indicate a charitable and a benevolent purpose, and, construed in connection with the word "students," indicate a charitable and a benevolent purpose, educational in character.

[2] "Needy young women students" constitute a class, public in character. The limitation of the bequest to the use of such students at Cornell University does not affect its public character or public purpose. *Williams v. Williams*, 8 N. Y. 525; *Starr v. Selleck*, 145 App. Div. 869, 130 N. Y. Supp. 693, affirmed 205 N. Y. 545, 96 N. E. 1116. Moreover, Cornell University is a public institution.

[3] The beneficiaries are indefinite, but that is not fatal. Personal Property Law, § 12; Real Property Law, § 113. The testatrix intended that the bequest be used for the benefit of young women students at Cornell University, who need and require aid and assistance in securing their education. The selection of the young women and the character of the aid and assistance to be rendered are left to the discretion of the trustee; but it is clear that such

selection must be made from those young women students at the University, who are in need of such aid and assistance, and that the aid and assistance to be given must be confined to the uses specified. So construed, the purpose of testatrix was definite and within the language of the statute.

[4] The fact that she has failed to designate a proper trustee does not invalidate the gift or bequest. Under the statute, the trust vests in the Supreme Court. The questions of its administration and enforcement for the uses specified may be determined on the settlement of the decree.

Findings may be prepared accordingly.

(78 Misc. Rep. 518.)

HUTCHINS et al. v. LAVERY et al.

(Supreme Court, Trial Term, Franklin County. December, 1912.)

1. WATERS AND WATER COURSES (§ 154*)—PRESCRIPTIVE RIGHTS—WATERS OF SPRING.

In an action to restrain defendants from using through pipes the waters of a spring, a defendant, having used the water under grants of a water right openly under claim of right for nearly 20 years, had acquired the right to divert such waters by prescription.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 167-173; Dec. Dig. § 154.*]

2. WATERS AND WATER COURSES (§ 156*)—ACTION TO ENJOIN USE OF WATER—EVIDENCE.

Where an agreement granted to certain parties the surplus waters of a spring, to one of them to use the water at his farm and for cooling milk at a butter factory, and to the other the right to the surplus water from such butter factory above what is necessary to operate the factory, a subsequent conveyance by one of the parties of a right to a defendant to use a portion of the water on a farm which was not a part of the farm of the original grantee conveys no right to the use of the water on such farm.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 158, 174-183; Dec. Dig. § 156.*]

Action by Putnam W. Hutchins and others against James V. Lavery and others for an injunction. Judgment for defendant Lavery, and against defendants Drury.

Cantwell & Cantwell, of Malone, for plaintiffs.

Main & O'Neil, for defendant Lavery.

Bryant & Lawrence, of Malone, for defendants Drury.

VAN KIRK, J. This action is brought to restrain defendants from their present use of water conducted from a spring on the George H. Williamson farm through pipes and pump logs. The Muzzy spring is the principal source of a brook which flowed through the George H. Williamson farm and through the lands of the plaintiffs. On the George H. Williamson farm was the "Chapman spring," which discharged its waters into the brook running

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from the Muzzy spring. In or about 1872 a wooden curbing was placed in the Chapman spring, and the waters of this spring were used in part through two hydraulic rams to supply water for the buildings on the George H. Williamson farm and an adjoining farm. In October, 1882, George H. Williamson entered into the agreement in evidence, by the terms of which he conveyed all the surplus waters of said spring, above that sufficient to supply the two rams, to Henry R. Williamson, Sidney Hinman, and Alden King, their heirs and assigns forever; and the agreement specifies the rights that each of these grantees shall have in said surplus waters. The right was granted to build a reservoir or curb at said spring and to lay a pipe therefrom. This line of pipe was laid to the Henry R. Williamson buildings, to the butter factory, and from thence by a half-inch pipe to the farm of Alden King, where it was used at the farm buildings and also at the Manson house. With the pipes so laid the water has been used continuously at the several places mentioned until June, 1911, except that the butter factory was destroyed by fire about three years ago and the water has not since been there used. During this time the waters from the spring, not used through the pipes and rams, have gone into the brook; also the waters at the factory not conducted to the Lavery place have gone into the brook. The discharge from the Muzzy spring was in amount about twice as much as the discharge from the Chapman spring. The plaintiffs are riparian owners along the brook below the defendants, and below any of the parties who have used water through this pipe.

In March, 1895, Alden King conveyed part of his farm to James V. Lavery, the defendant, together with all his right in the Chapman spring, excepting and reserving the right to take water from the pipe for the Manson place. In June, 1911, James V. Lavery and wife conveyed to the defendants Ella H. and George Ladd Drury the right to attach a half-inch pipe and take water for the use of the farms and buildings belonging to Drury, under certain restrictions and conditions. The Drury farm was no part of the King farm. In pursuance of this agreement the half-inch pipe, leading from the bridge at the highway, was replaced with an inch pipe leading to a point on the Lavery farm, where two half-inch pipes were connected with the inch pipe, one leading to the Lavery buildings, and one leading to the Drury buildings. Whatever rights the defendants have to the use of the water from the Chapman spring (1) are derived by prescription, or (2) belong to them as riparian owners along the brook.

[1] The grantor, George H. Williamson, in the instrument of October, 1882, although he owned the spring—that is, the lands around it—had only the right and title of a riparian owner; that is, in this case, the right to use on his farm the spring water for household and stock purposes. *Waffle v. Porter*, 61 Barb. 130. When he attempted to convey “all the surplus waters,” he conveyed the same subject to the rights of lower riparian owners. 40 Cyc. 628. A right to divert the water of a stream or spring may, how-

ever, be acquired by prescription (Id. 608; Hoyt v. Carter, 16 Barb. 212, affirmed Id. 221, note; Ely v. State of New York, 199 N. Y. 213, 92 N. E. 629; Eckerson v. Crippen, 110 N. Y. 585, 18 N. E. 443, 1 L. R. A. 487); and, as conceded by plaintiffs, the grantees of water rights in said instrument having used those rights openly, notoriously, and continuously under claim of right under said grant until June, 1911, each had acquired the right to use the water in the manner and to the extent each so used it. There is no evidence in the case on which the court can find that, since June, 1911, Mr. Lavery has used more water at the farm buildings than was used there before 1911. Before and since June, 1911, he has used sufficient for his house, barn, and stock purposes. The fact that Lavery has substituted an inch pipe for part of the old half-inch pipe is no wrong to the plaintiffs, since he is not drawing more water than he drew before. Casler v. Shipman, 35 N. Y. 533. The defendant Lavery is also a riparian owner; but, as that gives him the right only to use the waters for house and stock purposes, he has no further right as riparian owner than he has acquired by prescription. The plaintiffs are, therefore, not entitled to any restraining order as against him.

[2] The defendant Drury has not the right to use the waters from this spring. A more careful examination of the agreement of October, 1882, will disclose this. While this agreement granted to Henry R. Williamson, Hinman, and King, and to their heirs and assigns, forever, all of the surplus water of the spring above that necessary for the two dams, in its later provisions it defines the specific rights of each grantee. The grantee Henry R. Williamson is to have the right to use the water at his farm; the butter factory may use the water for "cooling milk and other purposes connected with the manufacture of butter," but not to drive the water wheel; the grant to King is "the right to take and convey the waste or surplus water from the said Excelsior butter factory, over and above what may be necessary to properly and advantageously operate the said factory, in pipes or pump logs to his own dwelling house and farm." The right that King and Lavery have acquired by prescription is not an undivided interest in the surplus water of the spring, but is a right, within the limits above quoted, to take the surplus or waste water from the butter factory; and, within that limit of claim or right, he has acquired the right to use a quantity of water equal to that which he has actually used at the King farm buildings and nothing more. Title by prescription is measured by the extent of the possession or use. Hall v. Augsburg, 46 N. Y. 622, cited 199 N. Y. 219; 40 Cyc. 700. Lavery, therefore, had no right or title to convey to Drury to use water at Drury's farm, which was never a part of the Lavery farm, and on which the spring water had never been used, while Lavery was enjoying his right to the spring in full. Drury, therefore, acquired no right to use the spring water by said Lavery deed of June 2, 1911. The defendants Drury are the owners of the butter factory and all the water rights belonging thereto. They acquired this right after this

action was begun, and did not rely upon any water rights acquired with the factory lot when the half-inch pipe was installed under the Lavery deed. Whether or not the prescriptive right acquired to use water from this spring at the factory lot (which does not touch the brook) is a right to use solely upon the factory lot, or whether it is a right to use the quantity of water acquired in connection with that lot for any purpose, I do not think that the defendants Drury can protect themselves under this deed. It does not appear that the factory had the right to, or did, consume any water. It does appear that the water used at the factory was returned to the brook before the brook reached plaintiffs' land. That a three-quarter inch pipe ran to the butter factory does not mean that any water was consumed thereon; and, so far as the evidence shows, the owner of the butter factory had no right to any other use of the water than to detain it for temporary use. If the defendants Drury claim the right to use water under the deed to the factory lot, they must show that some appreciable quantity of water under this deed could be consumed upon the factory lot. Nor has Drury a right to use this spring water as a riparian owner. When this action was begun he did not own any of the lands adjoining the brook. On June 18th Mrs. Williamson granted him a strip of land, three rods wide, extending from the center of the highway and running along the highway from Drury's farm to the factory lot. Outside of the highway, therefore, this strip is very narrow. Mrs. Williamson has reserved the right to pass over this land as she sees fit, and she has testified that the grant was made to Drury under the agreement that he would reconvey it upon demand. Under the circumstances the court cannot uphold his right as a riparian owner. The transaction is too apparently one to secure a temporary success in this suit.

Plaintiffs therefore are entitled to a judgment restraining the defendants Drury from drawing water through the said pipe from this spring. But, while this is true, the plaintiffs have not furnished evidence upon which the court is able to determine what, if any, damage has been done to them by these defendants. Drury is drawing a very small amount of water; my recollection being that by actual measurement he is drawing one gallon per minute. This quantity of water returned to the spring, which is a long distance above the plaintiffs' farms, if the brook was otherwise dry, would hardly furnish water down the course of this brook. Beginning with the year 1908, Franklin county has been afflicted with very serious droughts. Streams and springs which had not been dry before dried in the seasons of 1911 and 1912. The whole Muzzy spring is not sufficient to supply water to plaintiffs' farms. The height of the water in the Chapman spring and curb is not instructive. The water has never overflowed the curb, however little was being used through the pipes. The spring and the curb are in soft, marshy land. It does not appear that the curb catches all of the water from the underground currents supplying the spring, nor does it appear that, when the water has reached a certain height

in the curb, it is not relieved by a discharge under the curb. Nor is the fact that the water at the Drury and Lavery farms fills a well 30 feet deep within 3 feet of its top instructive. The fact that the water remains in these wells at about a uniform height simply means that the water seeps out from the well underground at practically the same rate at which it is fed in. Nor do we know within what length of time these wells were filled by the overflow from the pipes. There is less pressure at the Henry Williamson place, but we are not informed that the actual use there is less. It satisfies the same needs as before. Nor are we informed how much water has been, or is now, used at the Manson place. But, Drury having wrongfully used the water, the plaintiffs, having sued for the injury, are entitled to at least nominal damages. *Hall v. Augsbury*, 46 N. Y. 622, 625. The plaintiffs are therefore entitled to judgment against the defendants Drury, restraining them from using the water from this spring through the said pipe, with \$1 damages, together with costs.

The defendant Lavery is entitled to a dismissal of the complaint; but, this being an equity action, and the evidence showing that Lavery had conveyed to Drury, and therefore was a party to a wrongful act, costs are not allowed to the defendant Lavery.

Judgment accordingly.

VILLAGE OF WELLSVILLE v. HALLOCK.

(Supreme Court, Equity Term, Allegany County. January, 1913.)

1. HIGHWAYS (§ 17*)—ESTABLISHMENT BY USER—RECORD OF USER.

Where there was evidence to show such user by the public as would have justified a record of the road as a highway by the public authorities, their failure to enter such record did not change the statutory mandate that the road should be a public highway.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 24; Dec. Dig. § 17.*]

2. MUNICIPAL CORPORATIONS (§ 697*)—STREETS—OBSTRUCTION—INJUNCTION.

A court of equity had jurisdiction of a cause of action by a municipality to restrain the obstruction of streets, although the statute provided that highway commissioners could maintain such action.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1502-1505; Dec. Dig. § 697.*]

3. HIGHWAYS (§ 6*)—ESTABLISHMENT BY USER—DURATION AND CONTINUANCE OF USE.

A road through defendant's premises had been used since 1866 by all wishing to do so, and soon afterwards it was worked by the pathmaster of the road district, and since about 1886 was used by the public as a highway, and a wooden bridge was built over a creek to accommodate public travel, with the consent of the owner and without interference until 1895, when he fenced the road and posted notices thereon forbidding its use as a public highway. *Held*, under Highway Law (Consol. Laws 1909, c. 25) § 209, providing that land used by the public as a highway for 20 years or more shall become a public highway, that by public user for the statutory period the road had become a public highway.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 8, 9; Dec. Dig. § 6.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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4. HIGHWAYS (§ 7*)—PERMISSION BY USER—ADVERSE CHARACTER OF USE—MANDAMUS BY PUBLIC AUTHORITIES.

Permitted use of land as a public highway for 20 years, and the working or maintaining of the same by public authorities, creates a highway; but without adverse user, or if it is not taken charge of and repaired by public authorities, a mere public use for 20 years, with the consent of the owner, will not make it a highway.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 10, 12–14, 16, 18; Dec. Dig. § 7.*]

5. DEDICATION (§ 38*)—CONSENT—ACCEPTANCE—REVOCATION.

Where the owner of land, over which a roadway had been used since 1866, in 1902 consented to the use of a part thereof as a highway, to be constructed three rods in width to connect with an iron bridge erected by a village, and moved his fence to the boundary of the highway, he could not, after alterations by the village on the faith of his oral consent, revoke it, and allege that there was no highway over that part of his premises.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 77, 78; Dec. Dig. § 38.*]

6. DEDICATION (§ 16*)—ACTS CONSTITUTING—HIGHWAY.

Where the owner of land, over which a roadway had been long used, in 1902 consented to the use of a part of it as a highway, over which village authorities constructed a roadway three rods in width to connect with an iron bridge erected by the village, and the owner moved his fence to such boundary, and afterwards took a deed of the premises in which the grantor reserved all street rights of way, such acts constituted a dedication of the highway to the public.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 15–49; Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1908–1918; vol. 8, pp. 7629, 7630.]

7. DEDICATION (§ 35*)—ACTS CONSTITUTING ACCEPTANCE.

Such acts on the part of the authorities constituted an acceptance of the road as a legal highway.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 68–71, 75, 76; Dec. Dig. § 35.*]

Action by the Village of Wellsville to restrain Charles M. Hallock from obstructing a highway. Permanent injunction to issue.

Francis O'Connor and James T. Ward, both of Wellsville, for plaintiff.

George H. Blackman, of Wellsville, for defendant.

BROWN, J. The issues and testimony present the question as to whether there is a highway running from the northwest corner of defendant's premises at East State street down a dugway road, crossing the lot line between lot 3 and lot 31, and thence east of defendant's mill building to Dyke's creek, crossing the creek and leading southerly to Broad and Dyke streets, in the village of Wellsville. That portion of the alleged highway from the north bank of Dyke's creek to East State street runs wholly through the premises of the defendant. At many times during the past three years the defendant has closed the roadway by erecting fences and barriers across the same, claiming that the roadway was not a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

highway and that it was his private property. The street commissioner of the plaintiff, on removing such fences, has been sued by the defendant for such alleged trespass, and many of such actions are pending undetermined. In 1911 the plaintiff brought this action to restrain defendant from fencing up and obstructing the roadway, alleging that it is a highway; the defendant contending that it is not a highway, and asserting that its existence as a highway must be evidenced by a formal record by the village authorities before jurisdiction can be acquired by a court of equity to determine the questions involved.

[1] In *Lewis v. N. Y., L. E. & W. R. R.*, 123 N. Y. 496, 26 N. E. 357, it was decided that, if the evidence tends to show such a user by the public as would have justified a record of the road as a highway by the public authorities, their failure to perform their duties does not change the mandate of the statute that the road should be deemed a public highway.

[2] In *Village of Haverstraw v. Eckerson*, 192 N. Y. 58, 84 N. E. 578, 20 L. R. A. (N. S.) 287, it was held that a court of equity had jurisdiction of a cause of action in behalf of a municipality to restrain the incumbering of streets, although the statute did provide that highway commissioners could maintain such action.

[3] Much testimony has been taken upon the subject of dedication, use, and acceptance of the road as a highway. The proof is that since the year 1866 there has been a dugway road leading from the northwest corner of defendant's premises at East State street and descending to the east to a point a few rods east of the line between lots 3 and 31, which has been at all times coincident with the existing roadway, and is entirely within the lines of the alleged highway, as described in the complaint. This dugway road, in connection with its extensions to the south, has been used by the public in passing through defendant's premises from East State street to Dyke street for more than 40 years. One of the defendant's grantors, who from 1872 to 1895 was in possession of the premises through which it runs, testified that: It was used by any one that wanted to use it. It was worked under the direction of the pathmaster of the road district 40 years ago. It has been worked and cared for by the Street Commissioner of the plaintiff since 1886. For more than 20 years before defendant went into possession of the premises, it was used by the public as a highway. There is no evidence that its use as a public highway was ever sought to be restricted or interfered with until the defendant purchased the premises in 1895, and at that time it had become a highway by use under provisions of the statute, which then provided that all lands which shall have been used by the public as a highway for a period of 20 years or more shall be a highway. It had become a highway by use, under all the authorities, by the consent of the owners of the fee, the use by the public, and the working and maintenance by the authorities of the town, and, later, of the village, when it was taken within the limits of plaintiff's corporation.

While there is much testimony tending to prove that for a short period in 1895, at the time the defendant went into possession of the premises, and for a while in 1899, this dugway road was fenced across at its western end, and that one or more signs forbidding its use as a public highway were posted along the same, such obstruction and posting of signs could have no effect in changing the roadway from a highway to a private road. *City of Buffalo v. D., L. & W. R. R.*, 190 N. Y. 96, 82 N. E. 513, 16 L. R. A. (N. S.) 506. The proof is that from 1895 to 1909 this dugway road was used by the public as a highway, repaired, worked, and maintained by the public authorities, and while it may be true that the defendant did keep a sign posted somewhere along such dugway road, upon which was written the words, "Private Way, No Trespassing," and has fenced up said road at various times since 1895, no such signs or fences were upon or along such dugway road prior to 1895. The defendant's grantor, who was in possession of said premises from 1872 to 1895, testified that he never placed, authorized another to place, or saw any obstructions, or signs on or along the dugway road prior to the past three or four years. This dugway road has been used as a part of a public thoroughfare from East State street to Dyke street since at least 1866. The crossing of this thoroughfare over Dyke's creek has been by means of a bridge; Dyke's creek being considerable of a stream, and in times of high water has taken away the bridge at least four times in the past 30 years. In 1889 the then wooden bridge was destroyed by a flood, and it was replaced by a wooden bridge built by the town of Wellsville. Later the bridge was again destroyed by flood, and replaced by a wooden bridge by the town of Wellsville. In 1902 the bridge was again destroyed by flood, and the present iron bridge, about 100 feet long, was erected by the town of Wellsville.

At the time one of the wooden bridges was erected the north end was moved to the east some 50 or more feet; the roadway at the north bank of the creek being changed to accommodate the new location. In 1874, upon the petition of the then owner of the premises through which the dugway road passes, a highway known as the "Miller and Tremain road" was laid out and properly recorded from the Erie Railroad tracks north, crossing Dyke's creek at the location of the bridge as it then stood, running northwesterly, west of the mill building of defendant, to the lot line between lots 3 and 31, and thence northerly along the east side of the lot line to State street, crossing the easterly end of the dugway road. This Miller and Tremain road was opened, worked, and maintained by the town of Wellsville, and later by the plaintiff, from its southerly end to the dugway road, and in connection with the dugway road was used by the public as a highway from 1874 to 1902. The fact that the Miller and Tremain road was laid out upon defendant's grantor's petition, was opened and worked only up to the intersection with the dugway road by the plaintiff, and that the dugway road has been used as a means of getting from the Miller and Tremain road to State street ever since that date (1874), is very sig-

nificant in determining the question as to whether it was not originally intended by defendant's grantor that the dugway road was and should be a public highway.

The northerly end of the Miller and Tremain road, from its intersection with the dugway road northerly to State street, has never been opened and worked. This end is 75 feet long, with a rise of more than 30 feet up a steep bank, and is impracticable for use as a highway without great expense. In 1902 the location of the Miller and Tremain road was changed to the east of defendant's mill building, forming a part of a continuous highway from the north bank of Dyke's creek to East State street by way of the dugway road, and has been used as such ever since, except as it was obstructed by defendant's fences erected within the past few years. The only possible purpose or object in maintaining a bridge over Dyke's creek by the town of Wellsville was to accommodate the public highway travel from Dyke street to East State street through the premises now owned by defendant. The only existing, practical, or feasible outlet for such traffic to the north was over the dugway road. The fact that the town erected and maintained the bridges, and that the plaintiff worked and maintained the roadway throughout its entire length from Dyke's creek to East State street, over and including the dugway road, from 1866 to the present time, and that it has been used by the public as a highway ever since that time, excepting possibly a short time in 1895 and in 1899, and for the past two or more years, makes it perfectly clear that the owners of the fee and those in possession of the premises occupied by the dugway road permitted it to be used as a public highway for more than 20 consecutive years prior to 1895, and within the terms of section 209 of the Highway Law (Consol. Laws 1909, c. 25) it is a public highway. This statute reads:

"All lands which shall have been used by the public as a highway for the period of twenty years or more shall be a highway with the same force and effect as if it had been duly laid out and recorded as a highway."

Judge Earl, in *Speir v. Town of New Utrecht*, 121 N. Y. 429, 24 N. E. 694, in speaking of this statute, says:

"The full scope and meaning of the words 'used as a public highway' are not quite certain. The user need not be adverse and under such circumstances as would be required to give an individual a right of way by prescription. If such had been the intention, other language would we think have been used. All we have here is that 'the road was used by the public generally.' But the mere fact that a portion of the public travel over a road for 20 years cannot make it a highway; and the burden of making highways and sustaining bridges cannot be imposed upon the public in that way. There must be more. The user must be like that of highways generally. The road must not only be traveled upon, but it must be kept in repair or taken in charge and adopted by the public authorities. We think all this is implied in the words, 'used as public highways.' Although the owner of land may not dedicate it for a public highway, and may not intend or assent that it shall become such, yet if he permits it to be used in the way just indicated for 20 years, it would be deemed a public highway, and he will not be permitted to question the public right."

It is said that, notwithstanding this decision, there can be no creation of a highway by user, unless the use is adverse and hostile to the owner of the fee; that if he consents to such use there can be no adverse use, and hence no presumption of a grant by the lapse of 20 years. In support of such contention *City of Cohoes v. D. H. & C. Co.*, 134 N. Y. 397, 31 N. E. 887, is cited, wherein Judge Vann said:

"Public highways may be created * * * by prescription, or where land is used by the public for a highway for 20 years, with the knowledge, but without the consent, of the owner. The presumption of a grant of the right of way springs from the mere lapse of said period of time in connection with the adverse user by the public."

It is urged under this decision that to create a highway by user the public must have used the road for 20 years with the knowledge and without the consent of the owner; that the use for the period must be against the consent of the owner, hostile to the owner's rights; that the plaintiff must prove as a part of its affirmative case that the use for 20 years was in opposition to and in spite of the owner's protest.

[4] While it would appear that the statement of Judge Earl, that the use for 20 years need not be adverse to the owner of the fee, is contradictory to and in conflict with the statement of Judge Vann, that the use must be with the knowledge, but without the consent, of the owner, yet they are perfectly consistent and reconcilable upon a brief examination of the statements. Judge Earl says that when the owner permits lands to be used in the way just indicated—that is, by the public traveling and the keeping in repair or taking in charge and adopting by the public authorities—in such a case no *adverse* use is necessary to create a presumption of a grant through lapse of time. Judge Vann is entirely silent as to the keeping in repair or taking in charge and adopting by the public authorities. In such a case adverse use is necessary to create a presumption of grant through lapse of time. The law undoubtedly is that permitted use of land as a public highway for 20 years and the working and maintaining of it by the public authorities create a highway; that if it is not kept in repair or taken in charge and adopted by the public authorities, the mere use by the public as a highway with the consent of the owner will not make it a highway. Where the only claim that the land is a highway is based upon the mere travel for 20 years, the land will not become a highway, unless it be shown that such use was against the consent and hostile to the rights of the owner. It is believed that all conflicting authorities can be harmonized upon the lines above stated. *Speir v. Town of New Utrecht*, 49 Hun, 294, 2 N. Y. Supp. 426; *Building of Bridge, etc.*, 100 N. Y. 642, 3 N. E. 679; *Devenpeck v. Lambert*, 44 Barb. 596; *Hamilton v. Owego*, 42 App. Div. 312, 59 N. Y. Supp. 103; *Palmer v. Palmer*, 150 N. Y. 148, 44 N. E. 966, 55 Am. St. Rep. 653.

Whatever was said upon the trial relative to this dugway road being a private road, as distinguished from a public highway, was in mere characterization of it, and inconsistent with the actual use to which it has been put for nearly 50 years.

[5] In 1902 at the time the town of Wellsville was erecting the present iron bridge over Dyke's creek to the south of defendant's mill

it was suggested by the plaintiff's street commissioner that the location of the highway that from about the year 1866 had run northerly from the north bank of the Dyke's creek to the west of the defendant's mill building and northerly along the lot line between lots 3 and 31 to the dugway road, be moved to the east about seven rods to its present location. This suggestion or proposition was made to the defendant in person, and as to the defendant's consenting thereto he testifies:

"Q. Did you forbid them from moving that road from the west side to the east side of the mill? A. No; I agreed to it. Q. That was not entirely satisfactory to you? A. It was not entirely satisfactory, but I agreed to it. Q. You agreed to it? A. Yes, to give them a highway three rods wide."

It thus appears that the defendant fully consented in 1902 to the use for highway purposes of the lands owned by him now occupied as a highway from the north bank of the Dyke's creek on the east of his mill northerly to the eastern extremity of the dugway road, and that the defendant specified in 1902 that the highway to be constructed could be three rods in width. Immediately following such consent the plaintiff entered upon said three-rod strip. The town of Wellsville constructed an iron bridge from its southerly terminus across Dyke's creek. The plaintiff laid out on the ground, and worked, a roadway suitable for public travel its entire length, connecting its northerly end with the dugway road, and has ever since maintained the same as one of the public streets or highways in the village. The defendant, after giving such consent, moved his fence from its former location to the western side of the three-rod strip, and it has been maintained by him on the western boundary of the highway from about the northeast corner of his mill building to the dugway road; such fence being three rods from the eastern boundary of the defendant's premises. Since 1902 the roadway to the west of defendant's mill has not been used by the public, and the same has been abandoned by the plaintiff, although no formal steps have been taken to discontinue the same as a legal highway.

It is thus seen that the plaintiff's right to maintain a highway from the north bank of Dyke's creek east of defendant's mill as it now exists depends solely upon the oral consent of the defendant in 1902, before the change was made, that the location of the highway be changed from its original place west of the mill to its present location, and the events occurring since that consent was given. In *People v. Goodwin*, 5 N. Y. 568, the owner of the land verbally consented that the commissioners should lay out the highway, and it was held that, if the commissioners had acted on the faith of that consent by laying out the highway, the owner of the land would have been estopped from denying the legality of the act. In *People v. Van Alstyne*, *42 N. Y. 38, the owners of the land verbally promised, if the highway was laid out, to claim no compensation for their lands. They subsequently revoked such promise. It was held that, if the commissioners had acted upon their parol consent before it was withdrawn, their claims to compensation would have been barred. In *Marble v. Whitney*, 28 N. Y. 297, it was held that, while the verbal consent to the alteration is

revocable, it must be revoked before the road is changed. A revocation of the consent subsequent to the alteration of the highway cannot be permitted. The consent is not a license that he can revoke after the alteration is made. If the alteration is made immediately on the faith of the virtual consent, the consent is irrevocable. On principle, the defendant ought not to be permitted to now revoke such consent, and allege that there is no highway on the easterly side of his premises east of his mill building.

[6, 7] The fact is that the town of Wellsville, since such consent was given, has rebuilt the iron bridge and maintained it as a highway bridge ever since. The plaintiff, immediately after such consent, laid out on the ground a highway, worked and made a roadway, and ever since has maintained within the lines described in the complaint a public highway. In 1909 the defendant, in pursuance of the terms of a contract to purchase, took title by deed of all the lands occupied by him on lot 31, in which deed his grantor reserved "all street rights of way laid out and passing through said premises." The lands described in the complaint between Dyke's creek and the dugway road were then occupied as a highway. It was one of the street rights of way that passed through the premises. The right to occupy the land as a street had been consented to by the defendant 7 years before. It is quite clear that defendant's title is incumbered by an easement expressly created in his deed. Whatever title he possesses is subject to the right of the public to pass and repass over the lands described in the complaint. Within the authorities and upon principle it must be held that so much of the land described in the complaint as has not been used by the public as a highway for the period of 20 years has by the consent and offer of a highway three rods wide of the defendant, the acts of the authorities of the plaintiff, and the conveyance to the defendant become dedicated to the public and accepted by the proper authorities as a legal highway, and was such at the time that the defendant erected the obstructions, built the fences, and placed the barriers across the same.

It therefore follows that the lands described in the complaint from the southerly terminus to the turn to the west near the foot of the dugway for the width of 3 rods constitute a legal highway; that the lands described in the complaint from the turn above mentioned up the dugway to East State street for the width of the actual use, about 17 feet, constitute a legal highway. The plaintiff is entitled to a permanent injunction restraining the defendant from obstructing the same, together with costs.

Let findings be prepared.

MORRIS v. CARNEGIE TRUST CO. et al.

HENKEL v. SAME.

(Supreme Court, Appellate Division, First Department. January 24, 1913.)

BANKS AND BANKING (§ 317*)—DISSOLUTION—PREFERENCES—DEPOSITORIES—
"MONEYS PAID INTO COURT."

Money deposited by a receiver or trustee in bankruptcy in a trust company designated by the bankruptcy court, under Bankruptcy Act July 1, 1898, c. 541, § 61, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3446), as a depository for money of bankrupt estate, and by the state comptroller, under Code Civ. Proc. § 746, as a depository of all "funds or moneys paid into court," is, under Banking Law (Consol. Laws 1909, c. 2) § 189, providing that all "moneys brought into court by order * * * of any court of record" may be deposited with any such corporation so designated by the state comptroller, and section 190, providing that, if dissolved, "the debts due from the corporation as * * * depository shall have preference," entitled to preference; moneys "paid into court," or "brought into court," meaning merely such as have come, by operation of law, in custodia legis, which they do when they come into the custody of an officer of the court, which a trustee or receiver in bankruptcy is.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1222; Dec. Dig. § 317.*]

For other definitions, see Words and Phrases, vol. 2, p. 1909.]

Ingraham. P. J., dissenting.

Appeal from Trial Term, New York County.

Two actions, one by Robert C. Morris, as receiver, the other by William Henkel, Jr., as trustee, against the Carnegie Trust Company and others. From judgments dismissing the complaints, plaintiffs appeal. Reversed and rendered.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Wallace Macfarlane, of New York City, for appellants.

Frank M. Patterson, of New York City, for respondents.

SCOTT, J. These two appeals involve the question whether a receiver or trustee in bankruptcy who, under order of the bankruptcy court, has deposited funds in a state trust company, which has been designated by the state comptroller and under the provisions of the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) is entitled to a preference over general creditors. The question was brought before the United States District Court in Matter of Bologh, 185 Fed. 625; but the District Judge refused to decide it, remitting the parties to the state courts.

In 1907, upon its own application, the Carnegie Trust Company was designated as a depository for the moneys of bankrupt estates under section 61 of the Bankruptcy Act, which reads as follows:

"Sec. 61. Depositories for Money.—Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residence of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

quire, by like order, increase the number of depositories or the amount of any bond or change such depositories."

Under the bankruptcy practice three classes of deposits are made in the designated depositories, to wit: (1) Deposits by receivers in bankruptcy, subject to withdrawal by checks signed by the receiver. (2) Deposits by trustees in bankruptcy, subject to checks signed by the trustee, countersigned by the referee in bankruptcy. (3) Deposits in composition matters to the credit of the judges of the United States District Courts. The third class has been recognized by the Carnegie Trust Company, and the superintendent of banks, as liquidator, as special deposits in trust, entitled to a preference in payment.

The deposits in question here are of the first and second classes. The Carnegie Trust Company, when these payments were made to it, was also a depository designated by the state comptroller under section 746, Code Civ. Proc., as a depository of "all funds or moneys paid into court." Section 189 of the Banking Law (Consol. Laws 1909, c. 2), referring to designated depositories, provides as follows:

"All moneys brought into court by order or judgment of any court of record may be deposited with any such corporation, that has been designated by the comptroller of the state of New York, as provided by the Code of Civil Procedure."

And section 190 as follows:

" * * If dissolved by the Legislature or the court, or otherwise, the debts due from the corporation as such executor, administrator, guardian, trustee, committee or depository shall have the preference. The court or officer making such appointment may, upon proper application, require any corporation which shall have been so appointed, to give such security as to the court or officer shall seem proper, or upon failure of such corporation to give security as required, may remove such corporation from and revoke such appointment. Such court or officer may make orders respecting such trusts and require the corporation to render all accounts which such court or officer might lawfully require if such executor, administrator, guardian, trustee, receiver, committee or depository were a natural person. Whenever any such corporation shall be designated by the comptroller of the state of New York as a depository for funds and moneys paid into court, before receiving any such deposit, it shall give to the people of the state a bond in the form and manner, as provided by section forty-four of this chapter."*

The plaintiff's claim is: (a) That the preference given by section 190 of the Banking Law, on the failure of a designated depository of "moneys paid into court," deposited with it, is not confined to those cases only of moneys paid into court which are expressly provided for in the Code of Civil Procedure. (b) That the federal courts within the state of New York come within the words "*any court of record*" in section 189. (c) That bankruptcy funds deposited in a state trust company are "*moneys paid into court*" within the meaning of those words as used in section 186, or "*moneys brought into court by order or judgment of any court of record*," as provided in section 189. (d) If these three points are established, then the plaintiffs are entitled to the preference given to such funds by the provisions of section 190.

As to the words "as provided by the Code of Civil Procedure," it is claimed by plaintiffs, and conceded by defendant, that they do not affect the question now under consideration, and are to be taken mere-

ly as qualifying the designation by the comptroller. If these moneys would have been entitled to a preference in payment if deposited in the trust company by a receiver or trustee appointed by a state court, and in obedience to an order of such court, I think it must follow that they are equally entitled to a preference when deposited under an order of the bankruptcy court, for the District Courts of the United States are unquestionably courts of record and therefore within the letter of section 189 of the Banking Law. No doubt it was competent for the bankruptcy court to designate as depositories state institutions which had not been designated by the state comptroller under the provisions of the Code of Civil Procedure; but that is not this case, and it is not unreasonable to assume that the Carnegie Trust Company was designated as a depository in bankruptcy because it had been designated by the state comptroller, and therefore, presumably, fell under the provisions of the state Banking Law as to preferential payment of trust deposits.

A question has arisen whether moneys received by a trustee or receiver under authority of a court, whether federal or state, are moneys "paid into court," or moneys "brought into court." I think they clearly are. The words "moneys paid into court" mean nothing different than moneys which have come, by operation of law, in custodia legis, and it does not matter, in my opinion, whether the moneys have actually come into the custody of the court itself, or of its clerk, or of any other officer of the court, which trustees and receivers in bankruptcy undoubtedly are. The question arose in *Ex parte Prescott*, 19 Fed. Cas. 1283, wherein a ship had been captured and sold as a prize, and the proceeds deposited by the marshal in a bank designated by the court. The clerk of the court claimed a fee by virtue of an act allowing him a percentage on all "moneys deposited in court." The court, per Story, J., held:

"Money deposited in court cannot mean brought in and deposited *sedente curia*, in the actual manual possession of the court. Such a construction would be against all practice as well as all legal reasoning. It must therefore mean money which is deposited subject to the order of the court, be it in whose actual possession it may, whether of a bank or an officer of the court. In such a case the bank or officer acts as the mere fiduciary or depository of the court, and in legal contemplation the money is in the custody of the court."

Trustees and receivers in bankruptcy are expressly declared to be officers of the District Court (Bankruptcy Law, § 1, subd. 18), and it has been held repeatedly that, upon an adjudication of bankruptcy, title to the bankrupt's property becomes at once vested in the trustee, and placed in the custody of the bankruptcy court (*Mueller v. Nugent*, 184 U. S. 1-14, 22 Sup. Ct. 269, 46 L. Ed. 405; *Murphy v. Hoffman Co.*, 211 U. S. 564, 29 Sup. Ct. 154, 53 L. Ed. 327; *Whitney v. Wenman*, 198 U. S. 539-552, 25 Sup. Ct. 778, 49 L. Ed. 1157; *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183). It seems to me to be quite clear, therefore, that the moneys deposited in the Carnegie Trust Company by the appellants were "moneys paid into court," as those words are used in the Banking Law. If so, I see no reason for making a distinction between state court funds and

federal court funds. They are both within the strict letter of the statute, and, as I think, within its spirit and intention.

The judgments appealed from should therefore be reversed, and judgments awarded to the appellants as prayed for in their complaints, with costs in both courts.

McLAUGHLIN, LAUGHLIN, and CLARKE, JJ., concur.

INGRAHAM, P. J. (dissenting). The Carnegie Trust Company was organized under the Banking Law of this state as a trust company. Article 5, c. 10, of the Laws of 1909 (Consol. Laws 1909, c. 2). By section 186 of the act the trust company was authorized to accept trusts from and execute trusts for married women, in respect to their separate property; to act under the order or appointment of any court of record as guardian, receiver, or trustee of the estate of any minor and as depository of any moneys paid into court, as provided by the Code of Civil Procedure, whether for the benefit of any such minor or other person, corporation or party; to "take, accept and execute any and all such legal trusts, duties and powers in regard to the holding, management and disposition of any estate, real or personal, and the rents and profits thereof, or the sale thereof, as may be granted or confided to it by any court of record, or by any person, corporation, municipality or other authority"; to "take, accept and execute any and all such trusts and powers of whatever nature or description as may be conferred upon or intrusted or committed to it by any person or persons, or any body politic, corporation or other authority, by grant, assignment, transfer, devise, bequest or otherwise, or which may be intrusted or committed or transferred to it or vested in it by order of any court of record, or any surrogate, and to receive and take and hold any property or estate, real or personal, which may be the subject of any such trust"; and "to accept the appointment of executor or of trustee under the last will and testament, or administrator with or without the will annexed, of the estate of any deceased person, and to be appointed and to act as the committee of the estates of lunatics, idiots, persons of unsound mind and habitual drunkards." Section 189 of the act provides that such a trust company may be administrator, guardian or trustee, and provides for the granting of letters testamentary or of administration by any surrogate, or the issuance by any court of letters guardian of any infant. Section 190 of the act provides that:

"No bond or other security, except as hereinafter provided, shall be required from any such corporation for or in respect to any trust, nor when appointed executor, administrator, guardian, trustee, receiver, committee or depository. * * * If dissolved by the Legislature or the court, or otherwise, the debts due from the corporation as such executor, administrator, guardian, trustee, committee or depository shall have the preference."

The plaintiffs claim that the money deposited by the receiver or trustee in bankruptcy is entitled to be preferred over other deposits upon the dissolution of the trust company. The plaintiff in one of the actions was appointed by the United States District Court as re-

ceiver of a firm against whom proceedings in bankruptcy had been instituted, and in the second case the plaintiff had been appointed a trustee of a person who had been adjudicated a bankrupt. These plaintiffs had deposited these funds in the Carnegie Trust Company as a depositary, not under the specific order of a court of record, but it was the receiver and the trustee, respectively, who selected the Carnegie Trust Company as the depositary of the moneys coming into their hands. The Carnegie Trust Company had been, with other banks and trust companies, designated as a depositary of moneys of bankrupt estates under section 61 of the Bankruptcy Act; but there was no order of the court directing that this particular institution should be selected as the depositary of these moneys, nor, as I understand it, did the trustee or receiver receive this money as money paid into court. They were acting under the Bankrupt Act as the persons entitled to collect of the bankrupts the estate of the bankrupt and apply it to these creditors. Now, the money deposited by the receiver and trustee were ordinary deposits subject to check at sight, and it seems to me that the relation between the receiver and trustee and the Carnegie Trust Company was the same as any other depositor who had opened an account and deposited money subject to check. It was not, strictly speaking, money paid into court, which involved a fund which the court holds, either by its clerk or by a depositary named by it, the moneys of parties to the litigation; but rather, as the depositary of moneys held by a trustee, it had received money deposited with a banking corporation for the purpose of safekeeping and which is under the control, not of the court, but of the trustee or receiver.

A consideration of the provisions of the Banking Law, to which attention has been called, shows that the preference intended to be given was in a case where the trust company had itself been appointed trustee, guardian, executor, administrator, committee, receiver, or depositary. Where the court itself had selected the trust company to act in one of these capacities, and where money thus in its possession was money which it had received in such a capacity, a preference was given. There is no express provision of the statute which gives to a receiver appointed by a state court a preference for moneys deposited by him as such receiver over other depositors. As it appears by the sections of the Banking Law before referred to, a trust company could be appointed by the court as its receiver, as its trustee, as an executor or administrator of an estate, and when, acting in such a capacity, it receives money or property, the parties entitled to that money or property are entitled to a preference; but there is no provision, as I read the statute, that when an executor, administrator, or other person, receiving money in a fiduciary capacity, selects a bank as its depositary, such executor or administrator or trustee should receive a preference for the money so deposited over other depositors. When the United States court designated this trust company as a depositary, it exercised an independent authority over which the state of New York had no control. It required the trust company to give a bond to secure its deposits, which it must be assumed was considered suf-

ficient to secure them. Such designation, it seems to me, had no relation to the Banking Law of the state of New York, and its act in making such designation gave to the receiver or trustee in bankruptcy no power to enforce a provision of the Banking Law which was intended solely to provide for cases where the courts of this state had designated this trust company as one to execute a trust, and to affect money or property which the trust company had received under such appointment or designation.

For this reason I think the judgment appealed from should be affirmed.

(79 Misc. Rep. 224.)

CÆSAR et al. v. BERNARD et al.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

CORPORATIONS (§ 545*)—INSOLVENCY—TRANSFERS—PREFERENCES—LIABILITY OF DIRECTORS—"SUCH" CORPORATION.

Under Stock Corporation Law (Consol. Laws 1909, c. 59) § 66, providing that no corporation "which shall have refused to pay any of its notes or other obligations" when due shall make certain transfers of property, and that no transfer of any property of any "such" corporation, when it is insolvent or its insolvency is imminent, with intent to prefer particular creditors, shall be valid, and declaring its directors liable for violation of any provision of the section, for the directors to be liable for a preferential transfer the corporation must have, before the transfer, refused to pay an obligation; there being nothing else to which "such" can refer.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2170-2175; Dec. Dig. § 545.*

For other definitions, see Words and Phrases, vol. 7, pp. 6750-6754; vol. 8, p. 7808.]

Appeal from City Court of New York, Special Term.

Action by Henry A. Cæsar and another, partners as H. A. Cæsar & Co., against Robert W. Bernard and others. From three orders granting motions made by certain defendants for judgment on the pleadings, plaintiffs appeal. Affirmed, with leave to appeal to the Appellate Division.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Hirsch, Scheuerman & Limburg, of New York City (Henry L. Scheuerman, Herbert R. Limburg, and Harry F. Mela, all of New York City, of counsel), for appellants.

Richard H. McIntyre, Jr., of Brooklyn, and W. Cleveland Runyon, of New York City, for respondent William M. Bernard.

John Elton Wayland, of New York City, for respondent Robert W. Bernard.

Claudius A. Hand, of New York City, for respondent Runyon.

LEHMAN, J. The plaintiff, a judgment creditor of the Wyckoff Trading Company, has brought an action against directors of that corporation for alleged violations of section 66 of the Stock Corporation Law, in that they made conveyances, assignments, and transfers of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

property of the corporation while it was insolvent or its insolvency was imminent with intent to prefer particular creditors. Three of the defendants moved for judgment on the pleadings. The plaintiffs appeal from the orders granting these motions.

The complaint fails to allege, and the plaintiff does not claim, that at the time of the alleged preferences the corporation had refused to pay any of its notes or other obligations; but he relies upon the second sentence of section 66 of the Stock Corporation Law, which provides that:

"No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor of the corporation shall be valid," etc.

It is the contention of the plaintiff that a violation of this sentence occurs whenever a preference is given when a stock corporation is insolvent or its insolvency is imminent, regardless of whether the corporation had refused to pay any of its notes when due. The difficulty with plaintiff's contention is that this sentence does not provide that no corporation or its officers may give a preference to particular creditors, but provides only that no "such" corporation or its officers may do so. The word "such" can refer only to corporations of the class previously referred to, and the only class of corporations previously referred to is corporations which shall have refused to pay any of its notes or other obligations when due. Consequently we can give the statute the construction placed upon it by the plaintiff only if we entirely disregard the word "such."

The plaintiff argues that we have a right to disregard this word, because the Stock Corporation Law was not intended to change the general policy of the state, which by earlier statutes had provided against any insolvent corporation making any assignment with intent to prefer particular creditors. It is true that the statutes of this state, since the enactment of chapter 325 of the Laws of 1825, had provided against such preferences. The earlier statutes, however, differed in a material point from the statute under consideration. They merely provided a convenient means to enforce the rule, recognized in equity, that the capital of a corporation is a trust fund for all its creditors; but they did not provide for a personal liability on the part of officers or stockholders concerned in such illegal transactions. Moreover, though the courts found it necessary to give a liberal construction to the language of the earlier statutes in order to effectuate what they conceived was the purpose of the Legislature, such construction did not violate the language of the statute.

In this case, if we seek to effectuate what was perhaps the intent of the Legislature, we must construe a statute which provides for a liability not recognized by the common law, not only liberally, but in disregard of all rules of grammatical construction. It is true that in the case of *O'Brien v. East River Bridge Co.*, 36 App. Div. 17, 55 N. Y. Supp. 206, the Appellate Division of this Department, Ingra-

ham, J., dissenting, held that the word "such" could be disregarded. That case was, however, reversed by the Court of Appeals (161 N. Y. 539, 56 N. E. 74, 48 L. R. A. 122), and though the reversal was placed squarely upon other grounds, still the majority opinion stated that "the statute in terms seems to apply only to a corporation 'which shall have refused to pay any of its notes or other obligations when due in lawful money of the United States,' " and that without a finding of such a fact there is much difficulty in applying this statute, even to a case where the payment was made to an officer or director. Since the Court of Appeals rendered that decision I have been unable to find a case where any appellate court has granted relief under the statute without a finding that the corporation had refused to pay any of its notes or other obligations.

I think, therefore, that, regardless of our own views as to the probable legislative intent, we must hold that the statute applies only to "such" corporations as have failed to pay their notes or other obligations.

The orders should be affirmed, with \$10 costs and disbursements, with leave to appeal to the Appellate Division. All concur.

(78 Misc. Rep. 532.)

PEPPER v. CUTLER.

(Supreme Court, Special Term, Schenectady County. December, 1912.)

1. POWERS (§ 33*)—EXECUTION—SALE OF REAL PROPERTY—INTENT.

Whether a disposition of real property is in execution of a power conferred by will is a question of intention; the conveyance being construed to effectuate the intent of the parties, unless inconsistent with settled rules of law.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 110–120; Dec. Dig. § 33.*]

2. POWERS (§ 33*)—EXECUTION—REAL PROPERTY LAW—REFERENCE TO POWER—INDIVIDUAL INTEREST OF DONEE.

Real Property Law (Consol. Laws 1909, c. 50) § 173, providing that an instrument executed by the grantee of a power conveying an estate or creating a charge which he would have no right to convey or create except by virtue of the power shall be deemed a valid execution thereof though not referred to therein, is a rule of construction, and has no application to a conveyance of real property by the widow to whom the same had been given by her husband's will with the power to sell and convey the same, and from the income and proceeds support herself and daughter during their life.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 110–120; Dec. Dig. § 33.*]

3. POWERS (§ 33*)—EXECUTION—CONVEYANCE.

Testator gave all of his estate to his widow in trust, to convey and hold with full power to sell any and all the property, and from the income and proceeds support herself and daughter during their life. During the life of the daughter, the widow individually and as executrix conveyed part of the real property in fee to defendant, and for more than 12 years no demand was made on him, and neither the trustee nor the beneficiaries of the trust had any use or benefit of the property. *Held*, that the grantor

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

intended to convey the fee under the power, and that the conveyance was valid.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 110–120; Dec. Dig. § 33.*]

Suit by Carrie Pepper, as trustee, etc., of Harmon C. Pepper, deceased, against Edward D. Cutler to recover certain land. Complaint dismissed.

Peale & McLaughlin, of New York City, for plaintiff.

Henry V. Borst, of Amsterdam, for defendant.

VAN KIRK, J. Harmon C. Pepper, deceased, by his will, after the payment of his debts, gave all of his estate, real and personal, to his widow, Carrie Pepper, "in trust, to have and to hold, with full power to sell and convey any or all of said property, both real and personal, and from the income and proceeds thereof to support and maintain during her life herself and our daughter," as in her judgment will best promote the interests of both. Upon the wife's death he gives all the residue remaining to the daughter during life, and, if she has issue, to her absolutely. If the daughter shall die without issue, then the residue to his next of kin. He appoints his wife as sole executrix. She has duly qualified as such, but has never accounted. Both she and her daughter are living. The land in question was a part of his estate. Mrs. Pepper, individually and as executrix, has executed a deed, dated June 8, 1899, purporting to convey said real estate to the defendant. This action by the trustee is brought to recover said land.

The evidence is brief. No witness was called. We have the following admissions made in open court and in the pleadings: On or about January 22, 1899, said will was admitted to probate in Schenectady county. In accordance with the devise therein, plaintiff became seised in fee simple of said real property, being about 200 feet square at the corner of Union street and Bedford road. Plaintiff does not have now, and never did have, any legal estate individually or in any other capacity than as trustee in the aforesaid parcel of real property by virtue of the devise contained in the aforesaid will. Defendant is, and since the execution of said deed has been, in possession of the said premises, and claims to own the same. The summons in this action is dated January 22, 1912. In addition to said admissions, the only evidence is the will and the deed. No provision of the will in favor of the widow is stated to be in lieu of dower. The deed is the short form warranty deed provided for in chapter 475 of the Laws of 1890, and the party of the first part describes herself therein as "Carrie Pepper individually and as executrix of the last will and testament of Harmon C. Pepper, deceased." She does not describe herself or mention herself in the deed as trustee; nor in the deed is there any other mention of the will or any mention of the power of sale therein given.

No provision for the widow having been made in the will in lieu of her dower, if the provisions of the will required an election by her, the time within which she must elect not having expired (Real Prop. Law [Consol. Laws 1909, c. 50] § 201) at the time of the deed in ques-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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tion, the widow owned her dower right consummate in the lands described in the deed, and this right, though unassigned, was a valuable property right subject to sale. *Mutual Life Ins. Co. v. Shipman*, 119 N. Y. 324, 24 N. E. 177.

[1] The question here presented is this: In the June 8th deed, did Mrs. Pepper convey her title as trustee to the lands in question? The question whether a particular disposition of real property is in execution of a power was always a question of intention. *White v. Hicks*, 33 N. Y. 383, 393. It is well settled that, in determining what property or interest therein is conveyed by a deed, the intent of the parties will control, and the deed must be construed to effectuate that intent, unless inconsistent with settled rules of law or of property. 13 Cyc. 601; *Perrior v. Peck*, 39 App. Div. 390, 396, 57 N. Y. Supp. 377; *Harriot v. Harriot*, 25 App. Div. 245, 249, 49 N. Y. Supp. 447.

[2] Section 175 of the Real Property Law is a rule of construction, and does not apply in this case, since the donee of the power has also an individual property right or estate in the property. We must construe the deed, therefore, as if section 175 did not exist. *Mutual Life Ins. Co. v. Shipman*, 119 N. Y. 324, 24 N. E. 177. This case does not hold that the plain intent of the grantor in a deed to execute a power, although both the grantee of a power and the owner of an individual right in the estate must, or may, be disregarded under the rule quoted on page 329 from Kent's Commentaries:

"The general rule of construction, both as to deeds and wills, is that if there be an interest and a power existing together in the same person over the same subject, and an act be done without a particular reference to the power, it will be applied to the interest and not to the power. If there be any legal interest on which the deed can attach, it will not execute a power."

On the contrary, the Shipman Case recognizes that this latter rule must yield to the contrary intent of the grantor in the deed if plainly disclosed. Nothing in conflict with this understanding of the Shipman Case is found in *Weinstein v. Weber*, 58 App. Div. 112, 68 N. Y. Supp. 570, or in *Merolla v. Lane*, 122 App. Div. 535, 107 N. Y. Supp. 439. This also is the holding in *Vines v. Clarke*, 111 App. Div. 12, 97 N. Y. Supp. 532, a decision in this department which has never been modified or criticised. No rule of law or of property, to which our attention is called, is violated if it be held that Mrs. Pepper intended to execute the power, when she executed the deed of June 8th. In *White v. Hicks*, 33 N. Y. 383, 393, on page 394, the court quotes from Judge Story as follows:

"But the principle furnished by them, however occasionally misapplied, is never departed from, that if the donee of the power intends to execute, and the mode be in other respects unexceptionable (that is, if it correspond to the former requirements of the power), that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. I agree that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful under all the circumstances, then that doubt will prevent it from being deemed an execution of the power. All the authorities agree that it is not necessary that the intention to execute the power should appear in express terms or recitals in the instrument. It is sufficient that it shall appear by words, acts, or deeds demonstrating the intention."

[3] The facts seem to me to disclose plainly that Mrs. Pepper intended to convey the premises in fee simple under the power. We are not informed as to what occurred at the time the sale was made further than as the deed recites it. This deed is in form to convey in fee simple to the grantee, his heirs and assigns forever, the real estate therein described, together with the appurtenances and all the estate and rights of the party of the first part in and to the premises. The first party covenants that she is seised of said premises in fee simple and has good right to convey the same. The party of the second part shall quietly enjoy the premises. The premises are free from any incumbrances. The first party will execute or procure any further necessary assurances of title to said premises. The first party will forever warrant and defend the said premises. The statute declares what these several provisions shall be construed to mean. The will shows that Carrie Pepper is not seised of said premises in fee simple, except as trustee. Her warranty of peaceable possession is a warranty which the trustee only could make; and, if she conveyed anything other than as an individual, she conveyed as trustee, because as executrix she had no interest whatever in the real estate. The real estate could be sold to pay debts, but only on petition to the surrogate and notice to all parties interested; and, without such proceedings, the real estate was not liable for the payment of debts. *Russell v. Russell*, 36 N. Y. 581, 583, 93 Am. Dec. 540. The deed is not in the usual form for conveying any interest in lands less than fee-simple title, and there is no intimation in the deed of an intent to convey anything less. Another circumstance is that from the time of the execution of the deed the defendant has been in possession, and is now in possession and enjoyment of the premises. For 12½ years no demand was made upon him, and the trustee has had no use or benefit of the aforesaid real estate, nor have the beneficiaries under the trust. This conduct is entitled to great weight in determining the intent of the parties to the deed (*Carthage T. P. Mills v. Village of Carthage*, 200 N. Y. 14, 93 N. E. 60), and is inconsistent with the claim that the dower right only of the grantor was intended to be conveyed. If Mrs. Pepper had not intended to convey title in fee simple, it seems impossible that she and the other beneficiary would have allowed the defendant to enjoy the full use and profit of this land for so long a term of years. The presumption from the payment of the consideration is not helpful as to intent. There is no presumption further at least than that the consideration is the full value of the property or interest therein intended to be conveyed.

The fact that the grantee is a lawyer does not militate against our conclusion. The blank for the deed evidently came from the grantee's office, and we may assume that he drew it and knew the law. It does not appear that he was Mrs. Pepper's counsel, or that he held any confidential relation with her. It does not appear that he secured more than her deed as an individual. He knew there was a will, but it is not shown that he ever saw the will. No pre-

sumption rests against him if he was careless enough to take her statement of the contents of the will. If he took her statement, the use of the word "executrix," instead of "trustee," is easily understood.

It is claimed, also, by the plaintiff that Carrie Pepper had an interest in the real estate of deceased other than her dower interest under the provision in the will concerning maintenance and support. The entire estate, including the income, is given to the trustee, but "from the income and proceeds" she is to support and maintain herself and daughter. There is no division of income and proceeds named, and no gift of any part thereof to Mrs. Pepper. This gave her no estate or interest in the land.

The defendant urges that Mrs. Pepper has no dower interest, because the provisions of the will are inconsistent with her taking dower, although there is no statement in the will that the provision in her favor is in lieu of dower. Therefore she is put to her election, and she has elected to accept the provisions of the will. But if the will should be so construed, and if it be held that the presumption is that she has made her election, because she has apparently accepted the provisions of the will, our conclusion would be the same. Under those circumstances, section 175 of the Real Property Law would apply, and the deed be construed as in execution of the power.

Complaint dismissed, with costs.

MATTIACCIO v. ILLINOIS SURETY CO.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

TRIAL (§ 394*)—FINDINGS OF FACT—CONCLUSIONS OF LAW.

A judgment will be reversed, where the trial court does not comply with Code Civ. Proc. § 1022, providing that the decision must state separately the facts found and the conclusions of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 924-926; Dec. Dig. § 394.*]

Appeal from City Court of New York, Trial Term.

Action by Antonio Mattiaccio against the Illinois Surety Company. From judgment for plaintiff, and denial of new trial, defendant appeals. Reversed, and new trial granted.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Nelson L. Keach, of New York City, for appellant.

Anthony J. Romagna, of New York City, for respondent.

PER CURIAM. It is conceded that no decision containing findings of fact and conclusions of law has been filed pursuant to section 1022 of the Code of Civil Procedure for which reason the judgment must

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be reversed. *Wander v. Wander*, 111 App. Div. 189, 97 N. Y. Supp. 586.

Under the circumstances it will be necessary in this case to order a new trial, with costs to appellant to abide the event.

(79 Misc. Rep. 218.)

GIBBS v. WARING.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

1. NOVATION (§ 12*)—PRESUMPTION AND PROOF.

Novation is not to be presumed, but must be established by clear proof that the old obligation was extinguished and the new party assumed the obligation of the former contract.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 12; Dec. Dig. § 12.*]

2. NOVATION (§ 7*)—SUBSTITUTION OF NEW DEBTOR.

That a creditor knows a corporation has agreed to assume the debts of its organizer which were connected with the business incorporated does not of itself operate to substitute the corporation as debtor in place of the organizer, so as to release him from a debt due such creditor; there being no consent to such substitution on the part of the creditor shown.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 7; Dec. Dig. § 7.*]

Appeal from City Court of New York, Trial Term.

Action by Herbert H. Gibbs against Vechten Waring. From judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Arthur J. Carleton, of New York City (Herbert H. Gibbs, of New York City, of counsel), for appellant.

Griggs, Baldwin & Baldwin, of New York City (Charles G. Signor, of New York City, of counsel), for respondent.

SEABURY, J. This action is brought to recover a balance alleged to be due for legal services rendered by the plaintiff to the defendant. There is no doubt that the services were rendered. The question which is the subject of dispute upon this appeal relates to the claim of the defendant that there was a new contract entered into with the consent of the parties, whereby the corporation known as the Vechten Waring Company was substituted as debtor in the place of the defendant. On March 26, 1907, the defendant incorporated his business under the name of the Vechten Waring Company. An agreement was entered into between the defendant and the corporation, of which the plaintiff had knowledge, which provided that the corporation—

“shall immediately assume and become liable to pay in the due course of business all of the obligations of said Waring incurred in and about his said business.”

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] Novation is not to be presumed, but must be established by clear proof that the old obligation was extinguished and that the new party assumed the obligation of the former contract. *McLaughlin v. Gillings*, 18 Misc. Rep. 56, 41 N. Y. Supp. 22; *Inman v. Burt*, 124 App. Div. 73, 108 N. Y. Supp. 210. The evidence falls far short of establishing that the Vechten Waring Company assumed the obligation of the defendant to pay for all the legal services rendered by the plaintiff for the defendant from March 27, 1906, to March 27, 1907, or that the plaintiff accepted the responsibility of the Vechten Waring Company and consented to the discharge of the defendant. The plaintiff received, on account of his services, several checks of the Vechten Waring Company, which were sent to him by the defendant, to whom he personally acknowledged receipt of the payments made. All of the plaintiff's correspondence in reference to his bills for services were had with the defendant personally.

[2] There is no evidence in the record that the plaintiff ever released the defendant from his obligation to him. The respondent seeks to have us infer that such a release was made from the fact that the plaintiff knew of the agreement in which the Vechten Waring Company agreed to assume the debts of the defendant incurred in reference to his business. This single fact, in view of the other circumstances disclosed, is insufficient to justify the inference which the respondent seeks to have drawn from it. We think that the learned court below erred in rendering judgment for the defendant.

Judgment reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

In re PUBLIC SERVICE COMMISSION.

(Supreme Court, Appellate Division, First Department. January 31, 1913.)

1. STREET RAILROADS (§ 13*)—ESTABLISHMENT OF SUBWAY—REPORT OF COMMISSIONERS—CONFIRMATION—RES JUDICATA.

The confirmation in 1907 of a report of commissioners, confirmed by the court, that a subway railroad should not be constructed in a certain street without the property owners' consent, was merely an adjudication that under existing conditions the particular railroad contemplated should not be constructed, so that such adjudication was not *res judicata* of a subsequent application to construct a subway in the streets.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 13.*]

2. STREET RAILROADS (§ 13*)—SUBWAYS—PLAN OF CONSTRUCTION—SUFFICIENCY.

Rapid Transit Act (Laws 1891, c. 4, as amended by Laws 1912, c. 226) § 4, requires that the general plan of construction adopted by the Public Service Commission shall show the general mode of operation of the railroad and such details as to the manner of construction as are necessary to show the extent to which any street is encroached upon; and section 6 provides that, when the Appellate Division shall authorize the construction of the road upon the report of the commissioners, the Public Service Commission shall properly detail plans of construction according to the general plan, including plans for switches, etc. *Held*, that the general

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plan of construction need not show how deep an excavation will be necessary, or what change in details are required, to properly construct the road; it being sufficient, with reference to the grade and location, that such plan shows that the road was a double-track road on one level, as near to the surface as conditions permitted.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 13.*]

3. STREET RAILROADS (§ 13*)—SUBWAYS—AMENDMENT OF CONSTRUCTION PLANS—DEFECTS.

The action of the Public Service Commission in amending the general plan of construction of a double-track subway, so as to show that the tracks were to be on one level, was a mere detail, not requiring the plans to be resubmitted to a new commission or the municipal authorities.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 13.*]

4. STREET RAILROADS (§ 13*)—COMPENSATION.

In so far as possible, the city should secure abutting owners for damage to abutting property because of defective plans for the construction of a subway, or negligence in construction, or for damages from its construction upon the proposed plan.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 13.*]

In the matter of the application of the Public Service Commission for the approval of rapid transit routes in Park Place and William and Clark Streets. On application to confirm the report of commissioners. Report confirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

George S. Coleman, of New York City, for the motion.

Carl A. Mead, of New York City, for National City Bank of New York and others.

Frederick B. Campbell, William Allen Butler, and J. Edwards Wyckoff, all of New York City, for trustees of Liverpool & London & Globe Ins. Co., Limited, and others.

John Larkin, of New York City, for Potter & Kelsey, as trustees.

Moses J. Stroock, of New York City, for Kuhn, Loeb & Co., and Jacob H. Schiff.

Geller, Rolston & Horan, of New York City, for Farmers' Loan & Trust Co., opposed.

INGRAHAM, P. J. This was an application for the approval by this court, under the provisions of section 18, art. 3, of the Constitution, in lieu of the consent of the owners of the property bounded on the streets affected. The commissioners, who were appointed to determine whether such a railroad can or ought to be constructed, have reported in favor thereof. Certain property owners appeared before the commissioners and strenuously opposed the approval, and the same property owners have appeared before this court and objected to the court's confirming the report.

[1] The first objection, to which it is necessary to call attention, is based upon a proceeding before this court in 1906, when application was made to authorize a subway in William street, in which proceeding commissioners were appointed, who reported that such sub-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

way should not be constructed and operated, which report was confirmed by this court March 12, 1907; and it is claimed that this is to be treated as *res adjudicata* and a bar to this proceeding. It is clear, however, that no such effect can be given either to the report by the former commissioners or the approval thereof by this court. What was there determined was that the particular subway and railroad, permission to construct and operate which was refused, should not be then constructed without the consent of the abutting property owners. The reasons for then refusing the consent are not material. There was no adjudication that no railroad should be built in that street, but a determination that under the existing conditions the particular railroad thus provided should not be constructed without the consent of the abutting property owners. Such a refusal to consent could not possibly be construed into a decision that no railroad should ever be constructed in the street, or that on a change of conditions this court could not confirm a report of commissioners, subsequently appointed, that under the conditions submitted to them a railroad then contemplated should be constructed and operated, notwithstanding the property owners had refused their consent. What the court now has to determine is whether or not, on the evidence submitted to the commissioners, their decision that a railroad should be constructed should be confirmed.

[2] It is further objected that the general plan submitted by the Public Service Commission for the construction and operation of this railroad is insufficient to confer jurisdiction upon this court. This application is made under authority of the Rapid Transit Act (chapter 4, Laws of 1891, as amended by chapter 226, Laws of 1912). Section 4 of the act so amended requires the Public Service Commission to determine and establish the route or routes of such railroad and the general plan of construction, and that—

“such general plan shall show the general mode of operation and contain such details as to manner of construction as may be necessary to show the extent to which any street is to be encroached upon and the property abutting thereon affected.”

Section 6 of the act provides that, when the consents of the property owners, or, in lieu thereof, the authorization of the said Appellate Division of the Supreme Court upon the report of commissioners, shall have been obtained—

“the Public Service Commission shall at once proceed to prepare detailed plans and specifications for the construction of such rapid transit railroad or railroads in accordance with the general plan of construction, • • • including the number, location and description of all stations and plans and specifications for the suitable supports, turnouts, switches, sidings, connections, landing places, buildings, platforms, stairways, elevators, telegraph and signal devices, and other suitable appliances incidental and requisite to what the Commission may approve as the best and most efficient system of rapid transit in view of the public needs and requirements. • • •”

I think the general plans adopted by the Public Service Commission sufficiently complied with these provisions of the Rapid Transit Act. They contain such details as to the manner of construction

as may be necessary to show the extent to which any street, avenue, or any public place is to be encroached upon and the property abutting thereon affected. It is manifestly impossible, in preparing the general plan for the construction of such a road, to show just how deep an excavation will be necessary, or just what change in details will be required in order to properly construct the road, and we do not think it was intended that the general plans should contain such details. From the plans submitted and the testimony before the commissioners, it is apparent that the road to be constructed through William street was a double-track road on one level, as near to the surface of the street as the conditions as they were developed would permit.

[3] Upon the argument of the appeal we expressed to counsel who appeared for the respective parties that we thought that, before the report was confirmed, the Public Service Commission should definitely determine the question as to whether or not this double-track road should be built upon one level, instead of one track beneath the other, and to meet that suggestion the chief engineer has recommended to the Public Service Commission that the upper level plan be followed, and that he be authorized to proceed in accordance therewith; and in pursuance of that report the Public Service Commission have passed a resolution that the recommendation of the chief engineer be approved and that he be directed to proceed in accordance with the suggestions contained in his communication. This action of the Public Service Commission has, therefore, removed any ambiguity that there may have been in the plans as originally presented. This is a mere detail, and, of course, such a determination does not so change the plans as to require them to be resubmitted to either the municipal authorities or to a new commission.

[4] There was an objection, also, on behalf of the property owners, that a more explicit provision should be made in regard to the liability of the city for damage to abutting property in consequence of defective or improper plans, or negligence in the manner of construction, or damages caused to abutting premises or buildings thereon by the construction of the railroad upon the route and plan proposed for approval; and we think that, so far as the city can secure the abutting owners, such liability should be assumed, and we are assured by the proper authorities that the interests of the abutting owners will be protected by the city. With these general observations upon specific objections made by the property owners, it is only necessary to add that the court, realizing the importance of this question, the great value of the abutting property, and the difficult engineering problems that are presented in the construction of the proposed subway, have examined with care the testimony taken before the commissioners, with the result that the court is satisfied that this subway can be constructed, with the methods and appliances which are now well understood, without serious damage to the abutting property, and that a subway in William street is an essential part of the general plan of under-

ground railroads that has been adopted by the city of New York. The general welfare of the community requires that these methods of communication should be as ample as possible, and that there should be no delay in providing means of transportation, and the welfare of the whole city requires that this subway, as designed by the Rapid Transit Commission, should be approved.

In directing, therefore, that the report of the commissioners should be confirmed, the court wishes to express its obligation to the gentlemen who have consented to serve upon this commission for the manner in which their investigation was conducted, and the ability and devotion that they have shown in the discharge of the duties which they accepted at the request of the court. The record shows that the commissioners devoted the whole of the month of December in the performance of these duties, and that, instead of this proceeding taking months or years to complete, as has been too often the case in the past, the whole question was disposed of in a little more than a month from the time that the commissioners assumed their duty until the presentation of their report to the court. And the court also wishes to express its appreciation of the assistance which was rendered to the commissioners in thus promptly disposing of this matter by counsel who appeared for the various property owners who object to the construction of the road. The whole proceeding has, both by the commissioners and counsel, been conducted in a way to meet with our warmest approval, and we thus express our satisfaction with the methods that were adopted in the whole conduct of the proceeding.

The conclusion, therefore, is that the report of the commissioners should be approved. All concur.

STOCKERT v. DRY DOCK SAVINGS INST. et al.

SAME v. BOWERY SAVINGS BANK et al.

(Supreme Court, Appellate Division, First Department. February 7, 1913.)

1. TRUSTS (§ 59*)—SAVINGS BANKS—GIVING OF BANK BOOK—REVOCATION.

The giving of the bank book of a savings bank to the donee in connection with a deposit in the name of the donor as trustee for the donee, created an irrevocable trust, which was not revoked by the returning of the book at the request of the donor, in the absence of any evidence that the donor intended to revoke the trust and that the donee consented thereto.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 78–81; Dec. Dig. § 59.*]

2. TRUSTS (§ 59*)—REVOCATION BY WILL—DEPOSITS.

Where a savings bank deposit is made in trust for another, either irrevocably or tentatively only, it cannot be revoked by will, since, even if only tentative, it becomes irrevocable by the death of the donor at the same time the will goes into effect.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 78–81; Dec. Dig. § 59.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Special Term, New York County.

Separate actions by Sara E. Stockert against the Dry Dock Savings Institution and others and against the Bowery Savings Bank and others. Judgment for defendants in each case, and plaintiff appeals. Reversed and remanded.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

George H. Taylor, Jr., of New York City, for appellant.

Carlisle Norwood, of New York City, for respondents.

SCOTT, J. These appeals present a question as to "savings banks trusts." The creator of the trusts was one Letitia Riley Grogan, the wife of one William Grogan, to whom she had been married about 10 years. She was, in 1909, about 80 years of age, and very illiterate and penurious. She had, by some means or other, acquired, for a woman of her class, considerable property. She had on deposit, in the Seaman's Bank for Savings, \$615.50; in the Bowery Savings Bank, under her maiden name of Letitia Riley, \$926.26; in the Dry Dock Savings Bank, \$2,034.58; and, in the Bank for Savings, \$2,747.24. She owned a house at 32 Sherman street, Queens, in which she lived, some lots in the Bronx, and money in the Long Island Savings Bank.

Plaintiff was a niece of Mrs. Grogan. She was married to a Dr. Chas. F. Stockert, and lived in Nebraska. She had visited her aunt in 1900, and again visited her in 1909, with her husband. Between 1900 and 1909 letters were exchanged from time to time between plaintiff and her aunt. It fairly appears from the letters and the evidence as to Mrs. Grogan's declarations that plaintiff was a favorite, and perhaps the favorite, relative of her aunt. Plaintiff and her husband came to New York in 1909, partly to see the Hudson-Fulton celebration, and partly in order that her husband might attend some post-graduate lectures. After they had been here some weeks, plaintiff called on her aunt, after which they met with considerable frequency. Mrs. Grogan exhibited to plaintiff and her husband her bank books, and finally gave them to Dr. Stockert, to have the interest written up, and to make inquiries as to having the accounts put in trust. These books were apparently returned to Mrs. Grogan, because on October 27, 1909, she brought them with her to New York, and, in company with plaintiff and her husband, visited three of the savings banks.

She had about \$500 in the Seaman's Savings Bank. Of this she drew out about \$200, and transferred \$369.30 to an account entitled "Letitia Grogan, in Trust for William Grogan" (her husband). Of the amount drawn out she gave \$150 to Dr. Stockert to pay to certain relatives, which he subsequently did. She then went to the Bowery Savings Bank, where she had on deposit \$926.26, which she caused to be transferred to a new account, entitled "Letitia Riley, in Trust for Sara E. Stockert, Niece." She delivered this bank book to plaintiff, who took it West with her, and retained it until May 16, 1911. She then went to the Dry Dock Savings Bank, where she had \$2,034.58 which she had transferred to an account entitled "Letitia Riley, in Trust for Sara E. Stockert, Niece." She delivered this book to plain-

tiff, who took it West with her, and retained it until May 16, 1911. The amounts represented by these two accounts are the subjects of these actions.

Owing, apparently, to a rule of the Bank of Savings that it would not accept an account "in trust" for a niece, Mrs. Grogan drew a draft on the bank, directing it to pay the amount on deposit there (\$2,749.24) to Sara E. Stockert, who had the amount transferred to herself and her husband, "or survivor." Subsequently, in January, 1910, upon an expression of a wish by Mrs. Grogan, this book was returned to the bank, and the amount transferred to a new account in her name, and the new book sent to her. It appears that Mrs. Grogan's purpose in transferring this last account was that the money should be used, so far as necessary, to the payment of assessments on her Bronx lots, which, with her Long Island property, Mrs. Grogan conveyed to plaintiff on November 8, 1909. It appears quite plainly that at this time it was Mrs. Grogan's purpose to give practically everything she possessed to plaintiff, except the small provision she made for her husband.

On May 8, 1911, she wrote a letter requesting plaintiff to return the two books, in care of a Mrs. Munch, who lived next door. She did not state why she wanted them back. Plaintiff promptly returned the books as requested; but they never came into Mrs. Grogan's possession, being retained by Mrs. Munch. Her letter was dated May 16th. About a week before she died, Mrs. Grogan signed two notices, written by Sara A. Trainor, addressed to the Dry Dock and Bowery Savings Banks, stating that she had opened an account in the name of plaintiff's *husband*, saying, "Now I want to change it, and they refuse to return the books," and asking what to do. This latter was inaccurate in two respects. The account had not been put in the name of plaintiff's husband, and plaintiff had not refused to return the books.

On May 24, 1911, Mrs. Grogan made a will in which she specifically gave to one set of relatives the money in the Bowery Savings Bank, and to another set the money in the Dry Dock Savings Bank, explaining in a subsequent clause that she had given nothing to plaintiff, "because she and her husband have retained my bank books, which they have obtained from me for safe-keeping, and have refused to return them to me." Mrs. Grogan died on May 26, 1911, and this controversy arose.

[1] The present law as to savings bank trusts may be said to start with *Matter of Totten*, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711, 1 Ann. Cas. 900, wherein the Court of Appeals reviewed all the former cases on the subject, and stated its intention to lay down a decisive rule as follows:

"A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook, or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the testator."

This rule appears to establish two propositions: (1) If the depositor, during his lifetime, completes the gift by some unequivocal act, such as delivery of the passbook or notice to the beneficiary, the trust thereupon and thereby becomes irrevocable by any act of the depositor. (2) In default of such an unequivocal act, the trust remains tentative only during the lifetime of the depositor, and revocable by him by some decisive act or declaration. If not so revoked, the gift becomes absolute on the death of the depositor.

In *Tierney v. Fitzpatrick*, 122 App. Div. 623, 107 N. Y. Supp. 527, the depositor, after opening an account in trust for his son, left the bank book in his son's house, but frequently took it away for a short time for the purpose of having the interest written up, etc. He drew out the money, or part of it, and the action was against his executrix. This court held that the leaving of the bank book with the son under the circumstances, which involved the retention of dominion over it, did not make the trust irrevocable under the rule in the *Totten Case*. The Court of Appeals reversed on a point not considered in this court, holding that it had been error to admit evidence of declarations by the depositor, after the deposit, that he had opened the account in this way, because he already had as much money in his own name as the rules of the bank permitted. 195 N. Y. 433, 88 N. E. 750.

In *Matter of Davis*, 119 App. Div. 35, 103 N. Y. Supp. 946, the beneficiary died before the depositor. After the death of the beneficiary the passbooks were found in his safe deposit vault. Held, that the possession of the books by the beneficiary indicated that they had been given to him by the depositor, and that the trust had thereby become irrevocable.

In *Matter of U. S. Trust Company*, 117 App. Div. 178, 102 N. Y. Supp. 271, affirmed on opinion below 189 N. Y. 500, 81 N. E. 1177, a father had made a deposit in his own name in trust for his son. He had retained the bank book, and had never, so far as appeared, notified the son of the deposit. The son died before the father. The latter made no change in the account, which remained in the form stated until his death. It was held that the trust had never been consummated, but remained tentative until the son's death, when it lapsed *ipso facto*. The *Totten Case* was quoted and relied upon.

✓ In *Matter of Pierce*, 132 App. Div. 465, 116 N. Y. Supp. 816, the question arose under the Transfer Tax Act. The decedent had made deposits aggregating upwards of \$20,000 in various savings banks in Massachusetts, "in trust for" his wife and children. He had kept possession of the bank books, but had repeatedly declared to the beneficiaries that the moneys were theirs, and, in the case of the children, that they would be entitled to receive the funds when they became 21 years of age. Held, that the trust became absolute and irrevocable before the death of the testator, and not liable for tax. ✓

Matthews v. Brooklyn Savings Bank (recently decided) 151 App. Div. 527, 136 N. Y. Supp. 110, goes further than any of the foregoing cases. The bank book had been given to the beneficiary for safe-keeping, and before the depositor's death was returned to her, whereupon she drew out the money. It was held that the notice to the bene-

ficiary, implied in giving her custody of the bank book, created an irrevocable trust.

From the foregoing cases, I think it must be held that a consummate and irrevocable trust was created in favor of plaintiff, and that the only question really involved is the effect of what happened in May, 1911, just before the depositor died. The only evidence as to the intention of the depositor at the time the deposit was made is that she at once gave the bank book to plaintiff. That evidence, standing alone and unqualified, fixed the character of the trust as an irrevocable one under the rule in the Totten Case. Having thus fixed its character as irrevocable, the depositor could not thereafter revoke it without the consent of the beneficiary, and subsequent declarations by the depositor as to the intention with which she had made the deposit were inadmissible (*Tierney v. Fitzpatrick*, *supra*), and, if admitted, were without probative value.

The act of plaintiff in returning the bank books, at the depositor's request, cannot be taken as a consent that the trust be revoked. The letter requesting that they be returned did not suggest an intention of revoking the trust or changing the form of the deposit, and there was no reason why plaintiff should have supposed that the depositor entertained any such intention, nor is there the slightest evidence that she did so intend. At all events, whatever may have been her secret intentions, she never attempted to effect a revocation, either by notice to the beneficiary, or by withdrawing the money, or by changing the form of the deposit.

[2] If we are right that an irrevocable trust was created when the deposit was made, the attempt to dispose of the moneys included in the trust by will was obviously ineffective. *Kelly v. Beers*, 194 N. Y. 60, 86 N. E. 985. Indeed, it would probably have been equally ineffective if the trust had remained tentative only, and no attempt had been made to revoke it before the death of the depositor; for in that case the trust would have become irrevocable at the same moment that the will took effect.

There is no dispute as to the facts, and every fact essential to a final disposition of the controversy has been found by the trial court. There is therefore no occasion for disturbing the findings of fact, or ordering a new trial.

The judgments appealed from must be reversed, and a judgment directed in each case in favor of the plaintiff, with costs in all courts against the defendants Isabella Grogan and Sara A. Trainor, as executrices, etc. All concur.

(78 Misc. Rep. 584.)

KELLY v. MILLER, Borough President, et al.

(Supreme Court, Special Term, New York County. December, 1912.)

1. MUNICIPAL CORPORATIONS (§ 277*)—SEWERS—CONSTRUCTION—GOVERNING POWER.

Under Greater New York Charter (Laws 1901, c. 466) § 383 (9), providing for sewer construction, the governing power with reference to the construction of a sewer system and the maintenance of sewers is in the borough president, who has implied power to provide for sewer outlets within or without the corporate limits of his borough.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 732; Dec. Dig. § 277.*]

2. MUNICIPAL CORPORATIONS (§ 993*)—SEWERS—CONSTRUCTION—INJUNCTION—TAXPAYER'S ACTION.

A taxpayer of the city of New York was not entitled to restrain a sewer connection by the borough of the Bronx with a sewer in the city of Yonkers at the sole expense of the petitioners, on the condition that the connection might be discontinued by the city of New York at its election; it appearing that it was of great benefit to the latter city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2158-2161; Dec. Dig. § 993.*]

Taxpayer's action by Hugh P. Kelly against Cyrus C. Miller, as President of the Borough of the Bronx, City of New York, and others. Dismissed.

John T. Little, of New York City, for plaintiff.

Archibald R. Watson, Corp. Counsel, of New York City, for defendant City of New York.

Walsh, Wallin, Beckwith & Edie, of Yonkers, for defendants Gorton, Lynch, and Larkin.

COHALAN, J. Plaintiff, a taxpayer, brings this action under chapter 301 of the Laws of 1892 against the defendant Miller, as president of the borough of the Bronx, and three other defendants, to restrain them from allowing a connection of the sewer in Martha avenue, in the city of Yonkers, to be made with a sewer in the borough of the Bronx. The facts are undisputed, and only questions of law are at issue.

The plaintiff contends that the borough president was without power to permit a connection which would allow the residents of the city of Yonkers to use a sewer of the borough of the Bronx, that in issuing such a permit his action was illegal and void, and that this court should issue an injunction restraining the use of the connection by the defendants Gorton, Lynch, and Larkin. It appears that the permit was granted to construct the line of sewer at the expense of the petitioners and without expense to the city of New York, and upon condition that the connections might be discontinued by the authorities of the city. The evidence for the city showed that the permit was a temporary one and inured greatly to the benefit of the city of New York. It appears that the entire neighborhood at the point of connection slopes and drains towards the Bronx river, and that the drain in Martha avenue, from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

241st street to 242d street, and in 242d street from Martha avenue to Katonah avenue, was included in the general plan for the sewers of that district.

The necessity for this plan is shown from the figures giving the various elevations of the street intersections. The elevation of the surface of East 242d street, at the north line of the city of New York, is 21 feet lower than East 252d street at Mt. Vernon avenue. In order to obtain sewerage of 241st street, from Katonah avenue to the city line, it would have been necessary for the city, at its own expense, to have obtained permission from the city of Yonkers, and to have constructed the sewer in the remainder of 242d street to Martha avenue, and thence southerly in Martha avenue to 242d street.

The request by the defendants Gorton, Lynch, and Larkin to the borough president for permission to construct, at their own expense, these lines of sewers, furnished the opportunity to the city to obtain this construction without expense and at the same time to provide a sewer which the city itself would otherwise have been compelled to build at a considerable expenditure of money. In view of this situation, and the additional fact that the outlet sewer as built is amply sufficient to take care of the small additional sewerage that may come from the small territory connected with it in the adjoining municipality, there can be no reasonable objection to the permit as granted by the borough president. There has been no waste of the city's funds or of the city's property. Moreover, sewer outlets beyond the city limits are not necessarily illegal. *Dillon, Mun. Corp.* § 776.

[1] The governing power with respect to the construction of a drainage and sewerage system and the maintenance of sewers and drains is lodged in the borough president. Greater New York Charter (Laws 1901, c. 466) § 383, subd. 9. In addition to the express powers therein granted, he has implied powers to provide for sewer outlets, even outside of the corporate limits of his borough, and he may exercise this authority beyond the corporate limits for a public purpose. *Matter of Mayor*, 99 N. Y. 584, 2 N. E. 642; *Dillon, Mun. Corp.* § 1148.

[2] In view of the fact that no waste has been shown, and that the borough president, in granting the permit for a temporary sewer, acted within his lawful powers, I am of opinion that the complaint should be dismissed, without costs.

Complaint dismissed, without costs.

(78 Misc. Rep. 567.)

ZINN v. STAMM.

(Supreme Court, Special Term, New York County. December, 1912.)

1. LIMITATION OF ACTIONS (§ 196*)—EFFECT OF BAR—NEW PROMISE.

Where a reply to the defense of limitations, set up against several causes of action for money loaned united in one complaint, denies that the amounts sued for were barred, and alleges that within six years be-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fore the commencement of the action defendant, in a writing signed by him, acknowledged the claims in suit and promised to pay them, parol evidence that no other transactions were had between the parties, except those resulting in the loans, is admissible to identify the debt, and letters written by plaintiff to defendant, in connection with defendant's replies, are admissible to aid in the interpretation of the writing pleaded in the reply.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 717-721; Dec. Dig. § 196.*]

2. LIMITATION OF ACTIONS (§ 199*)—EVIDENCE—SUFFICIENCY.

In an action for money loaned, where the uncontroverted evidence is that there has been no other transaction between the parties except the loan, an itemized account of which appears from a letter of plaintiff to defendant, the reception of which in evidence was limited to identifying the debt which was acknowledged by defendant, it is error to direct a verdict for defendant; and in the absence of a request to go to the jury on any specific question, plaintiff's motion for the direction of a verdict should have prevailed.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 727-730; Dec. Dig. § 199.*]

Action by Martin Zinn against Paul Stamm for money loaned. Motion for new trial granted.

See, also, 152 App. Div. 76, 136 N. Y. Supp. 737.

Burnstine & Geist, of New York City (Henry C. Burnstine, of New York City, of counsel), for plaintiff.

Myers & Goldsmith, of New York City (Emanuel J. Myers, of New York City, of counsel), for defendant.

ERLANGER, J. [1] Nine causes of action are counted upon in the complaint for money lent, and to each cause the statute of limitations is pleaded as a defense. Plaintiff in his reply denied that the respective amounts sued for were barred, and alleged, further, that within six years prior to the commencement of the action the defendant, in a writing signed by him, acknowledged the respective claims in suit and promised to pay the same. Upon the former trial of this issue a verdict was directed in plaintiff's favor for the full amount, but the judgment entered on such verdict was reversed by a divided court. In the prevailing opinion Mr. Justice McLaughlin said, among other things:

"The difficulty which I encounter in holding the defendant liable is whether his admission can be said to apply to any one or all of the causes of action alleged in the complaint."

There was proof on the former trial that the only indebtedness of the defendant to the plaintiff was the amount sued for; nevertheless the acknowledgment was held to be only of a general indebtedness, and insufficient to toll the statute, and a new trial was ordered. Such new trial was had before me. To meet the difficulty mentioned by the appellate court, evidence was again admitted to identify the debt, by showing that no other transactions were had between the parties, except those which resulted in the loans, and in aid of the interpretation of the writing the contents of letters written by the plaintiff to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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the defendant were received for consideration in connection with the letters of the defendant in answer thereto. It is well settled that the promise or acknowledgment required by the statute cannot be partly in writing and partly oral. The statute calls for a writing signed by the party to be charged.

I think, however, the law is clear that parol evidence in such a case is admissible. See cases cited in the dissenting opinion in this case. 152 App. Div. 76, 136 N. Y. Supp. 737. In *Manchester v. Braedner*, 107 N. Y. 346, 14 N. E. 405, 1 Am. St. Rep. 829, the oral evidence held to be admissible was limited "to identify the debt and its amount, or to fix the date of the writing," and likewise the letters of the creditors are competent to show the intent of the debtor when he answered the same, and from which the acknowledgment of the debt is sought to be spelled. *Shaw v. Lambert*, 14 App. Div. 265-268, 43 N. Y. Supp. 470; *Levy v. Popper*, 106 App. Div. 395, 94 N. Y. Supp. 905, affirmed 186 N. Y. 600, 79 N. E. 1109. Plaintiff's letters so admitted were limited to identifying the debt, and the one that impressed me most was written on December 23, 1907, to the defendant, at the foot of which an itemized account of the \$10,000 due was noted. There was no denial of this evidence. This letter was answered by the defendant on December 25, 1907, in which he said, among other things:

"I am more than anxious to relieve myself of my indebtedness to you, and would have taken the steps proposed by me at our last meeting, had I been able to do so. I shall strive to do my very best as early as possible, but may tell you right here that for the near future the outlook for my making any money is anything but rosy."

On June 20, 1910, plaintiff again wrote to the defendant:

"I had expected to hear from you since my last communication relative to making a payment on my loan, and am quite surprised that you have not attended to same," etc.

In answer to this letter defendant, under date of June 22, 1910, wrote:

"I cannot inclose you a check, as much as I would like to. I would like to see you, however, and talk the matter over with you."

It seems to me that these letters, when read in connection with those received from plaintiff, definitely acknowledge the particular items mentioned in the complaint.

In *Benedict v. Slocum*, 95 App. Div. 602, 88 N. Y. Supp. 1052, there were three items of indebtedness represented by three different accounts. Plaintiff wrote a letter to the defendant, inclosing a number of notes for the different items, with the request that they be signed or returned. In answer to the letter the defendant wrote:

"I have thought over this matter of the notes a great deal, and if I knew I could pay them when they became due I wouldn't hesitate. I cannot promise to do that. I am willing to make a duebill as an acknowledgment, and which I shall feel just as much bound to pay when I am able."

It was held that this was a recognition that there was then due to the plaintiff the aggregate amount represented by the notes inclosed, and was a sufficient acknowledgment of the indebtedness.

In *Wright v. Parmenter*, 23 Misc. Rep. 629, 52 N. Y. Supp. 99, a purchaser of goods, who had received from the seller a statement of account showing the items and price of the goods purchased, and who had no other transactions with the seller, subsequently wrote:

"I regret to say that my neglect in not responding to your statement of account was owing to my not having disposed of but few of your goods; * * * but, now that I have got the ball rolling, am in hopes to do good business in the future."

This was held to be a sufficient acknowledgment. Mr. Justice Beekman, writing for the court, said:

"We have thus a complete identification of the debt sued for with that referred to in the defendant's letter."

While it cannot be said that the cited cases are directly parallel with the one at bar, there is nevertheless some analogy between them. Here an itemized account was noted at the foot of the letter of December 23, 1907, and, while not referred to in the answer thereto, the language employed by the defendant that he was more than anxious to relieve himself of his indebtedness could only have referred to the accounts so itemized, and expressly acknowledged the whole of it.

[2] It is clear from the unchallenged proof that there was no other transaction between the parties, except the \$10,000 loan, which was advanced to the defendant at different times; and, if the acknowledgment did not refer to the account mentioned, it is difficult to divine to what else the allusion was made. The anxiety of the defendant to be relieved of his indebtedness could not have been confined to a part thereof. The language employed, aided by the evidence, is opposed to such a construction; and, even if it is assumed that the nine causes of action are in effect an admission of separate loans, in my opinion all doubt or hesitation as to the debtor's meaning is dispelled when all the correspondence is considered together. The law demands no more in the way of proof than certainty and identity of the claim sought to be enforced.

In the light of these views, it was error to direct a verdict in favor of the defendant, and, inasmuch as no request was made on his behalf to go to the jury upon any specific question, plaintiff's motion for a direction should have prevailed. The motion for a new trial is granted.

Motion granted.

(78 Misc. Rep. 528.)

PEOPLE v. SHARP.

(Supreme Court, Trial Term, Monroe County. December, 1912.)

1. WITNESSES (§ 27*)—FEES—CRIMINAL PROSECUTIONS.

Under Code Cr. Proc. § 616, as amended by Laws 1895, c. 98, witnesses for the prosecution are entitled to the same fees and mileage as witnesses in a civil action in the same court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 56-64; Dec. Dig. § 27.*]

*For other cases see SAME topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. WITNESSES (§ 27*)—FEES—CRIMINAL PROSECUTIONS.

Where a witness was required, under Code Cr. Proc. 618b, to either deposit \$500 or enter into a recognizance to insure his appearance as a witness on trial of a defendant charged with murder, and, being unable to comply with either requirement, was detained in the county jail for about five months, when, after having testified, he was discharged, his application for an order for payment to him of witness fees at 50 cents a day for the time he was so detained must be denied, as he is entitled only to fees for the days he was in actual attendance on the trial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 56-64; Dec. Dig. § 27.*]

Nelson Sharp was prosecuted for murder in the first degree. Application by John Hogland for an order directing payment to him by the county treasurer of Monroe county of witness fees. Motion denied.

Frederick C. Wiedman, of Rochester (A. N. Jones, of Rochester, of counsel), for petitioner.

John W. Barrett, Dist. Atty., of Webster, opposed.

SAWYER, J. The above-named defendant was arrested on the 8th day of May, 1912, charged with murder in the first degree. He was thereafter indicted upon that charge by a grand jury of Monroe county, and upon trial was convicted thereof in the Supreme Court of that county. John Hogland, this petitioner, was at such trial a necessary and material witness, and testified thereat, for the people.

On June 21, 1912, proceedings under section 618b of the Code of Criminal Procedure were instituted by the district attorney of said county in pursuance of which petitioner was brought before a judge of a court of record, by whom he was required to either deposit the sum of \$500 in cash, or enter into a recognizance with suitable sureties in the sum of \$1,000 to insure his appearance as such witness upon the defendant's trial. He was unable to comply with either requirement, and was thereupon forthwith committed to the county jail of the county of Monroe, where he was detained until the 15th day of November following, when, after having testified upon such trial, he was discharged. He now applies for an order directing the payment to him by the county treasurer of Monroe county of witness fees, at the rate of 50 cents per day for the time he was so restrained, amounting to \$75.50.

[1] However equitable his claim may seem, it of course cannot be allowed, in the absence of statutory warrant therefor. The only authority for the payment of the people's witnesses upon a criminal trial is contained in section 616 of the Code of Criminal Procedure. Prior to 1895 that section provided that a person who had attended a trial as a witness in behalf of the people pursuant to a subpoena or an undertaking, where it was made to appear to the court that he had come from a place out of the county, or was poor, might receive *such reasonable sum as the court or judge might direct*. All other persons, whose testimony was demanded by the people in criminal trials, were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

required to attend and testify without any compensation whatsoever, and this was true whether such attendance was in pursuance of a subpoena or of an undertaking, and, inferentially, was equally true where commitment had been had in the cases then permitted by Code of Criminal Procedure, §§ 215, 216, 218. In such, as in other cases, payment was limited to those who were either poor or had come from a place without the county.

By chapter 98 of the Laws of 1895, section 616 was amended so as to provide that all witnesses in behalf of the people in a criminal action in a court of record should be entitled to the same fees and mileage as a witness in a civil action in the same court. By this amendment the phraseology of the section was entirely changed, and the law altered in two particulars: First. It did away with the limitation of payment only to witnesses who were either poor or foreign. Second. It repealed the discretionary power of the court to direct the payment of such sum as might to it seem reasonable.

Under the section prior to its amendment the court, unquestionably, had authority to take into consideration all the circumstances surrounding the attendance of a poor or a foreign witness, and if he had been detained in custody because of inability to procure a required undertaking that would properly have been a factor in determining the amount of compensation. Since the amendment of 1895, no such discretionary power is vested in the court. It can only order such payment as is directed by the section as it now stands, namely, the same fees and mileage as a witness is entitled to in a civil action in the same court. Those are plainly specified in section 3318 of the Code of Civil Procedure, which provides that:

"A witness * * * attending before a court of record * * * is entitled * * * to fifty cents for each day's attendance."

This contemplates and limits payment for such days only as the witness is in actual attendance at court, and, in embodying its provisions in the Code of Criminal Procedure, the Legislature, having made no extension thereof, and having expressly repealed the former discretionary power, evidently intended no payment should be made except for time necessarily spent at court.

[2] It was suggested by counsel upon the argument that the enforced detention of this petitioner from his commitment to the time of his actual presence in court should be held as a constructive attendance upon court. Two sufficient answers to this proposition at once suggest themselves: First. Section 616, *supra*, like all other statutes, must be strictly construed. Second. During a considerable portion of the time following petitioner's commitment the term at which this defendant was tried was not in session, and he cannot well be said to have been, even constructively, in attendance upon a term which did not exist, nor at a trial the time of which had not been determined upon.

The only authority upon the subject to which my attention has been called is that of *People ex rel. Troy v. Pettit*, 19 Misc. Rep. 280, 44 N. Y. Supp. 256. The commitment there under scrutiny was made under section 215 of the Code of Criminal Procedure, which materially

differs from section 618b, and the decision was based largely upon the proposition that the requirement from the witness of an undertaking *with sureties* was unauthorized and that his release could have been at any time procured by a writ of habeas corpus. The case is, however, a direct authority against petitioner's doctrine of constructive attendance; the learned justice assigning among other reasons for not granting the relief sought that:

"During most of the time that the relator was confined, neither the Court of Sessions nor the Supreme Court, in which the trial was had, was in session."

My conclusion is that petitioner, having attended upon the trial of Sharp from Monday, November 11, 1912, to Friday, November 15, 1912, both days inclusive, is entitled to payment therefor at the rate of 50 cents per day, and that, other than this, there is no authority vested in the court to direct. I have reached this conclusion with much reluctance. Petitioner is a laboring man, and apparently an honest and industrious citizen. Because of his misfortune in witnessing this homicide and certain conditions for which he now seems not to have been at fault he was, without warning, taken from employment which enabled him to comfortably support himself and incarcerated for practically five months. He was then released, only to find himself without either employment or money, and at a time of year when it is even forbidden to turn a criminal convict loose to shift for himself. If this be the law, and I think it is, we are more considerate of the welfare of evil-doers than of those whose only offense is their unfortunate ability to serve the state.

In justice and equity this man should be compensated. It is not within the power of the court to do this. The remedy for such hardships must come from the Legislature.

Motion denied, with costs.

SCHNEIDER v. NEWGOLD.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

EVIDENCE (§ 474*)—KNOWLEDGE—VALUE.

In an action for the reasonable value of laundry work, it was improper to permit the owner and manager of the laundry to state what the work was worth, where he had no personal knowledge of the work done, except as shown by his books.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196–2219; Dec. Dig. § 474.*]

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by Benjamin Schneider against Morris Newgold. From judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Bogart & Bogart, of New York City (John Bogart, of New York City, of counsel), for appellant.

Alexander Lamont, of New York City, for respondent.

PER CURIAM. This action is brought to recover the reasonable value of laundry work alleged to have been done by the plaintiff for the defendant. The answer is verified, and contains a general denial as well as a counterclaim.

The only proof as to the amount and value of this work alleged to have been performed consists of the plaintiff's testimony in answer to the question, "Now, between those dates did you do certain laundry work for him?" answered, "Yes, sir," and the further question, "What is that work worth?" answered, "\$113.34." No foundation for these questions and answers was laid. It appears from the testimony that the plaintiff was the owner and manager of a large laundry business, and had no personal knowledge of the work done, except so far as it might be shown by his books. The testimony was properly objected to and should have been excluded.

There was no competent evidence to sustain the judgment, and it must be reversed, and a new trial ordered, with costs to the appellant to abide the event.

(79 Misc. Rep. 250.)

DONNELLY v. POLIAKOFF.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

DAMAGES (§ 39*)—INJURIES TO AUTOMOBILE—DEPRIVATION OF USE.

Where plaintiff, in his action for damages for injury to his automobile from collision, did not show how it was used in his business, or the profits therefrom, and while it was being repaired did not hire another, but used another automobile of his own, damages for deprivation of its use while being repaired were not recoverable.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 260-284; Dec. Dig. § 39.*]

Appeal from Municipal Court, Borough of Manhattan, Third District.

Action by John Donnelly against Samuel Poliakoff. From a judgment of the Municipal Court of the City of New York in favor of the plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

Kleiner & Kleiner, of New York City, for appellant.

Conway, Williams & Kelly, of New York City (D. Theodore Kelly, of New York City, of counsel), for respondent.

LEHMAN, J. The plaintiff has recovered a judgment for damages sustained by reason of a collision between his automobile and a truck owned by the defendant. These damages include, not only the cost of repairs, but also a sum allowed for deprivation of the use of the automobile during the time required for these repairs. It

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

appears that the automobile was used in the plaintiff's business, but it does not appear in what manner it was used, nor what profits were derived from its use. It further appears that, while the automobile was in the repair shop, the plaintiff hired no other automobile, but used a second automobile belonging to himself. I do not think that, under these circumstances, any damages for the deprivation of the use of the automobile can be allowed.

A judgment for damages must be based upon definite proof, and not upon conjecture. Where an automobile has been injured, the court can award damages for the deprivation of its use while it was in the repair shop only where it is shown that the automobile was used for a business purpose, or that another vehicle was hired to take its place. *Bondy v. New York City Railway Co.*, 56 Misc. Rep. 602, 107 N. Y. Supp. 32; *Foley v. Forty-Second Street Railroad Co.*, 52 Misc. Rep. 183, 101 N. Y. Supp. 780. There is no claim here that any other vehicle was hired to take its place, and the judgment, therefore, must stand or fall upon the proof that it was used in the plaintiff's business. If damages are awarded because the plaintiff was deprived of the use of the automobile in his business, these damages must, of course, be based upon an estimate of loss to his business. There is, however, in this case no claim that the business has suffered any loss; in fact, it affirmatively appears that the plaintiff suffered no loss in his business, for he had another automobile, which he could use in place of the injured automobile.

It follows that the damages are based upon an erroneous theory, and the judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

(78 Misc. Rep. 480.)

PEOPLE v. HYDE.

(Supreme Court, Special Term, New York County. December, 1912.)

CRIMINAL LAW (§ 1073*)—CERTIFICATE OF REASONABLE DOUBT.

Where, from the language of the bribery statute and the absence of decisions in point, questions of law ought to be determined by an appellate tribunal, a certificate of reasonable doubt will be granted as to whether an instruction defining bribery was erroneous, whether the facts charged constituted a crime, and whether the acts of defendant as found by the jury constituted the crime of receiving a bribe.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2730; Dec. Dig. § 1073.*]

Charles H. Hyde was convicted of bribery, and applies for a certificate of reasonable doubt and stay of execution. Application granted. See, also, 149 App. Div. 131, 133 N. Y. Supp. 780.

Charles S. Whitman, Dist. Atty., of New York City, for the People.
Stanchfield & Levy, of New York City (John B. Stanchfield, of New York City, of counsel), for defendant.

GOFF, J. Were the law as clear as the facts, made so by the verdict of the jury, there could not justly arise any doubt of the defend-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ant's guilt; but from the language of the statute and the absence of authority directly in point questions of law are involved which are of sufficient merit to receive that careful consideration and authoritative determination which an appellate tribunal alone can give. At common law the simple practice was for the justice presiding at the trial to reserve mooted questions of law for the opinion of the judges and meanwhile stay the execution of the sentence. Under the more elaborate system of our Code procedure the execution of sentence cannot be stayed unless—by a process of legal metaphysics—a justice of the Supreme Court will certify a reasonable doubt that the conviction will stand.

From the arguments of counsel, as well as what has become a settled practice, it may be safely assumed that an application for such a certification will be made. This procedure will necessarily entail both expense and delay to the defendant, as well as to the people, and incidentally present the anomaly of one justice of the Supreme Court sitting in review of the judicial action of another justice of the same court, who was vested with original jurisdiction. As a matter of right the defendant may appeal within one year after his conviction; but the stay of execution of sentence is not linked with that right, and may be granted or refused in discretion. If there has been reversible error in the conviction, it is manifestly to the advantage of the defendant to be relieved of the stain as soon as possible; and if there has not, it is the duty of the district attorney to see to it that the judgment of the law be enforced. Therefore, in order to expedite and aid the defendant's remedies and to invoke the authority of the Appellate Division, I grant, under section 527 of the Criminal Code, a certificate of reasonable doubt on the following questions:

Whether the instruction given to the jury defining the crime of bribery, as applying to the acts of the defendant in evidence, was erroneous.

Whether the facts set out in the indictment constitute a crime, and if the defendant has been sufficiently apprised thereof.

Whether, under the statute, the acts of the defendant, as found by the jury, constitute the crime of receiving a bribe.

In addition, I will grant an order staying execution of the sentence and admitting the defendant to bail in the sum of \$25,000 pending appeal, on condition, however, that within 10 days herefrom he files a notice of appeal, and brings on his appeal for argument before the Appellate Division not later than the first Monday of April, 1913. In the event of the failure of the defendant to file a notice of appeal and bring it on for argument within the time mentioned, the order granting the stay and admitting to bail shall be vacated and set aside on the application of the district attorney to any justice of the Supreme Court.

Ordered accordingly.

(79 Misc. Rep. 244.)

COLONIAL BANK v. SUTTON.

(Supreme Court, Appellate Term, First Department. February 7, 1913.)

1. ASSIGNMENTS (§ 14*)—RIGHTS ASSIGNABLE—RECEIVER'S FEES.

The right of a receiver to his fees is inchoate, and upon the grounds of public policy unassignable until liquidated.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 22; Dec. Dig. § 14.*]

2. ASSIGNMENTS (§ 131*)—ACTIONS—PLEADING—ISSUES.

In an action for receiver's fees by an assignee thereof, the issue of the validity of the assignment is raised by a denial of the allegation of due assignment; the defense that unearned receiver's fees are not assignable not being personal to the receiver.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 220-226; Dec. Dig. § 131.*]

Appeal from City Court of New York, Trial Term.

Action by the Colonial Bank against George A. K. Sutton. Judgment for plaintiff, and defendant appeals. Reversed.

Argued January term, 1913, before SEABURY, LEHMAN, and PAGE, JJ.

John E. Roeser, of New York City, for appellant.

Jesse S. Epstein, of New York City, for respondent.

LEHMAN, J. The plaintiff claims to be entitled to the fees and allowances of one Frederick E. Sutton as receiver of the Van Kannel Revolving Door Company.

[1] The basis of plaintiff's alleged title to these fees is an assignment made by the said Frederick E. Sutton prior to the time when the said fees were earned. This assignment, in my opinion, passed no title to the fees. The receiver, like an executor, occupies a position of trust, and the fees earned by him are inseparable from his position.

"Until ascertained and liquidated at the time and in the manner authorized by law, the commissions are not subject to the executor's disposal, but the right to them is inchoate and upon grounds of public policy unassignable." Matter of Worthington, 141 N. Y. 9, 35 N. E. 929, 23 L. R. A. 97.

[2] The learned trial justice recognized that the assignment was illegal and against public policy, but gave judgment nevertheless in favor of the plaintiff, on the ground that no such defense was pleaded, and that the defense of illegality was a personal defense. The conclusion, I think, involves an error. On the ground of public policy, the law has made the inchoate right to fees nonassignable. This quality is inherent in the subject-matter of the assignment, and no title can pass by the assignment. The defense that the assignment is illegal is, therefore, not personal to the receiver, and the issue of the legal effect of the assignment is properly raised by a denial of the allegation that the fees were duly assigned.

Judgment should be reversed, and judgment directed for the defendant, with costs in both courts. All concur.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In re FALABELLA'S WILL.

(Surrogate's Court, New York County. February 10, 1913.)

1. WILLS (§ 303*)—EXECUTION—SUBSCRIPTION BY TESTATOR—SUFFICIENCY OF EVIDENCE.

Where three unimpeached witnesses swore that they saw testatrix sign the will with her own hand, and the contestant, husband of deceased, who was not present at the execution of the will, simply stated that, in his opinion, the subscription was not that of testatrix, subscription of the paper propounded was sufficiently shown.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 711-723; Dec. Dig. § 303.*]

2. WILLS (§ 163*)—UNDUE INFLUENCE—BURDEN OF PROOF.

Undue influence is an affirmative assault on the validity of a will, and the burden of proof is on the contestant, and does not shift throughout a probate proceeding; and this rule applies to an original proceeding in the Surrogate's Court.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388-402; Dec. Dig. § 163.*]

3. EVIDENCE (§ 90*)—"BURDEN OF PROOF"—DEFINITION.

"Burden of proof," *onus probandi*, is an equivocal term, referring, primarily, to the obligation resting on a party who has the affirmative of an issue of fact to establish it by a preponderating weight of evidence, and, secondarily, to a duty to go forward with the evidence at a precise moment in a judicial proceeding.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 112; Dec. Dig. § 90.*]

For other definitions, see Words and Phrases, vol. 1, pp. 904-907; vol. 8, p. 7593.]

4. WILLS (§ 274*)—PROBATE—AVERMENTS OF PETITION.

The proponent in a proceeding for probate must aver, in the first instance, testator's capacity and freedom from restraint.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 628, 631; Dec. Dig. § 274.*]

5. WILLS (§ 163*)—VALIDITY—PRESUMPTIONS—FREEDOM FROM RESTRAINT.

Freedom from restraint in the execution of a will cannot be presumed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388-402; Dec. Dig. § 163.*]

6. WILLS (§ 248*)—PROBATE—JURISDICTION OF APPELLATE DIVISION.

The Appellate Division serves as the real ordinary, and is vested with co-ordinate and original power over contested probates.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 584, 585; Dec. Dig. § 248.*]

7. WILLS (§ 163*)—VALIDITY—PRESUMPTIONS—FRAUD OR UNDUE INFLUENCE.

There is no presumption of fraud or undue influence in a probate cause from mere relations of confidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388-402; Dec. Dig. § 163.*]

In the matter of the probate of the will of Angelina Falabella, deceased. Probate decreed.

Antonio Ferme, of New York City, for proponent.

Goldsmith, Rosenthal, Mork & Baum, of New York City, for contestant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

FOWLER, S. Contested probate proceeding.

The usual objections—testamentary incapacity and undue influence—were interposed to the probate of the will of Angelina Falabella by the husband of the testatrix. Husband and wife lived apart at the time the will was executed. The will is in favor of the mother of testatrix. There were no children of the marriage.

[1] The allegation that the testatrix subscribed the will is contested, and the genuineness of her signature is challenged. But three respectable and unimpeached witnesses swear that they saw testatrix sign the will with her own hand. The husband, who was not present at the execution of the will, simply states that, in his opinion, the subscription to the will is not that of testatrix. No handwriting experts were called, and there was no other comparison of handwriting specimens conceded to be genuine. The husband was allowed to give his testimony without objection. Under this state of facts subscription of the paper propounded by testatrix is found. The other statutory requirements for the due execution of the will were established by the testimony of the subscribing witnesses.

[2, 3] As to the plea of undue influence, the burden of proof is on the contestant, and does not shift throughout a probate proceeding. Such is the statement of the Court of Appeals in a very late case, and it seems to complete a definitive doctrine of great importance in probate law. It may be expedient and proper, in view of this important decision of the Court of Appeals, for the surrogate to take this early occasion to make clear his appreciation of the gravity of such final determination on this important point, as this is the court of this state in which most contentious probates of importance are heard and determined in the first instance.

The burden of proof in contested probate proceedings is sometimes said "to rest ordinarily on proponent" throughout the cause. *Matter of Kellum*, 52 N. Y. 517; *Rollwagen v. Rollwagen*, 63 N. Y. at page 517; *Matter of Will of Cottrell*, 95 N. Y. 329, 336; *per curiam*, *Dobie v. Armstrong*, 160 N. Y. at page 590, 55 N. E. 302. But in other cases of equal authority it is stated that the burden of proof on a plea of undue influence, for example, is on contestants. If the burden then shifts from proponent, the burden of proof is not always on proponent. These two decisions are, on their face, types of adjudications of weight. I had hoped that I might give heed in this court of first instance to both doctrines by attributing the primary meaning of the term "onus probandi" to the first class of cases and the secondary sense of that ambiguous term to the second class of cases. "Burden of proof," *onus probandi*, is an equivocal term. It refers, primarily, to the obligation resting on a party who has the affirmative of an issue of fact to establish it by a preponderating weight of evidence, and, secondarily, to a duty to go forward with the evidence at a precise moment in a judicial proceeding. *Thayer, Prelim. Treatise on Evid.* 354, 364, 379; *Doheny v. Lacy*, 168 N. Y. 213, at page 220, 61 N. E. 255; *Loder v. Whelpley*, 111 N. Y. 239, at page 250, 18 N. E. 874; *Baxter v. Abbott*, 7 Gray (Mass.) 71, 83; *Jones v. Gran. State Ins. Co.*, 90 Me. 40, 37 Atl. 326. If the different decisions on burden of

proof in will contests could be reconciled, it would bring the modern law of this state into line with the former probate law of New York and England (*Barry v. Butlin*, 1 Curt. 637; s. c., 2 Moo. P. C. 480; *Fulton v. Andrews*, 7 Ho. L. Cas. 448, 461; *Tyrrell v. Painton*, [1894] P. D. 157), as well as with that prevailing in the Commonwealth of Massachusetts (*Crowninshield v. Crowninshield*, 2 Gray [Mass.] 524); otherwise our law stands apart.

But a very plain intimation in the *Matter of Will of Kindberg*, 207 N. Y. 220, 100 N. E. 789, very lately decided by the Court of Appeals, makes it, I think, impossible to reconcile the adjudications. A late writer, in his useful compendium of the case law of evidence, well states that it is "a hopeless task to undertake to reconcile the decisions which relate to the burden of proof in respect to the probate of wills." Jones, Ev. § 189. Professor Thayer, in his most admirable of all modern treatises on the true bases of the law of evidence, points to the root of this difficulty. Thayer, Prelim. Dissertation on Ev. 354 et seq.; Thayer's Cases on Ev. 69.

In a proceeding to test the validity of the probate of a will, pursuant to section 2653a, Code of Civil Procedure, the statute regulates the burden of proof and the procedure. The statute prescribes that in that class of actions—

"the decree of the surrogate admitting the will or codicil to probate shall be prima facie evidence of the due attestation, execution and validity of such will or codicil."

It then proceeds to regulate the procedure on the trial of such actions. It has been generally supposed by the profession that the burden of proof in that class of actions rested on the contestant solely by virtue of the statute. *Dobie v. Armstrong*, 160 N. Y. 584, 590, 55 N. E. 302; *Iverson v. Iverson*, 80 App. Div. 599, 603, 80 N. Y. Supp. 1011; *Mock v. Garson*, 84 App. Div. 65, 67, 82 N. Y. Supp. 310; *Heath v. Koch*, 74 App. Div. 338, 77 N. Y. Supp. 513; *Scott v. Barker*, 129 App. Div. 241, 113 N. Y. Supp. 695.

The latest utterance of the Court of Appeals on burden of proof in probate matters was made on an appeal from a judgment entered on an affirmance of the verdict of a jury on issues sent to the Supreme Court for trial. *Matter of Will of Kindberg* (December 31, 1912), 207 N. Y. 220, 100 N. E. 789. It was there said:

"Undue influence is an affirmative assault on the validity of a will, and the burden of proof does not shift, but remains on the party who asserts its existence. *Tyler v. Gardiner*, 35 N. Y. 559; *Cudney v. Cudney*, 68 N. Y. 148; *Matter of Will of Martin*, 98 N. Y. 193, 196."

The serious question in my mind is whether the pronouncement of the Court of Appeals in the *Matter of Will of Kindberg* was intended to regulate the burden of proof in original proceeding to probate a will in the courts of the surrogates, or only on trials by jury. If it was intended to apply to probate proceedings, whenever a plea of undue influence is interposed in this court to a petition for probate, the burden of proof is on the party so asserting it. In this and other jurisdictions, as I shall attempt to show, it has been laid down that the burden of proof in probate proceedings is always on the proponent,

and that that burden does not shift throughout the trial. The burden of taking up the evidence may shift, after factum of will has been established by proponent; but the burden of giving preponderating proof on the whole issue in a probate proceeding rests always on the proponent. Is the finally completed rule announced in the Matter of Kindberg intended to abrogate altogether this established principle of probate law? That is now the first question. Were it not for the decisions cited in the opinion of the Court of Appeals in Matter of Will of Kindberg, I should venture to think that the statement of that court had no reference to original probate proceedings; but *Tyler v. Gardiner*, 35 N. Y. 559, *Cudney v. Cudney*, 68 N. Y. 148, *Matter of Will of Martin*, 98 N. Y. 193, referred to in *Matter of Kindberg*, were all appeals from surrogates' decrees in proceedings for probate. Evidently they were not regarded as foreign to the decision in the Matter of Kindberg. It may be assumed, therefore, that the pronouncement of the Court of Appeals is intended to be controlling in original proceedings for probate in the courts of the surrogates whenever a plea of undue influence is interposed. If this is now the rule of this jurisdiction, we must follow it here in every instance. I so did practically in a late case. *Matter of Klinzner*, 71 Misc. Rep. 620, 638, 130 N. Y. Supp. 1059.

Before the decision in *Matter of Will of Kindberg*, I had, however, been somewhat inclined to think that when the statement was made in several cases of importance in this state, that the burden of proof rests, in a proceeding for probate, on him who asserts undue influence, it was meant to assert only that after factum of will is established the contestant asserting undue influence then has the onus of going forward with his proofs (*Doheny v. Lacy*, 168 N. Y. 213, 220, 61 N. E. 255), and not that the burden of proof, in its primary significance, did not always rest on the proponent of a will in the courts of the surrogates. Doubtless, after the contestant had completed his proofs, the proponent resumed and gave adminicular proofs in support of the probate. *Hoyt v. Jackson*, 2 Dem. Sur. 443, 446. But, then, onus probandi the whole case was again on proponent. *Matter of Flansburgh*, 82 Hun, 49, 50, 31 N. Y. Supp. 177; *Howland v. Taylor*, 53 N. Y. 627; *Taylor's Will Case*, 10 Abb. Prac. (N. S.) 300. The reason why I was induced to think that the burden of proof, in its primary significance, in a probate cause rested always on the proponent I shall proceed to state. These reasons were of three kinds: (1) Because statute and the state of the pleadings naturally placed the burden of proof on proponent. (2) Because the traditional practice in probate proceedings so placed it. (3) Because both reason and authority had sanctioned it.

The state of the pleadings in a proceeding for probate naturally placed the burden of proof, in its primary signification (or, in other words, the necessity of sustaining all the issues on the will by a preponderance of evidence), on a proponent. In order to entitle a proponent to a decree of probate, he must establish (1) due execution of a testamentary script, pursuant to the statute of wills; (2) testamentary capacity; (3) freedom from restraint. Now, a plea

of undue influence is a mere negation of an allegation of freedom from restraint. Dayton on Surrogate's Practice, 177. If we assume that it is the pleadings which always fix the burden of proof in the first instance, then, on the principle originally adopted by our courts from the Roman law, "*Ei incumbit probatio qui dicit non qui negat*," onus probandi rests always on the proponent in a proceeding for probate (*Doheny v. Lacy*, 168 N. Y. 213, 220, 61 N. E. 255), except in the exceptional instance of special pleas in bar, such as former judgment, when proponent is temporarily relieved of the burden.

[4, 5] That the proponent in a proceeding for probate must aver, in the first instance, testator's capacity and "freedom from restraint" has been long established in this court. Section 2623, Code Civil Procedure, formerly 2 R. S. § 14; 1 R. L. 365, § 6; Dayton, Surrogate's Practice, 177; *Kingsley v. Blanchard*, 66 Barb. 317, 322; *Harper v. Harper*, 1 Thomp. & C. 351, 355; *Ramsdell v. Viele*, 6 Dem. Sur. 244, 247, affirmed 117 N. Y. 636, 22 N. E. 1130; *Matter of Schreiber*, 112 App. Div. 495, 98 N. Y. Supp. 483, affirmed 185 N. Y. 610, 78 N. E. 1111; *Matter of Goodwin*, 95 App. Div. 183, 88 N. Y. Supp. 734. A plea of undue influence is the mere negation of freedom from restraint already alleged by proponent. A person unduly influenced is not free from restraint. Placing the burden of proof (in the sense of an obligation to establish undue influence) on a contestant tends to place contrary burdens on the opposing parties to the same issue. We thus have the burden of proving freedom of restraint placed on proponent and the burden of proving the negative on contestant. In this state of the law it would be but a step to presume freedom from restraint, and thus have the entire burden of proof in contested probates placed on contestant. But this is not yet the rule, and it cannot be under the present statute of wills.

That the common or traditional law regulating the proceedings in the courts of the surrogates, in the absence of statutes, placed the burden of proof or weight of evidence on all the issues in a proceeding for probate on the proponent, there can be no doubt. If any change has been made in this state in the common law, it is by reason of later adjudications of authority in this state. The burden of proving undue influence in probate was carefully considered in a leading case in England by the Privy Council on appeal (*Barry v. Butlin*, 1 Curt. 637; s. c., 2 Moo. P. C. 480); and it was held that onus probandi in every case lies upon the party who propounds a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. *Fulton v. Andrews*, 7 Ho. L. Cas. 448, 461. This statement was expressly approved in this state in *Crispell v. Dubois*, 4 Barb. 393, 397, and again by that very distinguished surrogate, Mr. Rollins, in *Hoyt v. Jackson*, 2 Dem. Sur. 443, 446, and his judgment was afterwards affirmed by the Court of Appeals. 112 N. Y. 493, 20 N. E. 402. This point has, in substance, I think, been often since adjudicated, both here and elsewhere. *Thayer's Cas. Ev.* 82,

100, 106; *Matter of Kellum*, 52 N. Y. 517; *Howland v. Taylor*, 53 N. Y. 627; *Rollwagen v. Rollwagen*, 63 N. Y. 504, 517; *Matter of Green*, 67 Hun, 527, 535, 22 N. Y. Supp. 1112; *Loder v. Whelpley*, 111 N. Y. 239, 250, 18 N. E. 874; *Dobie v. Armstrong*, 160 N. Y. 584, 590, 55 N. E. 302; *Roche v. Nason*, 105 App. Div. 256, 266, 93 N. Y. Supp. 565, affirmed 185 N. Y. 128, 77 N. E. 1007. Upon the integrity of this line of authority I have, with some qualifications, ventured to rely, although not, I hope, to the prejudice of the decisions which did not turn on it. *Matter of Mooney*, 73 Misc. Rep. 315, 323, 324, 132 N. Y. Supp. 705; *Matter of Van den Heuvel*, 76 Misc. Rep. 137, 146, 147, 136 N. Y. Supp. 1109.

That judicial reasoning and authority had sanctioned the proposition that the burden of proof in a probate cause rested always on proponents, I had formerly believed. When it was asserted by judges of great distinction that the burden of proving undue influence rested on contestants, I had supposed that the term "burden of proof" was used in its secondary sense of proceeding with the evidence in a cause. In this sense, if no evidence is given by contestant, the proponent rests on his *prima facie* case, and the contestant fails. If evidence was given by contestant, the burden of evidence was then resumed by the proponents in both senses of the term "*onus probandi*." If we examine the parallel lines of apparently discordant authorities on this point, we will find that this is what might well have been meant by the statement in question. One of the earliest statements to the effect that the burden of proving undue influence rests on the party alleging it is in the year 1856. In *Boyse v. Rossborough* (6 Ho. L. Cas. 1, 49) the Lord Chancellor said:

"Where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it."

This adjudication is often cited in our own courts. *Matter of Green*, 67 Hun, 527, 533, 22 N. Y. Supp. 1112. This decision was subsequently recognized in this state, and it is the starting point of the entire doctrine in probate law on the burden of proving undue influence. It is apparent that in *Boyse v. Rossborough* the term "burden of proof" is used in the sense of a going forward with the proofs, because, if the proofs are in equilibrium, the proponent of a will does not, in England, necessarily succeed, even if the contestant fails. In such a case where the contestant's proofs are in equilibrium, it is the duty of the probate judge to hold that his conscience is not satisfied with the proponent's proofs that the will was the free and unrestrained act of a capable testator. *Tyrrell v. Painton*, [1894] Probate, 151, 156; *Mortimer on Probate Law*, 87. And such, I think, was the rule here. *Howland v. Taylor*, 53 N. Y. 627; *Rollwagen v. Rollwagen*, 63 N. Y. 504, 517; section 2627, Code Civ. Proc. This line of authority demonstrated conclusively, to my mind, that the burden of proof in a probate cause was al-

ways logically on the proponent, as stated by the adjudications and statutes already cited to that point.

Let us examine the authorities on this point a little further. The statement of the Lord Chancellor, in *Boise v. Rossborough*, was reiterated in *Tyler v. Gardiner*, 35 N. Y. 559, 594, and most obviously only in the secondary sense of the term indicated; for the majority opinion proceeds:

"When such evidence [of undue influence] is furnished, the burden of repelling the assumption to which it leads is cast upon the party to whom the fraud is imputed."

Can anything make it plainer that the court, in *Tyler v. Gardiner*, intended by this language to hold only that the onus probandi on the whole issue of freedom from restraint and duress rests again where it always had rested in a probate proceeding in a court of probate, to wit, on the proponent? Yet this is the leading case on this point. Many of the later statements to the effect that on an issue of undue influence the burden of proof rests on those who assert it, though constantly made in the adjudications (*Matter of Green*, 67 Hun, 527, 531, 535, 22 N. Y. Supp. 1112; *Matter of Will of Martin*, 98 N. Y. 193, 196; *Cudney v. Cudney*, 68 N. Y. 148, generally cited to the same point, does not seem to refer at all to the proposition), do not negative the general rule in probate courts already noticed, viz., that the burden of proof on the whole cause rests on the proponent; and that it is the burden of going forward with the plea at the proper moment which is stated to rest on the contestant setting up a plea of undue influence.

After careful consideration I am obliged, however, to conclude that the statement in the decision in *Matter of Will of Kindberg*, to the effect "that undue influence is an affirmative assault on the validity of a will, and that the burden of proof does not shift, but remains on the party asserting it," is deliberate and final; and that it is applicable to an original proceeding for probate in this court. Thus it is that in this state we have now on this point a domestic rule, which, while not always in precise accord with that prevailing in some other jurisdictions, is the one we must henceforth follow without discussion or cavil. The part of the decision in *Matter of Kindberg* which is of the greatest importance is that the burden of proof does not shift, but remains on the party asserting undue influence. This was not the doctrine of *Tyler v. Gardiner*, which is entitled to be regarded as the initial case on this point. The present rule has been built up in substantially three cases, dating from 1866, two of which were by no means final in their statements or implications. These three brief statements have given us a rule of the most tremendous and far-reaching significance, and the door is now shut. To this rule I must defer in this cause. I do so the more willingly because of the great excellence and deserved renown of the high court which has established the rule, no doubt with wisdom and deliberation. To the Court of Appeals the welfare, peace, and dignity of this state owe a great debt.

The scope and application of the rule in question, as now settled, will for a moment be considered. It is said, in *Matter of Will of Martin*, 98 N. Y. 193, 196, which in turn relied on the expression in *Tyler v. Gardiner*:

"The case, then, is one where the testatrix had testamentary capacity, a present knowledge of the contents of the will, and where, at its execution, she was surrounded by all the guards which the statute has prescribed to prevent fraud and imposition. A will executed under these circumstances can be avoided only by influence amounting to force or coercion, and proof that it was obtained by this coercion. The burden of proving it is on the party who makes the application."

The importance of this statement was apparent to the judges, and the precise language is quoted with great precision in *Matter of Nelson*, 97 App. Div. 213, 217, 89 N. Y. Supp. 865. The decision in *Matter of Will of Martin* went a step farther than *Tyler v. Gardiner*. But it still left open the question whether the burden shifted to proponent. If we now add to the doctrine stated in the *Will of Martin* the statement in *Matter of Kindberg*, that this "burden of proof does not shift," we have not only a plain working rule, but, to some extent, a precise evaluation of the proofs in cases of contested wills. According to this rule it would seem at first that if contestant's proof fail the decree must in every instance be for the will. But must it be for the will in every such case? This is the most important question of all. I have not seen the precise question directly answered in this state.

[6] Suppose a case in this state where the contestant's proofs do not preponderate on the plea of undue influence and yet make a very strong case of suspicion, must the will in such a case be admitted to probate by the surrogate? If not, we have a proper limitation of the rule as lately announced, and one in accord with the rule elsewhere. There is reason to believe, although this need not be now held in this cause, that the judgment is then to be left to the conscience of the surrogate, as it is in other probate jurisdictions of importance; and such, in my opinion, should be the law under the statute. Section 2622, Code Civ. Proc. Otherwise the surrogate in probate causes is the mere "judex" of the formulary system of the Roman law. He simply ascertains if the formula has been complied with, and this is all. This conception of the surrogate's function in contentious probate matters does not constitute him, at common law, a judicial officer whose conscience is required to be satisfied before he signs a decree of probate. Such a conception of the surrogate's function or duty is, I think, not the conception of the court in *Rollwagen v. Rollwagen*, 63 N. Y. at pages 520, 521, where most obviously there was no preponderance of evidence on the plea of undue influence, yet the will failed, and I say it with deference, most justly failed. If the surrogate is deprived of all discretion in such a case, this is most clearly not the general conception of the law, nor is it the law of the land, through which we derive our whole probate system and probate law. In *Tyrrell v. Painton*, [1894] Probate Division, it was said the party propounding a will "must satisfy the conscience of the court that the instru-

ment propounded is the last will of a free and capable testator." This statement has been reiterated here, and the principle is now expressed to some extent in this state in the form of a statute. Section 2622, Code Civ. Proc. But I will say no more on this point at this time. The judgments of the surrogates in contentious probates are made of little importance in the present system, where the Appellate Division serves as the real ordinary, and is vested with co-ordinate and original power over contentious probates. Jessup, Surr. Prac. 196, and cases cited. Any issues in such proceedings also stand or may be sent for a trial by jury in almost any cause whatever. Sections 2588, 2653a, Code Civ. Proc.

[7] There is no presumption of fraud or undue influence in a probate cause from mere relations of confidence. Nor does the burden now shift on a plea of undue influence. The contestant has failed to support his plea of undue influence, and I must pronounce for the will.

Let the decree for probate be presented for my signature.

(78 Misc. Rep. 589.)

In re ELLIS' ESTATE.

(Surrogate's Court, Onelda County. December, 1912.)

EXECUTORS AND ADMINISTRATORS (§ 311*)—ADMINISTRATION OF ESTATE—DISTRIBUTION OF PROCEEDS.

Where an executor received one-half the proceeds of milk of two separate dairy farms, under two separate contracts made with the testator, which did not terminate until after his death, such proceeds represent the earnings of the testator's personal estate; and where the executor pays them to the devisee of each farm, his accounts will be surcharged therewith, such proceeds to be distributed as directed by the will.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1261, 1262; Dec. Dig. § 311.*]

Judicial settlement of the accounts of the executor of John D. Ellis, deceased. Decree entered.

Josiah Perry, of Utica, for Lizzie May Ellis and Ella Ellis Pryce.

J. W. Rayhill, of Utica, for accounting party and executor, Joseph R. Ellis, individually and as executor.

J. W. Rayhill, of Utica (C. D. Thomas, of Herkimer, of counsel), for Ulysis Ellis, one of legatees.

SEXTON, S. On February 5, 1911, John D. Ellis died, owning, with other property, the "Cruickshank farm" and the "Schuyler farm," so called, which he disposed of by will—the first to Ulysis Ellis, and the second to his brother, Joseph R. Ellis, concluding his will with this clause:

"All the rest, residue and remainder of my estate of every kind, name and nature, real and personal, I give, devise and bequeath as follows: One-half thereof to my said brother, Joseph R. Ellis, and the remainder to be divided equally between my said nieces, or the survivor thereof, Lizzie May Ellis and Ella Ellis, to have and to hold unto their own proper use and benefit forever."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

He appointed said Joseph R. Ellis, executor. Letters testamentary were issued on the 3d day of April, 1911.

The testator, prior to his death, entered into a written contract with one Israel Gilbert for a period of one year from December 1, 1910, to December 1, 1911, which provided that Gilbert was to do all work and to have the use of a dairy of 25 cows belonging to the testator. Each of the parties to the contract was to pay one-half of the taxes, furnish one-half the seed and one-half of all the feed for the stock, and the testator was to furnish any additional hay or fodder not raised on the farm, necessary to carry all live stock to grass, and the milk from the dairy was to be taken to the Donafeld Cheese Factory and proceeds divided between the parties to said contract.

Said testator in his lifetime also entered into a renewal agreement in writing with one Joseph Smith, for a period of one year, to begin December 1, 1910, and end December 1, 1911, by the terms of which said Smith agreed to cultivate and work the "Schuyler farm," each party to pay one-half the taxes, and one-half of the necessary seed, and, in case of insufficient hay, each to furnish one-half of the necessary amount, and the proceeds of the farm, or the money realized, was to be divided equally between them. The cows on the farm were owned by the testator, and said Smith was to have the use of them, and the milk produced was to be taken to the Michigan Condensed Milk Company, during the term of said agreement.

After the death of said testator, February 5, 1911, said Gilbert and said Smith continued in possession of said farms until the termination of said respective agreements, and fully complied with the terms thereof. No specific mention is made of said farm contracts in the will. The executor received \$371.62, one-half of the proceeds of milk of the "Cruickshank farm," and paid it to Ulysis Ellis, devisee of said farm; and he also received the sum of \$674.24, one-half of the proceeds of the milk of the "Schuyler farm," and paid the same to Joseph R. Ellis, devisee of said farm. This disposition of the proceeds of the milk of the two farms was objected to on the accounting by Lizzie May Ellis and Ella Ellis, residuary legatees; each claiming one-fourth thereof under the residuary clause of the will.

The legal status of the parties to these farm contracts is defined in *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415, where the court, upon reviewing the various authorities construing agreements of the character under consideration, says:

"The balance of the authorities above cited seems to be that, notwithstanding the technical terms employed, such an agreement does not amount to a technical lease; that the relation of landlord and tenant is not contemplated, and the portion of the crops reserved to the owner is not rent, but compensation for the use of the land, while the other portion is compensation to the occupier, for his work, labor, and services, etc.; and that the legal possession of the land is in the owner, and the two are tenants in common of the crop." *Reynolds v. Reynolds*, 48 Hun, 142, and cases cited.

The money in controversy represents simply the earnings or avails of the personal estate of the testator, and must be disposed of in the same manner as any other increase of personalty coming into the hands of the executor. *Matter of Strickland*, 10 Misc. Rep. 486, 32 N. Y.

Supp. 171. It is conceded that the executor received \$1,045.86 as the proceeds of the milk under the two contracts in question: hence his account must be surcharged with said sum, and he must distribute the same as directed by the will.

Decreed accordingly.

(78 Misc. Rep. 514.)

PEOPLE v GARDNER.

(Essex County Court. December, 1912.)

CRIMINAL LAW (§ 968*)—MOTION IN ARREST—DEFENDANT UNDER SIXTEEN YEARS OF AGE—INDICTMENT.

Where defendant, under 16 years of age, indicted for burglary in the third degree and grand larceny, pleaded guilty to the burglary charge, and on suspension of sentence was placed in charge of the probation officer for 3 years, a motion in arrest, under Code Cr. Proc. § 467, made the following day, on the ground that the grand jury had, under Laws 1905, cc. 655, 656, no jurisdiction to find an indictment because of defendant's age, must be granted; no claim being made that a certificate of a judge, under said Code, § 57, that it is proper that the charge should be prosecuted by indictment, had been filed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2423-2432, 2435-2444; Dec. Dig. § 968.*]

Fred Gardner was convicted of burglary, and moves in arrest of judgment. Motion granted.

Patrick J. Finn, Dist. Atty., of Ticonderoga, for the People.
Maurice B. Dean, of New York City, for defendant.

PYRKE, J. The defendant was indicted by the grand jury of this county for the crime of burglary in the third degree and of grand larceny in the second degree. To this charge he pleaded not guilty. Subsequently, and on the first day of the November, 1912, term of the County Court, he was allowed to withdraw his plea of not guilty, and to enter in its stead a plea of guilty to the charge of burglary in the third degree. Thereupon sentence was suspended, and he was placed on probation in the charge of the probation officer of the county for the period of three years. On the following day Mr. Dean, who had previously been retained in his behalf, but who was not present in court on the preceding day, appeared and made a motion in arrest of judgment pursuant to section 467 of the Code of Criminal Procedure.

The motion was seasonably made, judgment not having been rendered. Upon this motion but two questions can be considered, namely: Did the court have jurisdiction over the subject of the indictment? and do the facts stated constitute a crime? My conclusion on the first question makes it unnecessary to consider the second one.

The motion must be granted, for the reason that the grand jury did not have jurisdiction to find the indictment, because the defendant was under the age of 16 years, being now, according to his appear-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ance and by his own statement, of the age of about 13 years. Section 2186 of the Penal Law (Consol. Laws, c. 40) provides that:

"A child of more than seven and less than sixteen years of age who shall commit any act or omission, which, if committed by an adult, would be a crime not punishable by death or life imprisonment, shall not be deemed guilty of any crime, but of juvenile delinquency only. * * *

Section 56 of the Code of Criminal Procedure in the enumeration of offenses, of which in the first instance Courts of Special Sessions have exclusive jurisdiction to hear and determine, includes "offenses of children, under section twenty-one hundred and eighty-six of the Penal Law." Subdivision 27. There is no claim here that any certificate pursuant to section 57 of the Code of Criminal Procedure has been filed. This offense, therefore, should have been heard and determined by a Court of Special Sessions, and the defendant should not have been indicted by the grand jury, and his plea of guilty should not have been accepted by this court. *People v. Knatt*, 156 N. Y. 302, 50 N. E. 835; *People v. Vert*, 134 App. Div. 790, 119 N. Y. Supp. 859.

The history of the legislation differentiating in the grade and punishment of offenses committed by persons under 16 years of age and those committed by persons over that age leaves no doubt of the legislative intent that children of tender years should not be prosecuted by indictment, except for offenses of the gravest character. The first legislative enactment that has come to my attention modifying the seriousness of an offense by reason of the age of the offender is chapter 726 of the Laws of 1894, amending section 699 of the Penal Code, which is the predecessor section of section 2186 of the Penal Law. By that amendment it is provided:

"Whenever a child under the age of fourteen years is charged with the perpetration of a crime, other than a capital crime, which, if committed by an adult, would be a felony, the child shall, in the discretion of the court, be tried as for a misdemeanor, and the court, magistrate or tribunal before whom such trial is held, shall impose the penalty as prescribed by law in the case of misdemeanors."

Under this amendment a child under 14 years of age, indicted for a felony other than a capital crime, could in the discretion of the court be tried as for a misdemeanor, in which event, upon conviction, the penalty prescribed for misdemeanors would apply. This section was further amended by chapter 103 of the Laws of 1902, raising the age limit to 16 years. Under both these amendments it was undoubtedly the legislative intent that crimes committed by children should be prosecuted by indictment, the same as those committed by adults.

In 1905, by chapter 655, the section was again amended, reducing the grade of this character of offenses when committed by children under 16 years of age to a misdemeanor, automatically and not by discretion. That amendment provides:

"The commission by a child under the age of sixteen years, of a crime, not capital or punishable by life imprisonment, which if committed by an adult would be a felony, renders such child guilty of a misdemeanor only. * * *

By chapter 656 of the Laws of 1905, becoming a law at the same time and evidently a companion piece of legislation, section 56 of the Code of Criminal Procedure, defining the offenses to be heard and determined exclusively by Courts of Special Sessions, was amended by adding to its twenty-seventh subdivision the words, "or offenses of children under section 699 of the Penal Code." It was plainly the intent of the Legislature, in reducing the grade of these juvenile offenses to that of misdemeanor, to make them cognizable exclusively by Courts of Special Sessions.

In 1909, by chapter 478, the Legislature again changed the phrasing of section 699 by making it read exactly as the present section 2186 of the Penal Law now reads. The sole purpose, apparently, of this amendment, was still further to modify the character of the offense by ceasing to classify it as a crime and denominating it a "juvenile delinquency." A survey of this legislation shows a progressive tendency on the part of the Legislature to deal gently with the misconduct of children of tender age; and there can be no doubt that since the legislation of 1905 it has been the legislative intent that no child should be the object of indictment, except when charged with an offense punishable by death or life imprisonment.

The motion in arrest of judgment should therefore be granted. And it appearing that the defendant cannot be convicted of any crime in this court, and that no new indictment can be framed against him, the money deposited instead of bail should be refunded.

Ordered accordingly.

(78 Misc. Rep. 588.)

CUKOR v. ROTHMAN.

(City Court of New York, Special Term. December, 1912.)

COURTS (§ 188*)—CITY COURTS—JURISDICTION—ACCOUNTING.

Where an agreement, whether interpreted as one of partnership or for the division of profits of the business in which the parties have embarked, renders an accounting necessary to determine their rights, the City Court of the City of New York has no jurisdiction of the cause of action.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 437-468; Dec. Dig. § 188.*]

Action by Victor P. Cukor against Henry A. Rothman. On motion for judgment on the pleadings. Granted.

Henry Kuntz, of New York City, for plaintiff.

Abraham Landan, of New York City, for defendant.

GREEN, J. Pursuant to the stipulation made by counsel in open court, I shall consider this motion as one for judgment on the pleadings, instead of a motion to compel a reply to the first defense in the answer. The agreement set forth in extenso in the answer is concededly the agreement upon which plaintiff predicates his cause of action, and, whether that agreement be interpreted to be a partnership agreement between the parties to this action or an agreement for a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

division of the profits of the business in which they embarked, the fact, nevertheless, remains that an accounting is absolutely necessary to determine their respective rights therein. In view of such question necessarily arising, this court has no jurisdiction of the cause of action, and I therefore grant the motion of defendant for judgment on the pleadings, not upon the merits, but for want of jurisdiction in the court to try the issues herein involved.

Motion granted.

(78 Misc. Rep. 499.)

WALTZ v. WORKMEN'S SICK AND DEATH BENEFIT FUND OF THE UNITED STATES OF AMERICA.

(City Court of New York, Trial Term. December, 1912.)

1. INSURANCE (§ 723*)—MUTUAL BENEFIT ASSOCIATION—MISREPRESENTATIONS—AGE.

Where, in an action on a mutual benefit certificate, the only issue was an alleged misrepresentation as to the insured's age, defendant claiming that he was over 45, and noninsurable under defendant's constitution and by-laws, instead of 42, as specified in the application, such misrepresentation constituted a defense, whether it was a breach of warranty or mere misrepresentation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1859-1865; Dec. Dig. § 723.*]

2. EVIDENCE (§ 349*)—AGE—BAPTISMAL RECORD.

Where plaintiff sued on a mutual benefit policy issued to W., who was born in G., France, a duly authenticated transcript of the birth or baptismal record of W., showing that his birth was duly registered in the office of the mayor of the town of G., in February, 1843, was admissible to show insured's age, and was not objectionable for failure to sufficiently identify the person named in the record with insured.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1384-1387; Dec. Dig. § 349.*]

3. INSURANCE (§ 730*)—JUDGMENT (§ 199*)—FRAUD—RESCISSION—TENDER OF ASSESSMENTS.

Where plaintiff's husband died after having been a member of defendant insurance society for 21 years, and defendant repudiated liability for misrepresentation concerning insured's age, it was bound, as a condition of its right to rescind, to tender or offer to return the dues and assessments paid by insured, with interest, and, no such tender having been made, the court was authorized by Code Civ. Proc. § 1185, to set aside a verdict directed for defendant and render judgment for plaintiff for the full amount of the certificate; both parties having moved at the trial for a directed verdict.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1877; Dec. Dig. § 730;* Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.*]

Action by Marie Waltz against the Workmen's Sick and Death Benefit Fund of the United States of America. Judgment for defendant.

Jacob I. Wiener, of New York City, for plaintiff.

Hillquit & Levene, of New York City, for defendant.

GREEN, J. This action was brought by the plaintiff to recover from the defendant, a fraternal association, a death benefit arising under and by virtue of a certificate of membership issued by the de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fendant to the plaintiff's intestate, her husband. The defense of the defendant is based on alleged fraud, and the claim is made that the plaintiff is not entitled to recover by reason of the fact that plaintiff's intestate in his application for membership alleged that he was 42 years of age, whereas in truth and fact at the time when he signed the application he was 45 years, 7 months, and 12 days old, and that the plaintiff's intestate was above the age at which under the constitution and by-laws of the defendant he was entitled to become a member of the defendant society, to wit, 7 months and 12 days older than allowed for the admission of members. While the evidence discloses no serious disputation of the defense interposed, the plaintiff nevertheless contends that neither in the answer, nor on the trial, nor at any time, did the defendant offer to return the money received as dues, and that consequently there was no rescission of the contract in law, and that plaintiff is entitled to judgment. This action came on for trial before the court and a jury at Trial Term, and after the case was closed counsel for both sides moved for a direction of a verdict. The court thereupon directed a verdict in favor of the defendant, subject to the opinion of the court; and the question of plaintiff's right to judgment is now before the court.

[1] The plaintiff is the widow of one Alois Waltz, who was a member of the defendant association at the time of his death. The defendant is a fraternal insurance association, and during the membership of the plaintiff's intestate had a constitution and by-laws binding upon it and upon its members. The plaintiff's intestate joined the defendant society on the 13th day of September, 1888, so that at the time of his death he had been a member of the society for 22 years. The provision of the constitution of defendant material to the questions herein involved is as follows:

"Every reputable workingman who has reached the age of 18 years and has not passed the age of 45 years is admissible to membership in this society."

The constitution further provides that every member may designate a beneficiary to whom, upon the death of the member, the society will pay a death benefit. At the time that the aforesaid Alois Waltz joined the defendant society, he stated in his application that he was 42 years of age, and upon this representation he was admitted to membership, and thereafter appointed this plaintiff, Marie Waltz, his beneficiary to receive any death benefit which might become payable according to the constitution of the defendant. It is true that no statement in his application, from the language thereof, may be interpreted as a warranty. Upon the death of the said Alois Waltz the plaintiff presented proper proofs of claim, and among other things a death certificate, and it thereupon appeared that the said Alois Waltz was not 42 years of age at the time of his admission on September 13, 1888, but was more than 45 years of age at that time.

[2] The said Alois Waltz was born in Guebwiller, department of Haut-Rhin, France, and the defendant offered in evidence a duly authenticated transcript of the birth or baptismal record of said Alois Waltz, showing that his birth was duly registered in the of-

fice of the mayor of the said town of Guebvillier on the first Wednesday of February in the year 1843. This evidence was in no way controverted by the plaintiff, and it therefore appears that the said Alois Waltz was born prior to the first Wednesday of February, 1843, and that, therefore, on the 13th day of September, 1888, he was more than 45 years of age. Counsel for the plaintiff raised no objection to the introduction of this evidence, save upon the ground of its competency, and also as to the identification of the person therein named with plaintiff's intestate; but this objection is clearly untenable under the authority of *Hartshorn v. Met. Life Ins. Co.*, 55 App. Div. 471, 67 N. Y. Supp. 13, which disposes effectually of that question. Counsel for defendant says in his brief:

"After both sides rested there was no actual issue of fact before the court which could be submitted to the jury. The documentary evidence offered by the defendant conclusively established the fact that Alois Waltz was more than 45 years of age at the time of joining the society. This evidence the plaintiff did not contradict, although the only issue raised by the pleadings was the age of the decedent at the time of signing the application for membership. There was, therefore, no evidence offered by the plaintiff to sustain a verdict in her favor, and there was nothing for the court to do but direct a verdict for the defendant."

With this statement I concur, with this exception, that if plaintiff's contention be sound, that, there being no offer to return the premiums or dues paid at any time, and no offer of judgment at or before the trial, there was no rescission of the contract in law, then plaintiff is entitled to recover, upon the theory that defendant cannot retain the dues or premiums and claim rescission of the contract. This is the only real question involved in this case, and, were the question of rescission absent, there must be judgment for the defendant, for I am of the opinion that upon the question of the misstatement of age, whether considered as a warranty or as a mere representation, the deceased member having been more than 45 years of age at the time that he joined the society, the plaintiff could not recover any death benefit from the defendant. The authorities seem to be conclusive upon that point. In the case of *Pirrung v. Supreme Council of Catholic Mut. Ben. Ass'n*, 104 App. Div. 571, at page 573, 93 N. Y. Supp. 575, at page 576, it was held that, where the constitution of a mutual benefit life insurance association provided that any person over the age of 50 years shall be ineligible for membership, the officers or agents of the association have no power to admit to membership a person over the age of 50 years, and if they assume to do so their action will create no liability against the association, and in that case, where a member of such association stated in his application for membership that his age was 49 years, and after his death it developed that he was actually over 50 years of age at the time that he made the application, the association was held not liable upon the certificate of membership issued to such member, independent of whether the member's statement of his age be regarded as a warranty or a representation only. Presiding Justice McLennan, of the Appellate Division, Fourth Department, in reviewing the facts in the above

case, after referring to the constitution of the defendant society, which contained a provision almost identical with the provision in the case at bar as to the limitation of age for proposed members, stated the law to be as follows:

"We think under such circumstances it must be held as matter of law that, if John Pirrung was in fact over 50 years of age at the time he made his application, and was initiated into defendant association, he was ineligible, and that the defendant, not being aware of the fact, did not become liable on account of the certificate of membership issued to him, and that this is so entirely independent of whether or not his statement as to his age be regarded as a warranty or as a representation only, * * * and that the officers or agents of the said society had no power to admit such to membership, and their acts in that regard would be null and void, and would create no liability in favor of the persons named as beneficiaries of such alleged member"—citing *Meehan v. Supreme Council*, 95 App. Div. 142, 88 N. Y. Supp. 821, affirmed 194 N. Y. 577, 88 N. E. 1125.

Counsel for the plaintiff has cited the case of *Egan v. Supreme Council, Catholic Benevolent Legion*, 32 App. Div. 245, 52 N. Y. Supp. 978, affirmed 161 N. Y. 650, 57 N. E. 1109. It is true that in that case the court held that a misrepresentation of several years as to the age of the member at the time of his admission into the society was not fatal, and did not constitute an absolute defense to a claim thereafter made for the death benefit or insurance money; but in that case, while the record does not show it, it is claimed by counsel for defendant that the member at the time of his admission was not beyond the age limit fixed in the constitution, and the constitution provided for a graded premium to be paid according to age. As stated by counsel for defendant:

"The distinction between the *Egan Case*, on the one hand, and the *Pirrung Case* and the case at bar, on the other, is that in the *Pirrung Case* and the case at bar the member at the time of his admission was beyond the age limit; and irrespective of all questions of good faith, and irrespective of the difference between the actual age of the member and the age as represented by him, the *Pirrung Case* holds that where a member at the time of his admission is older than the limit fixed by the constitution he virtually never becomes a member, and his beneficiaries have no claim whatever against the society."

In the *Egan Case* the point that the member was beyond the age limit fixed by the constitution was never raised. In the case of *Meehan v. Supreme Council, Catholic Benevolent Legion*, 95 App. Div. 142, 88 N. Y. Supp. 821, affirmed 194 N. Y. 577, 88 N. E. 1125, the same attorneys appeared as in the *Egan Case* and the action was against the identical defendant, and the only question submitted to the court was whether the member was beyond the age limit, and counsel for both plaintiff and defendant conceded that if the member was beyond the age limit the plaintiff could not recover.

This conclusion brings me to a consideration of what I have designated as the only real question in this case, that as to whether there was a rescission of the contract in law, notwithstanding the failure of defendant to tender or offer in any way the return of the money paid as premiums or dues by plaintiff's intestate for 22 years. The whole amount of the benefit involved in the case at bar is small, but the principle involved is important, as it has re-

lation to other cases. The court frankly stated to counsel for defendant, when it directed a verdict in his favor, that its sympathies were with the plaintiff, whose husband for 22 years was received as a member of the defendant association, and who paid his dues during all that period; and I am of the opinion that the court should neither search for nor erect barriers to defeat this claim, when justice requires that they be leveled to permit a recovery, if such recovery may be had according to law.

[3] Counsel for plaintiff in his brief says:

"Where one of two parties to a contract seeks to rescind for alleged fraud, the party claiming to be the innocent party must first return or offer to return to the other any and all benefits received by the alleged innocent party from the one who he claims has been guilty of the fraud."

It is true that such a proposition states the general rule of law, but some difficulty has been found in its application to the varying facts in the cases as they arose, and what constitutes a proper or sufficient tender or offer to return is not so readily determined. In the leading case of *Harris v. Equitable Life Assur. Soc.*, 64 N. Y. 199, the court said:

"There is no doubt of the correctness of the general rule that, where a party seeks to disaffirm a contract upon the ground of fraud, he is bound to act promptly upon the discovery of the fraud, and to return, or offer to return, all that he has received under the contract. * * * In other words, a man shall not keep what he has obtained under a fraudulent contract, and then claim that it shall be rescinded without any return."

The court further said (at page 200):

"In *Allerton v. Allerton*, 50 N. Y. 670, this court held that the rule, that he who seeks to rescind an agreement upon the ground of fraud must place the other party in as good a condition as that in which he was when the agreement was made, is satisfied if the judgment asked for will accomplish that result, and in such case no offer to return that which was received is necessary."

In other words, the court held that there need be no tender or offer to return, when upon the trial before the court the judgment, no matter for which side rendered, would bring about the same result as if a tender or offer had been made. In the case of *Bradshaw v. Mutual Life Ins. Co.*, 205 N. Y. 473, 98 N. E. 853, Chief Judge Cullen in a dissenting opinion said:

"On a repudiation of the agreement, it was bound to restore the premiums it had received. Strictly speaking, it should in its answer have tendered their return and paid the money into court. *Waddington v. United Ins. Co.*, 17 Johns. 23. This remains the general rule throughout the country (1 *Bigelow on Frauds*, p. 80, and see cases there cited), but it has been modified in this state by the decision in *Harris v. Equitable Life Assur. Soc.*, 64 N. Y. 196. * * * The court held that the offer to allow judgment was a sufficient offer to return, because the judgment in the case could have awarded to the plaintiff the relief to which he was entitled in case the defendant succeeded in its repudiating liability."

The authority of the *Harris Case*, *supra*, remains now unquestioned in this state, and has been followed in the case of *Spencer v. Citizens' Mutual Life Ins. Co.*, 3 Misc. Rep. 462, 23 N. Y. Supp. 179, and in the case of *Powell v. F. C. Linde Co.*, 49 App. Div. 290,

64 N. Y. Supp. 153. In the Spencer Case, *supra*, Judge McAdam, writing the opinion of the court, said:

"There is this additional feature in the case: The defendant never returned nor offered to return the dues received at the time of the reinstatement, nor the payment made thereafter, and is not, therefore, in a position to urge that the contract has been rescinded by it."

In the case at bar no offer of any kind was made by the defendant to return the dues or premiums paid. In answer to the court's question upon the trial as to the necessity for their return or offer to return, there was a desultory statement made by counsel that the benefits received or drawn by plaintiff's intestate exceeded the amount of the dues or premiums paid. There was nothing in the answer to that effect, and there was no evidence before the court to justify the statement as made. The pleadings as they stood, and the procedure upon the trial, and the theory upon which the case was tried, were such that the judgment, when obtained, would not and could not have accomplished the same result as if a tender or offer to return had been made, and which obviates the necessity for a formal tender or offer to return, as the rule is laid down in the Harris Case, *supra*.

For the reasons assigned, therefore, I am of the opinion that a tender or offer to return the dues advanced by the plaintiff's intestate to defendant was necessary before it could succeed in this action, and, not having done so, the direction of a verdict in its favor was error. The verdict, however, having been directed subject to the opinion of the court under section 1185 of the Code, I do hereby, pursuant to the provisions thereof, set aside the verdict and direct judgment for the plaintiff for the full amount, with interest and costs. Let judgment be entered accordingly.

Judgment accordingly.

(78 Misc. Rep. 586.)

HINTON et al. v. BOGART.

(City Court of New York. Special Term. December, 1912.)

LIFE ESTATES (§ 25*)—TERMINATION—ACTION BY LANDLORD TO RECOVER TAXES—JUDGMENT ON PLEADINGS.

Where, on death of a life tenant, the remaindermen gave notice to the tenant of the termination of a lease made to him, but the tenant, after order to dispossess, continued to occupy the premises, paying the rent and taxes under the lease, and, on reversal of the judgment sustaining a demurrer to the complaint in an action against the tenant to recover taxes paid by the remaindermen, it was held that the relation of landlord and tenant had been revived, it was no defense to such action that, after the order to dispossess was obtained, rent was accepted by plaintiffs "without prejudice," and a motion for judgment on the pleadings will be granted.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 47; Dec. Dig. § 25.*]

Action by Alfred P. Hinton and others against George E. Bogart. On motion for judgment on the pleadings. Motion granted.

See, also, 78 Misc. Rep. 46, 137 N. Y. Supp. 697.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Everett, Clarke & Benedict, of New York City, for plaintiffs.
Ferriss & Storck, of New York City, for defendant.

GREEN, J. This is a motion for judgment on the pleadings, made by the plaintiffs. The action is to recover for taxes paid by the plaintiffs on premises occupied by defendant and originally leased to the defendant by a life tenant, and by the terms of the lease required to be paid by the tenant. The life tenant died, and by due process of law the remaindermen gave notice to terminate the tenancy, and, the tenant not removing from the premises, summary proceedings were duly taken, and an order duly made dispossessing the defendant, but the warrant was never formally executed. Defendant continued to occupy the premises after the order for the dispossession had been issued for a number of years, and paid both the rent and the taxes as they accrued and became due. Upon a demurrer to the complaint herein, interposed previous to this motion, it was held upon appeal to the Appellate Term of the court that the relation of landlord and tenant was revived and continued by the payment and acceptance of the rent. Defendant now contends in his answer to this cause of action that he is not liable for the taxes, which are the subject of this suit, but only for the use and occupation of the premises, and alleges that after the order in summary proceedings was obtained he tendered the rent and it was accepted by the parties plaintiff "without prejudice."

It is upon this last phrase, "without prejudice," that defendant resists this action for the recovery of the taxes. From all the facts alleged in the complaint and the answer, I am of the opinion that the phrase "without prejudice" has an unmistakable and definite meaning, in view of their undisputed transactions and their manner of conduct subsequent to the order for the dispossession. The final order created distinct rights between these parties, and the receipt and payment of the rent "without prejudice" gave the plaintiffs the right to issue a warrant of dispossession, and it gave the tenant the right to voluntarily quit the premises at any time he pleased, and this is clearly apparent from the pleadings. There are no facts set forth in the defense interposed to warrant any other conclusion in my opinion. The parties continued under the terms of the original lease, and by no reasoning can it be spelled out of the answer that defendant was to be released from the payment of taxes by use of the words "without prejudice" in the payment or acceptance of the rent. I am therefore of the opinion that this motion for judgment on the pleadings should prevail, and the same is granted, with \$10 costs.

Motion granted, with \$10 costs.

(78 Misc. Rep. 497.)

C. TENNANT SONS & CO. v. NEW JERSEY OIL & MEAL CO.

(City Court of New York, Special Term. December, 1912.)

1. BANKRUPTCY (§ 156*)—TRUSTEE—ATTACHMENT—MOTION TO VACATE.

A defendant's trustee in bankruptcy is entitled to move in the state court for vacation of an attachment on the bankrupt's property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 240-246; Dec. Dig. § 156.*]

2. ATTACHMENT (§ 102*)—AFFIDAVIT—UNLIQUIDATED DAMAGES.

Where complaint for breach of contract alleged that plaintiff was damaged generally in a specified sum, and an attachment affidavit alleged that deponent's information as to the damages alleged in the complaint consisted of market quotations for the merchandise referred to in the contract and knowledge of purchases and sales of such goods during the time covered by the complaint, the damages being unliquidated, the allegations were insufficient as showing the damages to sustain the attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 263-272; Dec. Dig. § 102.*]

3. BANKRUPTCY (§ 195*)—ATTACHMENT—VACATION—INDEMNIFIED SURETY.

Where an attachment was discharged by an undertaking of a surety company which had received indemnifying securities from defendant, and within four months defendant was adjudicated a bankrupt, the attachment will be vacated on motion of the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 296-305; Dec. Dig. § 195.*]

Action by C. Tennant Sons & Co. against the New Jersey Oil & Meal Company. On motion by defendant's trustee in bankruptcy to vacate a warrant of attachment. Granted.

Fletcher, McCutchen & Brown, of New York City, for plaintiff.

Hyman & Campbell, of New York City, for defendant's trustee in bankruptcy.

GREEN, J. [1] This is a motion made by a trustee in bankruptcy of defendant to vacate a warrant of attachment which was discharged by giving an undertaking executed by a surety company to discharge the same. The defendant moves to vacate upon the ground that the papers are insufficient upon their face to sustain the warrant, in that they fail to show facts to justify the court in arriving at the conclusion that any damage was sustained (the action being for breach of contract and the damages unliquidated), and that under Bankruptcy Act July 1, 1898, c. 541, § 67, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), the lien was obtained within four months of the adjudication in bankruptcy. The trustee has the right to make this motion. *Hardt v. Schuylkill Plush & Silk Co.*, 69 App. Div. 90, 74 App. Div. 549.

[2] As to the averments of damage, the complaint alleges generally that the plaintiff has been damaged by reason of defendant's failure to perform its agreement in the sum of \$953.60. The affidavit supplements this allegation by the statement:

"The sources of deponent's information as to the damages alleged in said complaint are the market quotations for the merchandise referred to in said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

contract set forth in the complaint herein, and knowledge of purchases and sales of such goods during the times set forth in the complaint."

It is evident by a mere statement of these averments that no one could possibly determine the amount of damage sustained, and the conclusion in the complaint is not to be accepted as the evidentiary facts required as to the damage. The authorities are clear upon this point. See *Frusher v. Vacuum Dyeing Machine Co.*, 148 App. Div. 68, 131 N. Y. Supp. 994; *Commercial Wood & Cement Co. v. Northampton Portland Cement Co.*, 41 Misc. Rep. 242, 84 N. Y. Supp. 38.

[3] Upon the other question involved I am of the opinion that the case of *King v. Block Amusement Co.*, 126 App. Div. 48, 111 N. Y. Supp. 102, disposes of the matter. It is true in this case the Court of Appeals answered two questions certified (see *King v. Block Amusement Co.*, 193 N. Y. 608, 86 N. E. 1126) in the negative, and held that, where an attachment was discharged by giving an undertaking, the court was not required on motion of the defendant to vacate the attachment upon the subsequent adjudication of the defendant as a bankrupt within four months of the granting of the attachment, and the court further held that the adjudication in bankruptcy did not avoid such an undertaking given under the circumstances recited. In the case just cited the surety on the undertaking took *no* security. *In the case at bar the surety company did take security from the defendant* fully sufficient to indemnify it from loss, and that security unquestionably is out of the estate of the bankrupt. In the case of *King v. Block Amusement Co.*, 126 App. Div. 51, 111 N. Y. Supp. 104, the court said:

"It is conceded that, if the surety had taken security, it would be the duty of the court under subdivision "f" of section 67 of the Bankruptcy Act to vacate the warrant of attachment as a condition of requiring the surety to deliver over to the trustee in bankruptcy the property pledged."

And I believe it is the duty of this court to follow the intimation therein given, concurred in by all the justices of the Appellate Division, as to the proper disposition of this case. It may be true that such expression was obiter in the case cited, but the high source from which it emanates is sufficient authority for its acceptance in the case at bar. In view of these facts, the motion of the defendant is granted and the attachment is vacated. The order should be settled on notice, and, in view of the question involved, if counsel for plaintiff desires a stay of proceedings pending appeal, I will hear him on the settlement of the order.

Ordered accordingly.

UTZ v. TAYLOR.

(Supreme Court, Appellate Division, Second Department. February 14, 1913.)

VENDOR AND PURCHASER (§ 197*)—MORTGAGES—VENDOR'S DUTY TO PROTECT—TERMINATION OF LIABILITY.

Where a vendor, as part of a contract for the sale of mortgaged property, agreed to protect a second mortgage thereon which the vendee assumed until February 1, 1904, there was an implied condition that the vendee would do nothing with the property which should make it either impossible to place a new mortgage thereon or increase the difficulty of so doing; and hence the vendor was released from further liability by the vendee's contracting to sell a portion of the mortgaged premises, with the building thereon, free and clear of all incumbrances, prior to any demand that she pay off the mortgage, requiring a refundment thereof before the date specified.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 407; Dec. Dig. § 197.*]

Appeal from Trial Term, Kings County.

Action by Emma Utz against Henry Taylor. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, WOODWARD, and RICH, JJ.

Cyrus V. Washburn, of Brooklyn, for appellant.

J. Stewart Ross, of Brooklyn, for respondent.

BURR, J. On October 3, 1900, the parties to this action entered into an agreement by which defendant was to convey to plaintiff a plot of ground, with the buildings thereon situated, on the northeasterly corner of Liberty and Schenck avenues, in the borough of Brooklyn, 50 feet wide on Liberty avenue and 100 feet deep on Schenck avenue. This agreement contained a clause in the words following:

"The premises which are to be conveyed by the party of the first part [defendant] are to be conveyed subject to the following incumbrances: A mortgage for \$2,500, with interest at 5%, and a second mortgage of \$2,000, interest at 5% per annum, which the party of the first part will protect to February 1, 1904."

On November 12, 1900, this contract was executed by the delivery of a deed, and at that time a further agreement was entered into, which, after reciting the contract to convey dated October 3, 1900, and the second mortgage referred to therein, contained this provision:

"Now, therefore, the said party of the first part [defendant] agrees to protect the said party of the second part [plaintiff] from any loss by reason of the calling in of the said mortgage of \$2,000 as aforesaid before February 1, 1904, except by reason of the default in the payment of interest and taxes."

Although the meaning of this clause is not entirely clear, both parties seem to have considered it as meaning that, if payment of the second mortgage of \$2,000 should be demanded by the holder thereof before February 1, 1904, defendant would either procure an assignment and extension of said mortgage to be made, or would pay the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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expenses which plaintiff should reasonably incur in procuring another mortgage upon the property in the place thereof. There is some testimony on the part of plaintiff that in May, 1902, the holder of this second mortgage did demand its payment, and it appears that it and the prior mortgage on said property were in fact paid in November, 1902, at which time plaintiff placed two new mortgages upon a portion of the property conveyed to her; the first mortgage being for \$3,500 and the second mortgage being for \$5,400. This second mortgage also covered other property owned by plaintiff. For a portion of the expenses which plaintiff claims that she incurred in connection with the placing of these mortgages, she obtained a verdict from a jury, and from the judgment entered thereon, and an order denying a motion for a new trial, defendant appeals.

Although there was a sharp conflict of testimony as to the making of a demand for the payment of the second mortgage by the holder thereof, it is not necessary for us to pass upon the weight of the evidence, since for other reasons plaintiff is not entitled to recover. If the agreement between plaintiff and defendant is susceptible of the construction placed upon it, there must be necessarily implied, in connection with the agreement on defendant's part, an agreement on plaintiff's part that she would do nothing with the property affected by said mortgage which should make it either impossible to place a new mortgage thereon or increase the difficulty of so doing.

Defendant attempted to prove that in November, 1901, and several months before the date when, even according to plaintiff's contention, a demand for the payment of the second mortgage was made, she had entered into a contract to sell a portion of the rear of the mortgaged premises, 25 feet wide in front on Schenck avenue and 50 feet deep on each side, with a building thereon, free and clear of all incumbrances, and that this contract was carried out at the time that the new mortgages were placed on the remainder thereof. This testimony was excluded, upon plaintiff's objection. This was error. If such were the facts, they afforded a complete defense to plaintiff's claim. By her own act, prior to any demand upon her, she had placed herself in a position in which she was obliged to either pay off said second mortgage or procure the property which she had agreed to convey to be released from the lien thereof. No damage could therefore result to her by a subsequent demand for the payment of that mortgage, since she had already obligated herself for her own benefit to procure its discharge. At least, by her act she had prejudiced the position of the defendant with relation to the extent of the property which she could offer as security for a new loan. Having done so, she released him from obligation of performance on his part.

The judgment and order should be reversed, and a new trial granted; costs to abide the event. All concur.

In re PRENTICE et al.

(Supreme Court, Appellate Division, Second Department. February 14, 1913.)

PLEADING (§ 258*)—AMENDMENT—LACHES.

Where attorneys asserted a lien for fees, and were adjudicated a certain sum by default, which was subsequently opened as a favor, and an answer filed, and the matter sent to a referee, the court did not err in refusing to allow an amendment of the answer, three years later, to set up limitations, laches, and negligence, which could have been set up when the answer was filed, where no sufficient excuse is offered.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 765-782; Dec. Dig. § 258.*]

Appeal from Special Term, Nassau County.

Petition by William P. Prentice and another, attorneys for Richard Sandiford, to enforce liens. From an order denying a motion by Sandiford to file an amended answer, he appeals. Affirmed.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, WOODWARD, and RICH, JJ.

Nicholas W. Hacker, of New York City, for appellant.

Thomas G. Flaherty, of New York City, for respondent.

WOODWARD, J. The petition shows that many years ago the appellant retained the respondents, attorneys, for the purpose of getting title to and defending the possession of certain real estate in the town of Hempstead; that the litigations growing out of this retainer were conducted by the petitioners, and generally with success, resulting in vesting in the appellant property to the value of approximately \$100,000. The petitioners asserted a lien against the property secured by the appellant through their efforts, which resulted in an adjudication by default for the sum of \$15,258.96, with interest, bringing the amount up to about \$20,000. Subsequently this default was opened, but it was provided in the order opening the default that the order adjudicating the amount, being the order of November 23, 1908, should be—

“permitted to stand as security for the performance of such final order as may hereafter be entered herein, but all proceedings under the said order are hereby stayed.”

The order further provided that the appellant be permitted to serve and file his answer as “verified on the 31st day of October, 1908,” and that the matter be referred to Robert F. Randall, to take testimony as to the value of the services rendered by the petitioners, and to report to the court. Thereafter Sandiford served his answer. Three years and a half after serving this answer, Sandiford now asks the court for permission to amend his answer, and to set up the defenses of the statute of limitations, laches on the part of the petitioners, and negligence.

We agree with the learned court at Special Term that this is not a case for amendment. All of the matters which the appellant now

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

seeks to set up by way of defense were equally available to him at the time of putting in the original answer, and no sufficient excuse is offered for not including them. Moreover, the appellant was in default. That default was opened as a favor to the appellant, and he has accepted the favor. The answer was put in, the matter sent to a referee, and it would be an act of bad faith at this time to change the conditions of the order granting the favor.

The order appealed from should be affirmed, with \$10 costs and disbursements. All concur.

NEUMANN v. HUDSON COUNTY CONSUMERS' BREWING CO.

(Supreme Court, Appellate Division, Second Department. February 14, 1913.)

1. MUNICIPAL CORPORATIONS (§ 706*)—ACCIDENT AT STREET CROSSING—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Plaintiff could not recover for the death of his intestate, who was run over by defendant's truck while crossing the street, however negligent defendant's servants were, in the absence of evidence which showed, or tended to show, that deceased was not guilty of contributory negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.*]

2. NEGLIGENCE (§ 85*)—CONTRIBUTORY NEGLIGENCE—CHILDREN—EMERGENCY OR FRIGHT.

A child in the exercise of due care in crossing a street, finding herself in a position of danger caused by the negligence of defendant's servants, and becoming suddenly frightened, was not chargeable with the exercise of what, in a moment of calmness, would be ordinary care, or with blame in turning her bicycle and running in front of defendant's oncoming truck, in order to avoid it.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 121-128; Dec. Dig. § 85.*]

3. MUNICIPAL CORPORATIONS (§ 706*)—ACCIDENT AT STREET CROSSING—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In plaintiff's action for the death of his intestate by being run over by defendant's truck, an instruction that if the truck came upon her in a way calculated to produce fright, and such fright caused an error of judgment by which the truck struck her, she was not guilty of contributory negligence, and that the jury should say whether there was such fright, was erroneous, in that it did not require a finding that the fright was not due to her own contributory negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.*]

Hirschberg, J., dissenting.

Appeal from Trial Term, Rockland County.

Action by Frank Neumann, as administrator, etc., of Frieda Neumann, deceased, against the Hudson County Consumers' Brewing Company. From a judgment of the Supreme Court in favor of the plaintiff, and from an order denying its motion for a new trial, defendant appeals. Judgment and order reversed, and new trial granted.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, THOMAS, and CARR, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Theodore H. Lord, of New York City, for appellant.
John F. McFarlane, of Nyack, for respondent.

CARR, J. On July 12, 1911, early in the afternoon of a bright, clear day, a young girl, about 12 years of age, was riding a bicycle across the main highway in the village of Sparkill, in Rockland county. She had been at the post office in the village, and was returning home in an easterly direction across said highway. She had come out from a lateral highway which crossed the main road. As she was at or near the center of the main highway, she came into collision with a heavily laden motor truck, and the rear wheel of her bicycle appears to have been struck by the front, right-hand wheel of the motor truck. Her bicycle was swerved around, and she and it were thrown under the wheels of the on-coming truck. Injuries resulted to her which caused her death. The plaintiff, her father, has obtained a judgment against the defendant, the owner of the motor truck, for the sum of \$4,000 and taxed costs. From this judgment, as well as from an order denying a motion for a new trial, the defendant appeals. The grounds of the appeal are that the verdict was not only against the weight of evidence, but that there was, in fact, no evidence to show negligence on the part of the defendant and freedom from contributory negligence on the part of the plaintiff; and there is likewise urged an exception taken to a part of the charge of the trial court.

A number of witnesses were produced by the plaintiff to show the circumstances preceding and attending the happening of the accident. Of these, but two claim to have seen the happening of the accident itself. One of them is the witness Robinson, and the other one Corwin. Evidence was given to show that the motor truck was being driven south on the main highway at a rate of speed estimated by one witness for the plaintiff at from 12 to 15 miles an hour, and that, as it approached the intersecting highway, no horn was sounded to give warning. The defendant's driver admitted that no horn had been sounded by him, and he gave reason for such fact by stating that, though he was looking ahead, there was no one in front of him on the highway, and hence he gave no warning. The plaintiff's witness Robinson testified that he was at work at the railway station platform, which he estimated to be about 125 to 150 feet away from the spot in which the collision took place; that he had noticed the young girl on her bicycle, about to cross the main highway, when the auto truck came along and hit her bicycle, and knocked her and it under the front left wheel of the truck. The part of the truck which struck the child, according to his testimony, was the right-hand side of the machine, "the front wheel on the right-hand side of the machine," and that the blow swung the child's bicycle around. When he first noticed her, immediately before the accident, she was a few feet in front of the auto, "probably two or three." The auto was going south, and the girl was going easterly. The witness Corwin, who was at the same place with Robinson, testified that they were located about 300 feet away from the point of the accident, and that his attention was attracted by hearing a scream, and, looking in the direc-

tion from which the sound came, he saw the child on the main highway near the center of the road, close to the on-coming motor truck, and that he noticed that she turned her bicycle to the south and went along for about five feet in front of the truck, then the front, right-hand wheel of the truck struck the rear wheel of her bicycle and threw her down and passed over her. The negligence claimed on the part of the defendant was that the auto truck was running at a high rate of speed and gave no warning of its approach, and that, had its driver been exercising proper care, he should have noticed the presence of the child on the main highway and so operated his machine as to have avoided injury to her, under the circumstances.

The driver of the defendant testified that at the time of the accident his machine was going at the rate of from four to five miles an hour; that he had slowed down as he approached the crossroad, the existence of which was known to him, because he was about to stop at a store about a block further on, and that his machine had three speeds, but it had been geared to the third or high speed at the time of the accident; that, had he seen the child, it was so equipped that it could have been brought to stop within a few seconds, but that he did not see the child at all, and was not aware of any accident until he heard a sound as if a chain had snapped, and he then swerved to the side and brought his truck to a stop in about 40 or 50 feet, and he then saw the child lying on the road. There is no controversy in the case that the auto truck passed over the child, thus injuring her fatally. The case was submitted to the jury by the trial court on a theory stated in the charge as follows:

"No liability can be predicated in this case upon neglect to give any warning by the sounding of a horn when this auto truck came on the highway. Of course, if there was nothing there that was apparent, it would make no difference, and if it was daylight, and the auto truck could be seen coming, it is unnecessary to give an alarm if you can see the object coming on; you know there is danger if you continue in its path. The plaintiff, to recover in this case, must recover upon the theory that at the time this accident occurred the negligence of the defendant was in the operation and management of this machine at that time when the conditions became apparent, if at all, to the driver. People who are using a highway, either with vehicles or as pedestrians—vehicles in this case, the girl upon her bicycle and this motor vehicle of the defendant—have equal rights. They must so conduct themselves, the law says, as not to commit unnecessary injury to another; and if they see a certain condition in front of them, and they know that that condition is likely to do harm to the other person, they must stop. That is common sense, gentlemen."

The plaintiff offered considerable evidence to show that the spot at which the accident took place was visible from the on-coming motor truck for a considerable distance, but that, to one emerging from the intersecting road, vehicles approaching from the south on the main road, as was this motor truck, were not visible for any considerable distance. There is no proof in the case showing whether the child had glanced in a southerly direction before she went onto the main highway. From the testimony of Corwin there is a probable inference that the child did not discover the on-coming motor truck until she was about to go, either immediately in front of it, or to strike its

side at the front, and that the swerving of the bicycle in a southerly direction was caused by her just as she screamed, and in order to avoid a collision. There was evidence on the part of some of the plaintiff's witnesses that as the motor truck passed along the highway it made a noise loud enough to be heard within some of the adjoining houses. The evidence of the defendant's driver, and of the two men who sat on the front seat of the truck with him, was to the effect that they were looking straight ahead and never saw the child at all. This is explainable, according to the testimony of several witnesses called by the defendant, by the claimed fact that after the child left the post-office she continued for a short distance on a dirt sidewalk in front of a store, and that she left the sidewalk to cross the main highway practically just as the motor truck had come to that spot. There is some testimony by the postmistress, who was called by the defendant, to the effect that the child had her head turned, looking behind her, as she came to the main road. This testimony was met by that of witnesses called by the plaintiff, who contradicted the story told by the postmistress. The jury must have found the defendant negligent on the theory that, if the driver had been looking ahead, he could have seen the child in time to avoid the collision, and that it was negligence on his part not to have seen the child under the circumstances, and to have taken measures accordingly.

[1] Assuming that negligence may be imputable to the defendant under these circumstances, there is a grave difficulty in the case on the question of the absence of proof to show freedom of contributory negligence on the part of the decedent. Was it her duty, when she came on the main highway, to glance right and left, as well as straight ahead, in order to see whether any vehicles were on-coming? As to these circumstances, the case is barren of any proof at all. Can this case be distinguished from the rule recently applied in *Peterson v. Ballantine & Sons*, 205 N. Y. 29, 98 N. E. 202, 39 L. R. A. (N. S.) 1147? There a man crossing a public street in the city, at a regular crossing, was run down by a truck drawn by a pair of horses. The evidence shows that beyond controversy the driver of the truck was negligent, and that, instead of looking ahead, he was looking behind, over his shoulder, in the direction of where an organ grinder was playing. The injured man, however, was not shown to have looked in the direction in which the truck was coming, or to have in any way done anything to avoid a collision. The Court of Appeals reversed the judgment in favor of the administratrix of the injured man in that case, on the ground that, while the defendant was negligent in the happening of the accident, yet that there was no proof that the decedent was free from negligence which contributed to it. Speaking of the rule as applicable to the facts of that case, the court said, by Gray, J., as follows:

"He had the right to cross the street between its regular crossings, but he was bound, when doing so, to be reasonably careful; and the plaintiff was not entitled to charge the defendant with liability for the accident, however negligent its servants, unless he could adduce evidence which proved, or tended to prove, that the deceased was free from fault at the time. The difficulty with the case is in the plaintiff's failure in that respect. Less

evidence may be required to show freedom from fault, where the injured party is dead; but, nevertheless, there must be some facts which, reasonably considered, permit of such an inference. The relaxation of the rule is not, as to the burden of proof, on the plaintiff in such an event; it is as to the quantum of proof, and greater latitude is allowed in permitting the inference of an exercise of care. *Baxter v. Auburn & Syr. Elec. R. R. Co.*, 190 N. Y. 439 [83 N. E. 469]. It was as essential to plaintiff's case to establish that by some evidence, as it was to show the negligence for which the defendant was responsible; for where both parties concur in acts causing the injury the blame cannot be placed exclusively upon the defendant. And where the evidence is as consistent with a neglect of duty or care on the part of the injured party as it is with their exercise, upon what principle shall a jury be allowed to speculate upon the probabilities?"

[2, 3] In this case the appellant complains likewise of an error in the charge of the trial court, which arises from a colloquy as follows:

"Plaintiff's Counsel: I ask your honor to charge the jury that if this automobile came upon the girl under circumstances calculated to produce fright or terror, and such fright caused an error of judgment by which the automobile struck her, she is not guilty of contributory negligence.

"The Court: If she was so frightened, and the jury say so, and it was sudden fright, she is not expected to exercise that same degree of care that you would be in a calm moment. I will charge as you ask me.

"Defendant's Counsel: I except to it as not applicable to this case.

"The Court: I leave it for the jury to say; if there was no fright or sudden fright, then it does not apply."

The charge of the trial court, in this particular, was erroneous. If the child, in the exercise of due care, had found herself in a position of danger caused by the negligence of the defendant, and became frightened suddenly, then, of course, she was not chargeable with the exercise of what, in a moment of calmness, would be ordinary care, and she should not be chargeable with blame in turning the bicycle to the south and running in front of the on-coming motor truck, in order to avoid it; but such rule applies only to a case where the person injured was put in a position of danger through the negligence of the defendant, and without any negligence on his or her part, and the court should have so stated.

It is contended, however, by the respondent, that the trial court so qualified its charge on this point as to remove any reasonable objection to it by saying:

"I leave it to the jury to say; if there was no fright or sudden fright, then it does not apply."

This qualification was not sufficient. The child might well have been frightened when she found herself in a position of sudden danger, and yet the peril in which she found herself might have been due to her own contributory negligence, in which case the theory of "a sudden peril" could not be availed of in her behalf.

Judgment and order reversed and a new trial granted, costs to abide the event. All concur, except HIRSCHBERG, J., dissenting.

PARRISH v. FISHEL.

(Supreme Court, Appellate Division, Second Department. February 7, 1913.)

1. TRIAL (§ 251*)—ACTION FOR RENT—INSTRUCTIONS—ISSUES.

Where a lessee, in an action for rent, showed, under objection, without pleading it, an agreement to surrender the lease before its expiration for an agreed rebate, and plaintiff denied the agreement, the refusal to submit the issue to the jury was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

2. LANDLORD AND TENANT (§ 157*)—LEASE—STIPULATIONS—CONSTRUCTION.

A stipulation in a lease that the lessee shall erect on the premises a garage costing not less than \$1,000 requires him to use his judgment, and unless it is shown that he acted in bad faith, or improvidently, or without reasonable skill, the cost to the lessee must be accepted by the lessor, though there is evidence that it was only worth \$576.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 534-542; Dec. Dig. § 157.*]

3. LANDLORD AND TENANT (§ 157*)—STIPULATION OF LEASE—ERECTION BY LESSEE OF BUILDING—ACCEPTANCE BY LESSOR.

A lessor, in a lease requiring the lessee to erect a garage on the premises costing not less than \$1,000, who accepted the garage at a cost of \$1,000 in fulfillment of the lease, and who, with knowledge of the insufficiency of the building, deducted under the lease a specified sum per month from the rent on account of the garage until the whole amount was so accepted, could not recover back the amount so allowed.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 534-542; Dec. Dig. § 157.*]

Appeal from City Court of New Rochelle.

Action by Carel Parrish against Jacob Fishel. From a judgment of the City Court of New Rochelle for plaintiff, and from an order denying a new trial, defendant appeals. Conditionally affirmed.

See, also, 138 N. Y. Supp. 1133.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, THOMAS, and CARR, JJ.

Frank Walling, of New York City, for appellant.

Hugh M. Harmer, of New York City, for respondent.

THOMAS, J. The plaintiff, lessor, has sued on a lease (1) for rent, \$250; (2) for breach of agreement in the written lease to build a garage on the premises that should cost not less than \$1,000.

[1] The defendant pleaded that the rent had been paid to the extent of \$100 by work and material furnished to the plaintiff, but the jury found against him. He also showed, under objection, but did not plead, an agreement to surrender the lease for some days before its expiration for an agreed rebate of \$50. The plaintiff denied, and the court properly declined to submit that issue to the jury.

[2] The plaintiff offered expert evidence by one Watson that the reasonable cost of the garage was \$576, and the estimated cost of labor and material is given in detail. The defendant is a builder, and shows that he paid for labor and material for the building \$1,195,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or \$1,095, if no allowance be made for his labor. The question is, not what Watson or some other would do it for, but what it cost. The stipulation was that the defendant should do it; that he should be responsible and use his judgment, and unless it be shown that he acted in bad faith, or improvidently, or without reasonable skill in laying it out and in furnishing material and labor, the money he expended must be accepted.

[3] It is objected that the building does not answer to the agreement in the lease. That question was not submitted, at least not so as to be the issue. Moreover, the plaintiff agreed to deduct \$50 per month on account of the garage, and did so voluntarily each month until the whole amount was accepted for rent from October 1, 1909. She did this deliberately, as her letter of November 8, 1910, indicates, and gave receipts for the full amount. So that she has accepted the cost of the building on the basis of a cost of \$1,000; that is, she has accepted the building at the cost of \$1,000 in payment of rent, although she states that she knew of its insufficiency early in the term. Now she would recover back what she has allowed. There has been a plain acceptance of the garage at a cost of \$1,000, and in fulfillment of the stipulation to build it.

The judgment and order should be reversed, and a new trial ordered, unless the plaintiff within 20 days stipulate to reduce the recovery to \$250; and, in case such stipulation be made, the judgment and order are affirmed, without costs. All concur.

JACINA v. LEMMI.

(Supreme Court, Appellate Division, Second Department. February 7, 1913.)

1. VENUE (§ 8*)—TRANSITORY ACTION—ACTION FOR PERSONAL INJURIES.

An action for personal injuries negligently inflicted is transitory, and generally the place of trial should be in the county in which the cause of action arose.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 17; Dec. Dig. § 8.*]

2. VENUE (§ 68*)—CHANGE OF VENUE—CONVENIENCE OF WITNESSES.

Where defendant, in an action begun in Kings county for a personal injury sustained by plaintiff in Delaware county, showed, in support of his application for a change of place of trial to Delaware county on the ground of convenience of witnesses, that all but one of the material witnesses named resided in Delaware county, and showed what they would testify to, and plaintiff in opposition averred in his affidavit that he was informed and believed that the accident was witnessed by only two persons, not named, and that it was desired by plaintiff to produce two or more witnesses residing in New York, the refusal to change the place of trial was erroneous.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 121; Dec. Dig. § 68.*]

3. VENUE (§ 77*)—CHANGE OF PLACE OF TRIAL—WAIVER OF RIGHT.

A defendant, who by inadvertence served a notice of trial, and who, before it had been acted on and with great promptness, withdrew it, was not thereby deprived of his right of a change of place of trial for the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

convenience of the witnesses, in the absence of any suggestion that plaintiff, in the interval between the service of the notice and the withdrawal, took steps to prepare for trial in the county in which the action was brought, or that his position was prejudiced by the notice.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 59, 134, 138; Dec. Dig. § 77.*]

Appeal from Special Term, Kings County.

Action by Anthony Jacina, as administrator of Martin Jacina, deceased, against Elizabeth C. Lemmi. From an order denying a motion to change the place of trial from the county of Kings to the county of Delaware, defendant appeals. Reversed, and motion granted.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, WOODWARD, and RICH, JJ.

Walter C. Stevens, of New York City, for appellant.

H. R. Scoville, of New York City, for respondent.

BURR, J. The defendant is engaged in the business of manufacturing wood alcohol and other wood products, with factories situated at various places in Delaware county, and, among others, at Elk Brook, in said county. On March 27, 1912, plaintiff's intestate was employed by defendant as a laborer in collecting logs and transporting them to defendant's factory, and while driving a team of horses, attached to a wagon heavily loaded with logs, down a steep incline, at or near Elk Brook, aforesaid, sustained personal injuries, in consequence of which he died.

In this action, brought to recover damages for the pecuniary injury resulting therefrom, various grounds of negligence are alleged, the principal of which are supplying decedent with "an improper and imperfect brake or means of blocking the wheels of said wagon while passing down said steep incline," and failure on the part of defendant's superintendent to properly attach a rope to the said load for the purpose of assisting to lower it down said incline. Defendant answered, denying any negligence upon her part, and affirmatively alleging contributory negligence upon the part of decedent, and the assumption by him of open, obvious and apparent risks.

[1] Within nine days after the joining of issue, defendant moved to change the place of trial from Kings county to Delaware county, upon the ground that the convenience of witnesses would be promoted thereby. Code Civ. Proc. § 987. Upon the merits, defendant was clearly entitled to the relief asked for. The action being transitory in character, the general rule is that the place of trial should be the county in which the cause of action arose. *Jacobson v. German-American Button Co.*, 124 App. Div. 251, 108 N. Y. Supp. 795; *Pinkus v. United Cloak & Suit Co.*, 124 App. Div. 535, 108 N. Y. Supp. 932; *Neeley v. Erie Railroad Co.*, 134 App. Div. 781, 119 N. Y. Supp. 953; *Studebaker Bros. Co. v. W. N. Y. & P. Traction Co.*, 140 App. Div. 308, 125 N. Y. Supp. 224; *Neiman v. Gardner*, 145 App. Div. 197, 129 N. Y. Supp. 913.

[2] Defendant names ten material and necessary witnesses whom

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

she proposes to call upon the trial of the action. All but one of these reside at Elk Brook. He resides at Hazel, Sullivan county. Several of these witnesses, their names being specified in the moving affidavit, defendant alleges will testify that the wagon furnished decedent was in good condition, that the brake shoe was in perfect order, and that decedent himself loosed this brake shoe thereby causing the accident. One or more of the witnesses, also named in the moving affidavit, defendant alleges will testify that the rope was securely fastened.

The only affidavit submitted in opposition to the motion is made by plaintiff's attorney, and is to the effect that "deponent is informed and believes that the occurrence which resulted in the death of the plaintiff's intestate was witnessed by only two persons besides himself," and that "it is desired on the part of the plaintiff to produce two or more witnesses in support of the plaintiff's claim who reside in the city of New York, and one, and perhaps two, witnesses who live in Delaware county, New York." This affidavit is entirely insufficient, for it fails to state either the names of the witnesses whom plaintiff proposes to call, or to state the substance of the testimony to be given by them, or to show how it is material. *McPhail v. Ridout*, 83 Hun, 446, 31 N. Y. Supp. 934; *Lyman v. Gramercy Club*, 28 App. Div. 30, 50 N. Y. Supp. 1004; *Lyman v. Corey*, 28 App. Div. 623, 51 N. Y. Supp. 1144.

[3] Respondent contends, however, that defendant has waived her right to make this application. Issue was joined on November 18, 1912. On the same day plaintiff noticed the cause for trial for the December term to be held in Kings county, and on the same day, and as defendant now asserts, by inadvertence, a cross-notice of trial was served by her attorney. On November 21st, and before the making of the motion to change the place of trial, defendant served upon plaintiff's attorney a notice to the effect that she withdrew her cross-notice of trial for the December term, and plaintiff's attorney indorsed thereon the following words:

"Service of the within notice, withdrawing defendant's notice, is hereby admitted this 21st day of November, 1912."

Whether or no this may be a consent upon his part to the withdrawal of defendant's notice of trial, we think that, under the circumstances here disclosed, it cannot be said that defendant waived her right to move to change the place of trial for the convenience of witnesses. If she had accepted a benefit, such as an extension of time to plead, under an agreement, express or implied, that she would try the action in the county in which it was originally brought, or had obtained a postponement of the trial when regularly reached upon the call of the calendar, a different question would be presented (*Haiz v. Starin*, 1 N. Y. St. Rep. 553; *Coleman v. Hayes*, 92 App. Div. 575, 87 N. Y. Supp. 12; *Schaaf v. Denniston*, 121 App. Div. 504, 106 N. Y. Supp. 168); but in this case defendant received no benefit, nor has plaintiff's position in any way changed by an inadvertent service of a notice on defendant's part, which, before it had been acted upon, and with great promptness, was withdrawn. There is no suggestion that, in the in-

terval between the service of the notice on the 18th of November and defendant's withdrawal thereof on the 21st of November, plaintiff had taken any steps to prepare for the trial of the action in Kings county, or that in any other manner his position had been prejudiced.

We think that the order appealed from should be reversed, with \$10 costs and disbursements, and the motion granted, with \$10 costs. All concur.

FIRST COMMERCIAL BANK OF PONTIAC v. VALENTINE et al.

(Supreme Court, Appellate Division, First Department. February 7, 1913.)

1. REPLEVIN (§ 124*)—LIABILITY ON BOND—EXTENT.

Sureties on a replevin bond, conditioned in the language of Code Civ. Proc. § 1699, for the return of the chattels and for the payment to the defendant of any sum which the judgment awarded to him against the plaintiff, were not liable for the amount of a judgment for damages from the detention and costs, in favor of a third person subsequently made a party defendant and awarded possession of the chattels.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 487-497; Dec. Dig. § 124.*]

2. PRINCIPAL AND SURETY (§ 59*)—LIABILITY OF SURETY.

The liability of sureties is strictissimi juris, and should not be extended by construction.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.*]

3. PRINCIPAL AND SURETY (§ 66*)—EXTENT OF LIABILITY.

Code Civ. Proc. § 815, providing that a bond or undertaking given in an action or special proceeding continues in force after the substitution of a new party in place of an original party, or any other change of parties, and has thereafter the same force and effect as if then given anew in conformity to the change of parties, only preserves unimpaired the liability on the bond or undertaking in favor of the party for whose benefit it was given, and does not extend such liability to the new parties.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 108-110, 112; Dec. Dig. § 66.*]

McLaughlin and Scott, JJ., dissenting.

Appeal from Special Term, New York County.

Action by the First Commercial Bank of Pontiac against Moses M. Valentine and another. From an interlocutory judgment overruling a demurrer to the amended complaint, defendants appeal. Reversed, and demurrer sustained in part.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, SCOTT, and DOWLING, JJ.

Herbert C. Smyth, of New York City, for appellants.

Alfred A. Wheat, of New York City, for respondent.

DOWLING, J. The Welch Motor Car Company of New York, on July 10, 1908, brought an action in replevin against P. Brady & Son Company to recover possession of two automobiles, and in that action the defendants herein, Valentine and Bloch, made and delivered

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to the sheriff a written undertaking, pursuant to the statute, which recited that: Whereas L. H. Perlman, the president of the plaintiff in that action, had made an affidavit that the defendant therein wrongfully detains certain chattels to the value of \$7,200, and the plaintiff claims the delivery thereof; therefore, and in consideration of the taking of said chattels, or any part thereof, by the sheriff of the said county of New York, by virtue of the said affidavit and the requisitions thereon indorsed, the said Moses M. Valentine and Isidor Bloch—
“jointly and severally undertake and are bound to the defendant in the sum of fourteen thousand and four hundred dollars for the prosecution of the action, for the return of the chattels to the defendant, if possession thereof is adjudged to it, or if the action abates, or is discontinued before the chattels are returned to the defendant, and for the payment to the defendant of any sum which the judgment awards to him against the plaintiff.”

This undertaking is entitled in the action of “Welch Motor Car Company of New York, Plaintiff, against P. Brady & Son Co., Defendant.” The sheriff thereupon replevied the chattels from the possession of P. Brady & Son Company, and delivered them to the Welch Motor Car Company. Thereafter, on October 28, 1909, an order was made in said replevin action, directing that the First Commercial Bank of Pontiac, the plaintiff herein, be made a party defendant thereto, and that the summons and complaint be amended accordingly, pursuant to which the said bank appeared and answered the complaint; and judgment was entered on November 22, 1910, awarding the possession of the chattels in question to said bank, fixing their value at \$2,500, with damages in the sum of \$5,924.95 for their detention, and that if same were not returned to the bank by the Welch Motor Car Company the latter should pay the former the sum of \$8,424.95. An appeal was taken from that judgment, which was affirmed by this court March 22, 1912. 149 App. Div. 945, 134 N. Y. Supp. 1150.

The complaint herein sets forth three causes of action. The first is based upon a statement of the foregoing facts and further allegations of the return of a judgment unsatisfied, of the failure to return the chattels, or to pay any part of the judgment, and of an assignment by P. Brady & Son Company to this plaintiff of all its claim against the defendants on the undertaking. Judgment is asked against the defendants herein in the sum of \$8,424.95, being the amount of the said judgment.

The third cause of action, after reciting the same facts, asks for judgment against the defendants in the sum of \$93.87, being the costs awarded in favor of the bank upon the appeal hereinbefore referred to.

[1] The second cause of action sets forth the same facts, and asks judgment in the sum of \$107.76, being the costs awarded upon said appeal in favor of P. Brady & Son Company. Liability upon this cause of action is not contested by the defendants. The present appeal is taken from the interlocutory judgment overruling the demurrer to the first and third causes of action, and the question involved is whether the sureties upon the undertaking were liable only to the sole defendant before the court when their undertaking was given, namely, P. Brady & Son Company, or whether they are liable as well to the de-

fendant subsequently brought in, namely, the First Commercial Bank of Pontiac. It will be noticed that the undertaking which is given is one the form of which is fixed by statute. Section 1699, Code Civ. Proc. It is given in an action the parties to which are specifically named, and refers to an affidavit in which the defendant then named is specifically charged to have wrongfully detained the chattels in question. By its terms the sureties bind themselves "to the defendant"; that is, to the only defendant then known to the court or to them, and to the only person who was charged with having committed the wrongful act. In effect, they bound themselves to make good to the defendant then named any damage which he might sustain by reason of the plaintiff's unwarranted assertion of a claim against him. It is obvious that sureties might well hesitate before giving an undertaking which would insure the world at large against loss sustained by reason of an unwarranted assertion of a claim on plaintiff's part. The sole conflicting claims as between which they undertook to assume liability were those between the plaintiff and defendant then present and litigating.

[2] The liability of sureties is *strictissimi juris*, and should not be extended by construction. *McCluskey v. Cromwell*, 11 N. Y. 593; *Barns v. Barrow*, 61 N. Y. 39, 19 Am. Rep. 247. To hold that the plain language of this undertaking should be construed to mean that the sureties are bound "to any person" or "any defendant" would be, we think, to unreasonably extend the fair import of the undertaking. While the question as to the construction to be given to such an undertaking has never been directly passed upon by the court, it would seem that the construction now given to this undertaking is the one which has been heretofore generally accepted as the correct one. In *Hochman v. Hauptman*, 76 App. Div. 72, 78 N. Y. Supp. 659, an order directing the issuance of a supplementary summons against Abraham Barasch as a party defendant in the place of John Doe, in an action in replevin, was unanimously reversed by this court, and in the opinion of Mr. Justice Laughlin in that case it was said:

"If the appellant had been joined originally, he would have been protected by the undertaking, and he could have excepted to the sureties, or have reclaimed the property. Sections 703, 704, Code Civ. Proc. It is not clear that the appellant's rights could be fully protected if he were not brought in as a party defendant."

In *Goldstein v. Shapiro*, 85 App. Div. 83, 82 N. Y. Supp. 1038, a motion was made by the plaintiff, in an action in replevin, to bring in by supplementary summons a stranger, who had filed a third party claim with the sheriff. The order granting the relief was reversed by the Appellate Division, Second Department, and in his opinion Mr. Justice Jenks said:

"Nor is it an answer that the plaintiff could have made him a party originally, because if this had been done the third party would have had the protection of the undertaking, which he now has not; and he could have excepted to the sureties or reclaimed the property, which he now cannot do. These considerations moved the court in *Hochman v. Hauptman*, 76 App. Div. 72 [78 N. Y. Supp. 659]."

The case of *Christal v. Kelly*, 88 N. Y. 285, is not in conflict with these authorities; for there the defendants for whom the undertaking had originally been given were members of a firm, the third member of which was subsequently brought in as a party defendant. When the sureties sought to avoid liability upon the undertaking, they did so, among other grounds, on the claim that, as they had given an undertaking to pay the judgment against the two defendants originally named, they were not liable for a joint judgment against those persons and others. But that was the case of an undertaking given to secure the discharge of a warrant of attachment; and, as the court well pointed out, it was intended for the benefit of defendants whose property had been, or might be, attached under process, to enable them to substitute for the property which had been or might be attached security for the payment of any judgment which might be recovered in the action, and thereby relieve their property from the actual or apprehended lien of the process. The court further said:

"It is also clear that, except for the undertaking, the attached property would have been available to satisfy the judgment obtained against these defendants. If the plaintiffs could have proceeded against the property, in case the undertaking had not been given, it seems to follow that they can proceed against the sureties, who have substituted their obligation in place of it."

The vital difference, it will be seen, between the case just cited and the case at bar is: First, in the *Christal* Case the undertaking was given to retain in the possession of specified defendants property which they then had, and which could otherwise have been held by the plaintiff to satisfy his claim; and, second, that the defendants who were indemnified by the undertaking were defendants then actually present in court and named in the undertaking. We have been referred to no case where sureties have been held liable as to third parties, who were in no way referred to or included in the language of the undertaking itself.

[3] Nor does section 815 extend the liability of the sureties under the undertaking. That section reads as follows:

"A bond or undertaking, given in an action or special proceeding, as prescribed in this act, continues in force, after the substitution of a new party in place of an original party, or any other change of parties; and has thereafter the same force and effect, as if then given anew, in conformity to the change of parties."

The sole effect of this section is to preserve unimpaired the liability upon a bond or undertaking in favor of the party for whose benefit it was given, regardless of any subsequent changes in the parties to the action. It is not disputed that the liability of the sureties upon the undertaking in question still existed in favor of P. Brady & Son Company despite the bringing in of the bank as an additional party defendant; and that, it seems to me, is the sole effect of this section upon the situation in this case. It follows, therefore, that the sureties upon the undertaking herein were liable only to the original defendant in the action, namely, P. Brady & Son Company; and that the bringing in of the bank as an additional party defendant did not extend the protection of the undertaking to them.

The complaint, therefore, fails to state a cause of action in favor of the plaintiff herein, save in so far as it sets up a claim in favor of P. Brady & Son Company for the costs awarded to it upon the appeal; and the interlocutory judgment appealed from should be reversed, and the demurrer sustained as to the first and third causes of action.

INGRAHAM, P. J., and LAUGHLIN, J., concur.

McLAUGHLIN, J. I dissent on the ground that the undertaking, when given, took the place of the property. Its purpose was to insure a return of the property, in case a judgment were procured directing its return, and insured to the benefit of any party to the action entitled to the possession of the property at the time the judgment was rendered. Section 815, Code Civil Proc.; *Christal v. Kelly*, 88 N. Y. 285; *Potter v. Van Vranken*, 36 N. Y. 619; *Becovitz v. Saperstein*, 46 Ind. App. 339, 92 N. E. 551. The statute permits, under certain circumstances, the substitution of parties, and this fact must have been known to the sureties at the time the undertaking was given; and I think we should hold that it was given subject to such contingency. *Helt v. Whittier*, 31 Ohio St. 475; *Howell v. Alma*, 36 Neb. 80, 54 N. W. 126, 38 Am. St. Rep. 694.

I think the judgment should be affirmed, and the defendants permitted to withdraw their demurrer and interpose an answer, on payment of the costs in this court and the court below.

SCOTT, J., concurs.

ROTHMANN V. INTERBOROUGH RAPID TRANSIT CO. et al.

(Supreme Court, Appellate Division, First Department. February 7, 1913.)

LIMITATION OF ACTIONS (§ 55*)—INJURIES TO PROPERTY—CAUSE OF ACTION—“OPERATION.”

Where an elevated railroad was completed January 15, 1880, though not opened to the public until March 1, 1880, it was in “operation” from the former date, so that an action first brought by the defendant or his predecessors on February 28, 1900, to restrain its operation and maintenance, was barred by the statutory period of 20 years.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 200–306; Dec. Dig. § 55.*

For other definitions, see Words and Phrases, vol. 6, pp. 4992, 4993.]

Laughlin, J., dissenting.

Appeal from Special Term, New York County.

Action by Thomas Rothmann against the Interborough Rapid Transit Company and others. From a judgment entered upon a decision after trial at Special Term (66 Misc. Rep. 378, 121 N. Y. Supp. 200), defendants appeal. Reversed, and complaint dismissed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and DOWLING, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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J. Osgood Nichols, of New York City, for appellants.
Arthur Furber, of New York City, for respondent.

McLAUGHLIN, J. Plaintiff is the owner of certain real estate abutting on Second avenue in the city of New York. Defendants have constructed, are maintaining, and operating an elevated railroad in that street, and this action was brought for an injunction and damages. The trial court awarded plaintiff a judgment for rental damages, and an injunction against the maintenance of the railroad, unless defendants paid the plaintiff the damages to the fee, which were fixed at \$3,300. The defendants appeal from the judgment, and substantially the only question presented is whether, from the undisputed facts, defendants have acquired the right by prescription to maintain and operate the railroad. The defendants, or one of them, commenced to construct an elevated railway in Second avenue in May, 1879, and it was completed by January 15, 1880, on which day the first train was run over the line, including the portion in front of plaintiff's property; but the road was not, in fact, opened to the public until March 1, 1880. On February 28, 1900, one Sophie Sterns, who then owned the premises now owned by the plaintiff, commenced an action to enjoin two of the defendants, the Manhattan Railway Company and the Metropolitan Elevated Railway Company, the then owners of the elevated railway structure, from maintaining the same or operating trains thereon. That action is still pending. The present action was not commenced until October 17, 1908.

It may be, as contended by respondent, that the defendants have not acquired the right by prescription, unless they had acquired it at the time of the commencement of the action by Sophie Sterns, February 28, 1900. *Eaton v. Swansea Waterworks Co.*, 17 Q. B. 267; *Workman v. Curran*, 89 Pa. 226; *Postlethwaite v. Payne*, 8 Ind. 104. Had they acquired such right at that time? It seems to me there can be but one answer to the question. The structure was completed as an elevated railroad January 15, 1880, and the statutory period commenced to run, as it seems to me, from that time, if not before. A similar question was considered in *Hindley v. Manhattan Ry. Co.*, 185 N. Y. 335, 78 N. E. 276, and the court, referring to its decision in *Lewis v. N. Y. & H. R. R. Co.*, 162 N. Y. 202, 56 N. E. 540, said:

"After deciding that the company had acquired no right by adverse possession as against the city, we held that it had acquired certain rights by prescription as against the abutting owners. There was no claim of title to the street easements, except by the act of constructing an elevated railroad in the public street. That act alone constituted the entry, and the maintenance of the viaduct, with the operation of trains thereon, constituted the possession, which we held in 20 years ripened into a prescriptive right."

When the Sterns action was commenced the road had been in complete operation for over 20 years, and this gave the defendants the right as against her, or her successors in interest, to thereafter maintain and operate it. Respondent urges, and this seems to have been the theory upon which the trial court proceeded, that the statutory period did not commence until March 1, 1880, when the road was opened to the public. This question was also considered, as I read

the opinion, and decided adversely to the respondent's contention in *Bremer v. Manhattan Ry. Co.*, 191 N. Y. 333, 84 N. E. 59. In that case it was made to appear that after the structure had been completed the defendants had increased the length of their trains and changed the method of operating them from steam to electricity, for which purpose it had increased the structure by putting down a third rail. It was held that such changes did not affect the defendants' right to maintain and use the original structure, the court saying:

"In the case before us the right asserted and exercised by the defendants was the construction and operation of an elevated railroad track as an entity. The operation and length of the trains were mere details of the right, not substantial elements or limitations of it. The increase in the size of, or injurious changes in, the structure, would be an increase of user, for which the plaintiffs might seek compensation. In this case they seem trivial; but, if the plaintiffs have suffered damage, they may recover for such damage, but not for the main structure. Thus we find no evidence in the case to defeat the right acquired by the defendants through prescription to maintain and operate their railroad."

See, also, *Scallon v. Manhattan Ry. Co.*, 185 N. Y. 360, 78 N. E. 284, 7 Ann. Cas. 168.

Here, as we have seen, the defendants commenced to erect the road in 1879, and the structure was entirely completed January 15, 1880. They then, at least, asserted their right to use the street in front of plaintiff's premises for the erection of an elevated railroad and to maintain it and operate trains thereon. This they did by entering the street, constructing the railroad, and by the operation of a train. The frequency with which trains might thereafter be operated, the length of the trains, or the purpose for which they were run, were, as pointed out in the *Bremer Case*, mere details of the right asserted by defendants, and not limitations of it.

Attention is called to certain authorities as holding that the prescriptive period did not commence to run until the road was thrown open to the public. But an examination of them shows that it made no possible difference whether that date or the time when the road was completed were chosen, and the court did not have under consideration or determine, in any of them, whether the statutory period commenced to run with the completion of the railroad or the operation thereon of trains for the public.

If the foregoing views be correct, then it follows the judgment appealed from must be reversed, and the complaint dismissed, with costs in the action and in this court to the defendant.

INGRAHAM, P. J., and CLARKE and DOWLING, JJ., concur.

LAUGHLIN, J. (dissenting). I dissent, upon the ground that the *substantial damages* in this class of cases are caused by the *operation* of the railroad, and therefore the statute of limitations as to operation does not commence to run until the commencement of public operation at regular intervals, as distinguished from slight occasional operation for the purpose of experimenting and testing.

PEOPLE ex rel. LYNCH v. WALDO, Police Com'r.

(Supreme Court, Appellate Division, First Department. February 7, 1913.)

MUNICIPAL CORPORATIONS (§ 185*)—POLICE FORCE—REMOVAL OF OFFICER—EVIDENCE TO SUSTAIN CHARGES.

Evidence, on proceeding for removal of a member of the uniformed force of the police department of New York City, *held* sufficient to sustain findings that, in his capacity of examining engineer, boiler squad, he, on examination of a person for an engineer's license, asked questions by prearrangement, enabling the candidate to pass, and that he made false statements to his superior officer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 492-509; Dec. Dig. § 185.*]

Scott and Dowling, JJ., dissenting.

Certiorari, on the relation of John Lynch, against Rhinelander Waldo, as Police Commissioner of the City of New York, to review the action of respondent in removing relator as a member of the uniformed force of the police department of the City of New York. Writ dismissed, and proceedings affirmed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Florence J. Sullivan, of New York City, for relator.

Harry Crone, of New York City, for respondent.

INGRAHAM, P. J. There are two charges against the relator: The first, that in the examination of a certain William H. Black, to determine his qualifications to hold a third-class engineer's license, the relator, in his capacity of examining engineer, boiler squad, asked said Black certain questions by prearrangement, which action on the part of the relator tended to defeat the just purposes of the examination, either wholly or in part; second, that the relator made false statements to the deputy police commissioner, when asked by the commissioner whether he had spoken to Patrolman Graham on the morning of November 25, 1911, and he answered that question in the negative, which answer was false.

To prove the first charge, Black, the applicant for the license, testified that he presented his first application for an engineering license to the relator on October 18, 1911. He was examined on that day, and was rejected, and was told to go back and get posted by some engineer and return in three months. Instead of waiting three months, he returned on November 1st, and presented the same application to the relator, and the relator asked him questions in relation to the boilers in the plant at police headquarters, and, when Black replied that he had not studied them, the relator told him that he could not do anything for him, and directed him to go down and see what kind of boilers they were, how they were fixed, and to come back and give a detailed description of them. Black applied for permission to examine the boilers at police headquarters, but was refused permission by the superintendent of the building. Black again returned on Novem-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ber 25, 1911, and was given another examination by the relator, when he was asked certain specified questions, answered them all correctly, and received a percentage of 100 per cent. and was granted his license. It appeared that on the morning that Black was examined he went to see Officer Graham, who seemed to be on intimate terms with the relator. Graham had been a member of the boiler squad, but had been relieved from that duty at the time of this examination. Black testified that he was aware, before he came before the relator on that morning, of what questions he would be asked, and that he had received this information from Officer Graham prior to his examination; and the relator asked him the exact questions that Graham had told him would be asked him, and he answered the questions as he had been instructed by Graham to answer them. It also appeared that Black had called on Graham at his residence at half past 7 o'clock in the morning of the day that he was examined; that he and Graham left together for police headquarters, but they separated at the corner of Grand and Center streets; that Black then proceeded to the examiner's room at police headquarters, and there found Graham and the relator and two other persons in attendance; and that the examination was conducted by the relator, and was oral. The relator, on the stand, absolutely denied having received any information from Graham in relation to Black's examination, and denied having any conversation with Graham on the morning of the examination, although it was subsequently proved that he greeted him when he entered the room.

The first question presented is whether this testimony sustains the finding that the relator was guilty of the first charge—that in his capacity of examining engineer of boiler squad he asked certain questions by prearrangement. Graham, who had been at one time a member of this boiler squad, had been relieved from that duty and remanded to patrol duty. He had no official business at police headquarters on the morning of this examination. Graham left his home for police headquarters with Black, but arrived at police headquarters before him, and was in the same room with the relator before Black presented himself for examination. There was ample opportunity, therefore, for Graham to inform the relator what questions Black could answer, so as to pass his examination and obtain his certificate. Just what questions the examiner would ask could have been known to no one except the examiner, as the relator testified that he varied the questions from time to time. Twice before Black had attempted to pass his examination, but before he knew what questions he was to be asked and how to answer them he failed in his examination. The third time, however, after his interview with Graham, he knew what questions were to be asked, and had been instructed how to answer them, and he passed the examination. There is a coincidence here that is a little difficult to explain upon the hypothesis of innocence. In these examinations, conducted as this record shows they are, there is ample opportunity for bribery or corruption that is most difficult to detect. No person could be placed in charge of an engine or boiler in the city of New York without having received from the police de-

partment a license, and thus all persons engaged in this occupation are subject to the members of this boiler squad. The efforts made by the head of the department to get rid of officers who have been guilty of such misconduct should not be so hampered as to prevent the dismissal of the policeman, except upon proof of guilt which would justify an indictment.

I think no one reading this record could doubt that the attitude of the relator as an examiner towards Black had entirely changed between the first and second examination, and the third, in which he was successful. Did that change occur because of an increase of knowledge, or evidence of greater efficiency by Black in the discharge of his duty? There is no evidence to justify such an assumption. Certainly, so far as appears, Black had no greater knowledge of working an engine, or the performance of the duties of an engineer, when he appeared for the third examination, than when he appeared at the other two, except the instructions that he had received from Graham on the morning of the third examination, and then Graham had told him just what questions would be asked and just how to answer them. When he got to police headquarters, he was by the relator asked just the questions Graham told him would be asked. The answers were as Graham told him they would be, and he passed the examination. Of course, both the relator and Graham denied that this remarkable change of attitude of the relator had any connection with Black's visit to Graham's house on the morning of the examination, or that anything that happened as between Graham and Black produced this change of attitude; but the respondent, who knew the men and the methods that were adopted, was satisfied that this evidence was sufficient to show that there had been some secret understanding between Black and Graham and the relator, and that the examination, conducted as it was, was the result of such an understanding, and I cannot say that that collusion is without evidence to sustain it.

In regard to the other charge, of making a false statement to the first deputy police commissioner, while that of itself might not be sufficient to justify the dismissal of the relator from the force, it was characteristic of the relator's attitude towards his superior officer and his relation to Graham. There was evidently some suspicion on the part of the police authorities that these examinations were influenced by improper considerations. After this examination was completed, the relator was called in before the first deputy commissioner and was asked a number of questions, among others, whether he (relator) had spoken to Officer Graham on the morning of November 25, 1911, to which the relator replied in the negative. The testimony was substantially uncontradicted that, when Graham came into the room, he saluted the relator by some such conversation as "Hello, Jack," and he talked to Lieutenant Breen, also a member of the squad, about five minutes, and Graham also had some conversation with other members of the boiler squad who were present before Black's examination. It was also proved that Officer Graham, when examined by the first deputy commissioner, admitted that he had a conversation with the relator, both with him and Lieutenant Breen.

This certainly was not a frank answer to the commissioner, when he was asked whether he spoke to Officer Graham on the morning of the examination. The deputy police commissioner testified that the relator said that he did not speak to Graham, that he saw Graham standing in a room, that he did not hear Graham speak to Fitzpatrick, and did not hear Fitzpatrick say anything to the relator; but on the testimony at this hearing he admitted that he heard Graham talking to Fitzpatrick.

Taking all the testimony—and I have examined it all with care—I think there was a basis for the commissioner finding that this examination of Black by the relator was the result of some arrangement between the relator and Graham, and that Black was allowed to pass this examination, where he had failed before, because of some such arrangement, communicated in some way by Graham to the relator.

I think, therefore, that the judgment of the commissioner was sustained by the evidence, and that the writ should be dismissed.

McLAUGHLIN and CLARKE, JJ., concur. SCOTT and DOWLING, JJ., dissent.

NORTON v. WILSON.

(Supreme Court, Appellate Division, First Department. February 7, 1913.)

APPEAL AND ERROR (§ 1060*)—HARMLESS ERROR—ARGUMENT.

In an action for malicious prosecution and false arrest, in which the original complaint alleged that plaintiff was charged with larceny and arrested therefor, the complaint was amended at the close of plaintiff's case to allege that the charge was a violation of the hotel law in taking property from the hotel, upon which the landlord had a lien, but plaintiff's counsel, in his opening argument, emphasized at great length that plaintiff had been charged with larceny, saying, "Which means, in plain, common Anglo-Saxon, you are a thief," and made that idea dominant in his argument. *Held*, that the argument of counsel must have been prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060.*]

Appeal from Trial Term, New York County.

Action by Mabel Norton against Willard Wilson. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Reversed, and new trial ordered.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and DOWLING, JJ.

Beno B. Cattell, of New York City (Arthur C. Palmer, of New York City, of counsel), for appellant.

Frank F. Davis, of New York City, for respondent.

CLARKE, J. The complaint alleged two causes of action, one for false arrest, which was dismissed upon the trial, and the other for malicious prosecution. It sets up that the plaintiff was by profession an actress; that on the 19th of October, 1909, the defendant mali-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ciously, and with the intent to injure the plaintiff in her good reputation, appeared before a police magistrate and without any probable cause whatsoever charged the plaintiff, before said magistrate, with having committed the crime of grand larceny, and with having stolen certain personal property of the value of \$500, and maliciously and without probable cause procured said magistrate to grant a warrant for the arrest of plaintiff upon said charge; that she was arrested at her home in the evening, taken to a police station house, and there imprisoned until the morning of October 20th, thereafter taken to the magistrate's court, and having been examined before said magistrate for the supposed crime, and the said magistrate, having examined the defendant herein and his witnesses, adjudged the plaintiff not guilty, and fully discharged and acquitted her of the same; that the said charge of grand larceny and the arrest of plaintiff thereunder were extensively published in several public newspapers, as the plaintiff believes, through the procurement of the defendant; that by means of the premises the plaintiff was injured in her person and prevented from attending to her profession, business, and household duties, and was compelled to pay the sum of \$250 costs and counsel fees in defending herself, and in consequence of her arrest and detention she has been unable to procure a professional engagement such as she has heretofore had by reason of her standing in the profession; and that many persons, hearing of her arrest, and supposing the plaintiff to be a criminal, have refused to employ her, to her damage in the sum of \$25,000.

The plaintiff was the wife of Edgar Norton, an actor, and with him and their son had occupied an apartment of three rooms and bath in the Hotel Remington, of which the defendant was the proprietor, for some three years and a half. At the time of the occurrences complained of, they were in debt for their board and accommodations. The defendant testified:

"As far as I can remember, the account had been an open one for about a year and a half before the Nortons went away. I had several conversations about the account with the plaintiff. I asked Mrs. Norton whether she could get the money on different times. She assured me that if Mr. Norton could not pay the bill she would pay me, even if she had to dispose of some of her property or mortgage some of her property. She would never see us defrauded. She said she had property. On the strength of that we continued giving her accommodations, and the family. * * * The latter part of September I asked Mrs. Norton again if she would get me the amount of the bill, which was getting up to be \$554, and she told me that Norton could pay this bill if he wanted to; that he was earning \$125 a week, and wanted me to send right away and demand it, and suggested that I send a telegram, which I did, as you can see."

This telegram was sent to Edgar Norton at Chicago:

"You must pay me \$50 every week or pay in full and vacate."

No answer was received, and no amount has ever been paid on said account. He further testified:

"I asked her to pay the bill, to pay what she owed, to pay what she could on the bill. She said she would pay me if Mr. Norton did not, and she herself would be responsible."

The defendant had previously had a litigation in attempting to enforce the innkeeper's lien, in which he had been successful on appeal. *Lurch v. Wilson*, 62 Misc. Rep. 259, 114 N. Y. Supp 789. The fact of this litigation and the claim of the defendant that, as an innkeeper, he had a lien upon property in the possession of the guests of his hotel were called to the attention of the plaintiff, and she had had conversations in regard thereto. She had gone to her attorney and consulted with him in regard to her rights, and had been advised that she could take out of the hotel her own personal property. The defendant had been away for some weeks in the summer and early fall of 1909, and when he returned he was informed by various members of his family and his clerks that the plaintiff had been engaged in stripping her apartment of everything except the furniture. On October 6th the plaintiff was stopped as she was carrying out of the hotel a large bundle, and on the 7th she and her son left, leaving the bill entirely unpaid. Subsequently another guest reported to the defendant that Mrs. Norton had left with her a large bundle containing things from the apartment.

The defendant consulted his attorney, laying the facts before him, who told him that it was a misdemeanor, but advised him to go before a magistrate and lay the matters before him. The misdemeanor referred to is that provided for by section 925 of the Penal Law (Consol. Laws 1909, c. 40), entitled "Frauds on hotel keepers":

"A person who obtains any lodging, food or accommodation at a hotel, inn, boarding house or lodging house, except an emigrant lodging house, without paying therefor, with intent to defraud the proprietor thereof or his agent or servant, or who obtains credit at such hotel, inn, boarding house or lodging house by the use of any false pretense, or who, after obtaining credit or accommodation at such hotel, inn, boarding house or lodging house, causes to be removed from such hotel, inn, boarding house or lodging house his baggage without the permission or consent of the proprietor, manager or authorized employé thereof before paying for his lodging, food or accommodation, and with the intention of not paying therefor, is guilty of a misdemeanor."

The defendant went before a city magistrate, laid the facts before him, who looked up the provision of law himself, and sent to his clerk and asked him to look it up, and both said that there was a cause for a warrant. An affidavit was drawn up, which the defendant signed, and the warrant was issued, upon which the plaintiff was arrested. She was arraigned before another magistrate, and after the witnesses had been heard, and the plaintiff had said that she had taken the advice of an attorney, the magistrate adjourned the further hearing until the afternoon and sent for that attorney, and upon his testifying that he had given the plaintiff the advice that she could take her own personal belongings from the hotel the magistrate discharged her.

After these papers had been admitted in evidence, and at the close of the plaintiff's case, the plaintiff was permitted, over objection and exception, to amend the complaint, stating that the offense with which the plaintiff was charged, instead of being larceny, was a violation of the hotel law. Plaintiff's counsel, however, in his opening, had expatiated at great length upon the fact that the plaintiff had been charged with the crime of larceny, saying, "Which means, in plain, common

Anglo-Saxon, you are a thief," had woven it into much of his examination, and had permeated the case with it, as is evidenced by frequent questions and statements by jurors. There can be no doubt as to the prejudice thereby created.

Plaintiff was permitted to give evidence herself and to call witnesses to establish a number of physical ills as a result of this arrest and detention overnight, which evidence was inadmissible under the pleadings, and the troubles testified to were not the proximate result of the defendant's act. These matters evidently affected the jury and account for the verdict. There were other errors, which may not occur upon a new trial.

The judgment and order appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event. All concur.

BARNARD REALTY CO. v. BONWIT.

(Supreme Court, Appellate Division, First Department. February 7, 1913.)

1. APPEAL AND ERROR (§ 867*)—SETTING ASIDE VERDICT—GROUNDS—EFFECT.

Where a verdict was set aside by the Municipal Court solely as contrary to law, and its order was affirmed by the Appellate Term, the facts found are taken as established.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3486; Dec. Dig. § 867.*]

2. LANDLORD AND TENANT (§ 172*)—CONSTRUCTIVE EVICTION—RATS.

Nightly noises made by rats in the walls and ceilings of a tenement, coupled with an offensive odor, which increased until the premises became untenable, amounted to a constructive eviction, since the tenant could not make the place habitable by pulling down the walls and ceilings to eliminate the rodents.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 695-703; Dec. Dig. § 172.*]

Appeal from Appellate Term, First Department.

Action by the Barnard Realty Company against Carl Bonwit. From a judgment of the Appellate Term (76 Misc. Rep. 464, 135 N. Y. Supp. 700), affirming an order of the Municipal Court, setting aside a verdict for defendant, defendant appeals. Reversed, and verdict reinstated.

See, also, 152 App. Div. 948, 137 N. Y. Supp. 1110.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and DOWLING, JJ.

Paskus, Cohen & Gordon, of New York City (Arthur B. Hyman, of New York City, of counsel), for appellant.

John C. Van Loon, of New York City (Frank Walling, of New York City, of counsel), for respondent.

CLARKE, J. [1] This is an action to recover rent of an apartment. The defense was constructive eviction. The jury found for the defendant. The verdict having been set aside solely as contrary to law, the facts found are established.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[2] Defendant and his wife moved into an apartment on the top floor of a new apartment house on the 15th of September, 1910, and moved out on the 8th of November, 1910. The reason therefor was the disturbance caused by the nightly meetings and performances of rats in the walls and ceilings, coupled with a most offensive odor, which increased until the place became untenable. There are two Appellate Term decisions—one, *Jacobs v. Morand*, 59 Misc. Rep. 200, 110 N. Y. Supp. 208, in which the presence of bed bugs, croton bugs, red ants, etc., was held not to be sufficient to establish a constructive eviction; and the other, *Madden v. Bullock* (Sup.) 115 N. Y. Supp. 723, which held that the loathsome stench of dead and decayed rats was sufficient.

Very large numbers of people live in tenement houses, apartment houses, and apartment hotels in this city. Such tenants have, and can have, control only of the inside of their own limited demised premises. Conditions unknown to the ancient common law are thus created. This requires elasticity in the application of the principles thereof. An intolerable condition, which the tenant neither causes nor can remedy, seems to me warrants the application of the doctrine of constructive eviction. The rule in *Jacobs v. Morand*, *supra*, in regard to bugs and ants within the apartment, which can be dealt with by the tenant by processes known to all housewives, should not be extended to cover offensive and unbearable nuisances outside of the apartment. This tenant could not pull down the walls or the ceilings. He and his family ought not to be compelled to pay rent for an apartment in which they could not live.

This court has held that, when the landlord had the entire control of the heating plant, a failure to provide sufficient steam heat was enough to constitute constructive eviction. *Berlinger v. Macdonald*, 149 App. Div. 5, 133 N. Y. Supp. 522. Of course, that case is different from the one at bar, because there it was within the power of the landlord to furnish the heat, and, if he did not, it was an act of omission upon his part. But here the jury have found the existence of an intolerable condition. The tenant did not cause it, and could not remedy it. If any one could it was the landlord. He attempted to and failed. We think the flat dweller was justified in his abandonment of the premises.

The determination of the Appellate Term and the order of the Municipal Court should be reversed, and the verdict of the jury reinstated, with costs to the appellant in all courts. All concur.

CROMWELL et al. v. NICHOLS et al.

(Supreme Court, Appellate Division, Second Department. February 14, 1913.)

1. TAXATION (§ 788*)—TAX TITLES—LEASE—PRESUMPTION.

On the production of a tax lease, it is presumed that the tax was legally imposed, and the proceedings and sale regular.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1555, 1557, 1559–1569; Dec. Dig. § 788.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. APPEAL AND ERROR (§ 1170*)—DISPOSITION ON APPEAL—TECHNICAL ERRORS DISREGARDED.

In view of the express provision of Code Civ. Proc. § 1317, as amended by Laws 1912, c. 380, inconsistency in the conclusions of law adopted by the trial court, not affecting any substantial rights of the parties, does not require a disturbance of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540–4545; Dec. Dig. § 1170.*]

Appeal from Special Term, Queens County.

Action by Hester A. Cromwell and others against Robert C. Nichols and others. From part of an interlocutory judgment of the Special Term, plaintiffs and certain defendants appeal. Judgment, so far as appealed from, affirmed.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, THOMAS, and CARR, JJ.

H. R. Noyes, of New York City, for appellants Cromwell et al.

Clarence R. Freeman, of New York City, for appellants Nichols et al.

James W. Treadwell, of New York City (Joseph F. Keany, of New York City, on the brief), for respondent.

PER CURIAM. [1] The question as to the presumption arising from the tax lease involved in this action was necessarily involved in the decision made in *Lott v. De Graw*, 30 Hun, 417. An examination of the printed record on appeal in that case shows that this precise question was sharply and elaborately presented to the court by the briefs of the respective counsel. We do not feel at liberty, under the circumstances, to consider that question now open in this court, in view of the fact that it has stood unquestioned for a generation or more, and may be considered to have become the rule as to the statutes in question, all of which have been long since repealed. As to the conflict of presumptions arising from the proofs offered by the plaintiff, we are of opinion that a question of fact was presented for the determination of the trial court, and that its decision thereon is supported by the evidence and should not be disturbed on appeal.

[2] Whatever inconsistency may appear in the conclusions of law adopted by the trial court does not require any disturbance of the judgment on this appeal, in view of the power conferred upon this court by section 1317 of the Code of Civil Procedure, as amended in 1912 (Laws 1912, c. 380).

The interlocutory judgment, in so far as appealed from, is affirmed with costs.

MENDELSON v. NEWBORG et al.

(Supreme Court, Appellate Division, First Department. February 7, 1913.)

DISCOVERY (§ 37*)—EXAMINATION OF PARTIES BEFORE TRIAL.

An order may issue for an examination of defendants before trial, where the plaintiff's uncontroverted affidavit shows that he has a cause of action, and indicates that he is without sufficient information to in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

telligently frame a complaint in respect to matters other and additional to the question of the amount which he is entitled to recover.

[Ed. Note.—For other cases, see *Discovery*, Cent. Dig. § 50; Dec. Dig. § 37.*]

Appeal from Special Term, New York County.

Action by Justin Mendelson against Moses Newborg and others. From an order vacating an order for the examination of two of the defendants before trial, plaintiff appeals. Reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Jacob A. Cantor, of New York City, for appellant.

Gabriel I. Lewis, of New York City, for respondents.

SCOTT, J. The plaintiff seeks to examine two of the defendants before trial, in order to enable him to frame his complaint. The allegations in the plaintiff's affidavit, which are not controverted, serve to show that he has a cause of action; but they also indicate that he is without sufficient information to intelligently frame a complaint. Ordinarily such an examination will not be allowed merely in order to enable the plaintiff to state the amount which he claims to be entitled to recover; but in the present case his lack of information does not appear to be limited to that item of his complaint.

Each application like the present must be determined upon its own facts, and with a view to facilitating, rather than retarding, the prompt and accurate formulation of the issues to be tried. The present action is not unlike the case considered by this court in *Matter of Sands*, 98 App. Div. 148, 90 N. Y. Supp. 749, wherein an order was sustained for an examination for the purpose of framing a complaint. Upon the authority of that case, we think that the order for examination should have been allowed to stand.

The order appealed from must therefore be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs. All concur.

IN RE OPPENHEIM.

(Supreme Court, Appellate Division, First Department. February 7, 1913.)

ATTORNEY AND CLIENT (§ 61*)—DISBARMENT—REINSTATEMENT.

Where the referee, on petition by an attorney for a rehearing of the application to disbar him and for his reinstatement, found that the attorney was not guilty of the charges on which he was disbarred, and the representative of the Bar Association appearing before the referee approved his report, the court will reinstate the attorney.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 84; Dec. Dig. § 61.*]

In the matter of the application of Benjamin Oppenheim, an Attorney, for a rehearing of the application to disbar him, and for his reinstatement. Reinstatement ordered.

See, also, 146 App. Div. 775, 131 N. Y. Supp. 423.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

INGRAHAM, P. J. This proceeding came before the court on the petition of the respondent for a rehearing of the application to disbar him and for his reinstatement. The opinion of this court in the original disbarment proceeding (58 App. Div. 510, 69 N. Y. Supp. 524) contains a full statement of the facts. The matter was referred to the official referee, who has reported in favor of the application, and that the respondent should be reinstated.

The facts that have developed since the original application was heard are fully set forth in the report of the referee, and it is quite evident that the witnesses before the referee in the original proceeding are thoroughly discredited, and that a finding based upon their evidence should not be allowed to stand; and as the referee is now satisfied that, as an original proposition, the respondent was not guilty of the charges upon which he was disbarred, and as the representative of the Bar Association, who appeared before the referee, has approved the report of the referee, I think that we should, on his report, reinstate the respondent as an attorney and counselor at law.

It is so ordered. All concur.

EWEN v. HOEFER, et al.

(Supreme Court, Appellate Division, First Department. February 7, 1913.)

Appeal from Special Term, New York County.

Action by John Ewen, as trustee in bankruptcy of Herman W. Hoefer, against Elizabeth M. F. Hoefer, otherwise known as Elizabeth M. Ochs, individually and as executrix of Maria Hackman, deceased, and another. From an order setting aside an order for the examination of a defendant before trial, plaintiff appeals. Reversed, and order for examination reinstated.

See, also, 139 N. Y. Supp. 1055.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Bennet & Cooley, of New York City (Elmer E. Cooley, of New York City, of counsel), for appellant.

Abraham M. Pariser, of New York City, for respondents.

PER CURIAM. The action is brought by the trustee in bankruptcy of Herman W. Hoefer to set aside certain conveyances, for an accounting of the rents, and for possession of the premises conveyed, on the ground that the said conveyances were made for the purpose of hindering, delaying, and defrauding creditors, pursuant to a secret agreement and conspiracy that the property should be held for and reconveyed to the bankrupt upon his request.

The complaint alleges that at the time said Hoefer made the transfer he was solvent, and that the effect of the said transfer was to make him insolvent and unable to pay his debts, and that the parties to the

said secret agreement, conspiracy, and fraudulent transfer were the defendants, Hoefer, Hackman and Ochs. Sufficient facts were presented by the moving papers to justify the order for the examination before trial.

The order appealed from should be reversed, with \$10 costs and disbursements to the appellant, and the order for the examination reinstated, with \$10 costs.

EWEN v. HOEFER et al.

(Supreme Court, Appellate Division, First Department. February 7, 1913.)

APPEAL AND ERROR (§ 1180*)—EXAMINATION OF DEFENDANT—STAY OF TRIAL.

Where an order denying a motion to examine defendant before trial is reversed, an order denying a stay of proceedings until the examination is taken will also be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4626-4631, 4658, 4659; Dec. Dig. § 1180.*]

Appeal from Special Term, New York County.

Action by John Ewen, as trustee in bankruptcy of Herman W. Hoefer, against Elizabeth M. F. Hoefer and others. From an order denying plaintiff's motion for a stay until a defendant could be examined before trial, plaintiff appeals. Reversed, and motion granted.

See, also, 138 N. Y. Supp. 1115; 139 N. Y. Supp. 1054.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Bennet & Cooley, of New York City (Elmer E. Cooley, of New York City, of counsel), for appellant.

Abraham M. Pariser, of New York City, for respondents.

PER CURIAM. This court having reversed the order vacating an order for the examination before trial, this order denying a stay of proceedings until the taking of said examination should be reversed, with \$10 costs and disbursements to the appellant and the motion granted, with \$10 costs.

FURTHMANN v. FURTHMANN.

(Supreme Court, Appellate Division, First Department. February 7, 1913.)

1. DIVORCE (§ 107*)—BILL OF PARTICULARS—ADULTERY.

In an action for divorce on the ground of adultery, a complaint which abounds with such phrases as "divers other men" and "divers other places," and which would permit plaintiff to offer proof to show adulteries committed anywhere, with any man, within two years, was so sweeping that it would be impossible to frame issues, and a motion for a bill of particulars should be granted.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 346-348; Dec. Dig. § 107.*]

2. DIVORCE (§ 107*)—MOTIONS—BILL OF PARTICULARS—EVIDENCE.

Where a motion asks for a bill of particulars, and that evidence be not admitted respecting matters concerning which plaintiff fails to give

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

particulars, the part of the motion as to the admission of testimony is premature.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 346–348; Dec. Dig. § 107.*]

Appeal from Special Term, New York County.

Action by Charles Furthmann against Gertrude Furthmann. From an order denying a motion for a bill of particulars, the defendant appeals. Reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

James W. Osborne, of New York City, for appellant.

Abraham Levy, of New York City, for respondent.

SCOTT, J. The plaintiff sues for divorce upon the ground of adultery, by a complaint containing no less than 16 paragraphs setting forth alleged acts of adultery in the most sweeping and general terms. At a cursory glance the complaint appears to set forth names and places with considerable particularity, but it abounds with indefinite phrases, such as “divers other men” and “divers other places,” so that, in effect, it would permit plaintiff to offer proof to show adulteries committed anywhere, with any man, and at any time within a period of two years. It is manifest that such a complaint as this affords no information to defendant as to what she will be called upon to meet, and that it would be quite impossible to frame issues which would certainly cover the matters to be tried. The purpose of granting a bill of particulars in a case like the present is, as has often been said, to define the issues which are to be tried, and unless plaintiff has drawn his complaint recklessly, and bases it only on suspicion, he must be able to state more definitely than he has done what charges against his wife he expects to support by proof.

[1] Indeed, his attempted denial of his ability to give further particulars is but half-hearted and far from convincing, and it is quite evident that his controlling reason is that stated in his affidavit to the effect that he is advised by his counsel that, because he expects to prove his charges by circumstantial evidence, he is “not obliged to furnish any of the details required by the defendant or her attorneys.” This advice was doubtless based upon the case of *Krauss v. Krauss*, 73 App. Div. 509, 77 N. Y. Supp. 203, much relied on by respondent upon this appeal, and cited by the justice at Special Term as authority for the denial of the motion. The *Krauss Case* was very different from this. There was but one co-respondent named, and the places at which the adultery was alleged to have been committed, evidently the successive residences of the co-respondent, were stated with particularity. All that was not stated was the particular day or days on which the adultery was committed. It was very apparent that the plaintiff expected to rely upon a continuous intimacy, accompanied by such circumstances as would justify the inference that the intimacy had been adulter-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ous. In such a case it would not be necessary for plaintiff to point out and prove the precise dates on which acts of adultery were committed, and therefore she was not required to specify them.

It may be in the present case that the plaintiff is honestly unable, and should not be required, to tie himself down quite so closely as defendant would have him do; yet it is entirely clear that she is entitled to much closer specifications of what she may be called upon to meet at the trial than is afforded by the complaint. The plaintiff has not been sufficiently frank and ingenuous with the court to enable us to say, in detail, how far he should be required to comply with the defendant's demand, or how much latitude of specification should be allowed him, in the interests of justice. We cannot accept his general statement that he cannot give with greater particularity the exact times when or places where the alleged acts of adultery were committed, in view of the very general charges in his complaint. If he cannot exactly specify, he can at least limit the range of his charges. Upon the papers before us, the best disposition of the motion will be to grant the motion as it is made, inserting in the order the provision, contemplated by the notice of motion, that in case the plaintiff has no knowledge, or is unable to give precise particulars, with reference to any of the matters as to which particulars are ordered, he shall so state under oath. Of course, he will be expected to make an honest attempt to comply with the order, and must be prepared to satisfy the court as to his good faith.

[2] So much of the motion as asks that the plaintiff be precluded from offering proof respecting matters concerning which plaintiff fails to give particulars is premature. It will be time enough to consider that question when the bill of particulars has been furnished.

The order appealed from must be reversed, with \$10 costs and disbursements, and the motion granted to the extent above indicated, with \$10 costs. All concur.

ABNER M. HARPER, Inc., v. CITY OF NEWBURGH.

(Supreme Court, Special Term, Orange County. February 15, 1913.)

MUNICIPAL CORPORATIONS (§ 354*)—PUBLIC WORK — BIDS — MISTAKE — RELIEF.

Plaintiff, intending to bid 90 cents per lineal foot for bluestone curbing and 65 cents for concrete curbing, put in a bid to defendant city in which the prices were transposed by mistake, and the city, without fraud, bad faith, or mutual mistake, accepted its bid for the stone curbing at 65 cents per lineal foot. *Held*, that plaintiff, under such circumstances and after the acceptance of its bid, was not entitled to a decree permitting it to rescind for mistake and recover its deposit.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 886, 887; Dec. Dig. § 354.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
139 N.Y.S.—67

Action by Abner M. Harper, Incorporated, against the City of Newburgh, for rescission of a bid for municipal work, and to recover \$500 deposited with the bid to secure compliance therewith. Complaint dismissed.

Hirschberg & Hirschberg, of Newburgh, for plaintiff.
Graham Witschief, of Newburgh, for defendant.

TOMPKINS, J. The plaintiff made a mistake in certain figures contained in a bid which it submitted to the defendant for street improvement work in the city of Newburgh, and now seeks to rescind its bid and recover the sum of \$500 deposited with said bid with the city clerk.

The bid consisted of several items, and plaintiff's claim is that there was an unintentional transposition of figures as to two items as follows: The plaintiff had intended to charge 90 cents per lineal foot for bluestone curbing, and 65 cents per lineal foot for concrete curbing; whereas, in the bid as submitted, those figures were inadvertently transposed, so that the plaintiff offered to do the bluestone curbing at 65 cents per lineal foot, instead of 90 cents, and the city council, receiving the bid in that form, acted upon and accepted it, in the absence of any representative of the plaintiff. The next morning, after the plaintiff's bid had been accepted and the contract awarded, the mistake was discovered by plaintiff's officers, who promptly gave notice to the defendant of the mistake, and asked leave to withdraw said bid and for a return of the said deposit of \$500. Correspondence and negotiations followed, culminating in the awarding of a contract for the said street improvement to another concern, and action of the city council intended to operate as a forfeiture of the plaintiff's deposit.

The mistake in plaintiff's bid is admitted. At least there is no claim that the figure given for bluestone curbing was intended to be given, and the plaintiff's claim that it was a mistake, and that the work could not have been profitably done for that price, is not disputed. Under the circumstances, it would seem that justice and equity required a return to the plaintiff of its deposit, and that was my impression at the trial; but it seems that the law is the other way, and that the plaintiff cannot recover its deposit after the defendant has acted upon the bid and awarded the contract, unless there was a mutual mistake, or a mistake on one side and fraud or bad faith on the other. There is no claim that there was a mutual mistake, nor does the plaintiff contend for any fraud, deceit, or bad faith on defendant's part. The mistake or error in the bid was not apparent on its face, nor was the defendant's attention called to it until after it had been accepted and the contract awarded.

Under these circumstances, it seems that the awarding of the work to the plaintiff made a complete contract, which is binding upon both parties, and from which neither may escape, except upon proof of fraud or bad faith or mutual mistake. *City of New York v. Seely-Taylor Co.*, 149 App. Div. 98, 133 N. Y. Supp. 808. In this recent decision the bid was more than \$100,000 less than the next lowest bidder,

while the lowest bid on readvertisement was \$124,000 higher than the one in suit, which was \$10,000, when it was intended to be \$103,000.

In the case of *City of New York v. Dowd*, 140 App. Div. 359, 125 N. Y. Supp. 394, cited by plaintiff's counsel, the error appeared on the face of the bid, it being the extension of multiplications, the items of which appeared on the bid, and the city's engineer at once noticed the mistakes in the extensions, before the bid was acted upon. In *Moffett, Hodgkins & Clark Co. v. City of Rochester*, 178 U. S. 373, 20 Sup. Ct. 957, 44 L. Ed. 1108, the bid, as to one item at least, was read before any other bid as to that same item was read, and immediately on hearing the bid as to that item read the company's representative announced that the bid was erroneous and explained the error. The chief error was in one item, which read \$1.50 per cubic yard for rock tunneling, while all the other bids submitted varied from \$12 to \$15 per yard. The company's representative at once claimed that the person who filled out the formal bid had been instructed in writing to enter a bid of \$15 as to that item, instead of \$1.50. The figures had been copied from a memorandum by a bookkeeper who was very shortsighted. The error as to the first item was in inserting the bid for another item. These errors were observed and called to the attention of the city authorities before the bid was formally acted upon. These facts distinguish this case from the one at bar.

The defendant is entitled to judgment dismissing the complaint, with costs.

R. F. STEVENS CO. v. MAUS.

(Supreme Court, Appellate Division, Second Department. February 14, 1913.)

EXECUTION (§ 372*)—SUPPLEMENTARY PROCEEDINGS—EXAMINATION OF DEBTOR PRIOR TO RETURN.

Code Civ. Proc. § 2436, provides that at any time after the issuing and before the return of an execution the judgment creditor, on written evidence that the judgment debtor has property which he unjustly refused to apply toward the judgment, is entitled to an order requiring the debtor to be examined concerning his property. *Held*, that an order for the examination of a judgment debtor under such section is auxillary and not supplementary to the execution, and that the remedy provided thereby is not barred by the lapse of 10 years from the date of the return of an execution on the judgment, where another execution had been issued on which no return was made.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1099; Dec. Dig. § 372.*]

Appeal from Special Term, Kings County.

Action by the R. F. Stevens Company against Henry Maus From an order denying defendant's motion to vacate an order for his examination before the return of execution, under Code Civ. Proc. § 2436, he appeals. Affirmed.

Argued before JENKS, P. J., and HIRSCHBERG, BURR, WOODWARD, and RICH, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Frederick E. Fishel, of New York City, for appellant.
J. T. Crusier, of Brooklyn, for respondent.

JENKS, P. J. The judgment debtor appeals from an order of the Special Term that denies his motion to vacate an order for his examination made pursuant to section 2436 of the Code of Civil Procedure. The judgment was entered September 20, 1893, and an execution issued forthwith was returned partly satisfied on October 3, 1893. A further execution was issued on November 20, 1912, and was outstanding on November 23, 1912, when the order under the said section was made.

The sole ground taken for vacation was that the right thereto was and is barred by section 2435 of the Code of Civil Procedure. We are cited to *I. & T. N. Bank v. Quackenbush*, 143 N. Y. 567, 38 N. E. 728. That case determined that an order authorized by section 2435 became barred after the lapse of 10 years from the date of the return of an execution, but in no way dealt directly with section 2436. But the contention of the appellant is that the reasoning of the opinion is applicable to the latter section. The Court of Appeals placed its decision upon two grounds. The first ground is that, as the judgment was barred after the lapse of 20 years, it was reasonable to suppose that at some time within that period the debtor was relieved from proceedings of the character in question, and that such limitation was determined by the statute itself to be 10 years, inasmuch as the statute prescribed that at any time within 10 years after the return of an execution the judgment creditor was entitled to the order. There is no analogy between the statute then considered by the Court of Appeals and the statute now under consideration, save that both are in aid of the judgment creditor. Section 2435 provides a remedy after a returned execution, and consequently arises upon the whole or partial failure of the execution. Section 2436 provides a remedy in furtherance of an outstanding execution. There is no express limitation in section 2436 like unto that of the 10 years in section 2435, save that the period of issuance is confined to any time after the issuing of execution and before the return thereof. If the general principle enunciated by the Court of Appeals in *I. & T. N. Bank v. Quackenbush*, supra, that every such remedy must be "barred by the lapse of some definite period of time" must be applied to this remedy, then such principle is substantially satisfied by this provision last mentioned.

The second ground in *I. & T. N. Bank v. Quackenbush*, supra, is that proceedings supplementary to execution are remedies in equity substitutive for the creditors' bill of chancery; that the rule that such bill could not be maintained unless the creditor had exhausted all his remedies at law or was in such a position as to make such remedies unavailable, applied to an order made under section 2435; and that, therefore, if the creditor's judgment had ceased by lapse of time to be a lien, his remedy at law could not be exhausted, and he must by some proper proceeding reinstate the lien, for otherwise the issue and return of the execution would be an idle ceremony. But I think that an order made under section 2436 is not in its nature a substitute for the

former creditors' bill. For the right to bring such a bill, aside from statutory provisions, rests upon a judgment, and in "a creditors' suit, strictly so called, * * * where the creditor seeks to satisfy his judgment out of the equitable assets of the debtor which cannot be reached on execution," generally the creditor must have an execution returned unsatisfied. Pomeroy's Equitable Remedies, §§ 882, 887. As the order under section 2436 must be made while the execution is outstanding, it is auxiliary, not supplementary, to the execution, and until the return of that execution it cannot be known that the remedy at law has been exhausted. The order was issuable while an execution could be issued, and in this case there is no question as to the regularity of the execution. Section 1377 of the Code of Civil Procedure.

The question presented by this appeal was decided correctly at Special Term in *Press Pub. Co. v. McGill*, 136 N. Y. Supp. 177. The order must be affirmed, with \$10 costs and disbursements. All concur.

PENFIELD v. PENFIELD.

(Supreme Court, Appellate Division, First Department. February 7, 1913.)

1. WORK AND LABOR (§ 7*)—SERVICES BETWEEN PERSONS IN FAMILY RELATION.

Where a child, whose mother died shortly after her birth, was brought up by an aunt, who in about five years became her stepmother, and she continued to reside with her father and stepmother during her infancy and after she attained full age, and continued to reside with her stepmother after her father's death, and returned to live with her stepmother pursuant to her invitation, the law would not imply a promise to pay for board.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 11½-22; Dec. Dig. § 7.*]

2. WORK AND LABOR (§ 28*)—SERVICES BETWEEN PERSONS IN FAMILY RELATION.

Evidence *held* not to justify a finding of a contract binding a child to pay board while living with her aunt, who became her stepmother.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 17, 55; Dec. Dig. § 28.*]

Dowling, J., dissenting.

Appeal from Judgment on Report of Referee.

Action by William W. Penfield, as executor of Louisa Ann Penfield, deceased, against Susan A. Penfield. From a judgment for plaintiff, entered pursuant to a decision of a referee, to whom the issues had been referred to hear, try, and determine, defendant appeals. Reversed, and new trial ordered.

See, also, 145 App. Div. 916, 129 N. Y. Supp. 1139.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and DOWLING, JJ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Thomas A. McKennell, of New York City (George C. Appell, of Mt. Vernon, and Alfred H. Appell, of New York City, on the brief), for appellant.

Gerard Roberts, of New York City, for respondent.

LAUGHLIN, J. During the period from September 1, 1901, to November 1, 1905, the appellant resided with her stepmother at the homestead in Westchester county, which the appellant's father had by will left to his widow, the plaintiff's testatrix, for life "as a house for my family"; and this action is brought to recover for the board and lodging of the appellant during that time. The plaintiff alleges that the board and lodging were furnished at the request of the appellant, and were reasonably worth the sum of \$25 per week. These allegations were put in issue by the answer, and the appellant alleged that the board and lodging were furnished to her gratuitously, and she also interposed the statute of limitations as a bar to a recovery. The action was not commenced until the 5th day of August, 1910. The referee rules that the action, in so far as a recovery is sought for the period prior to August 5, 1904, is barred by the statute of limitations; but he allowed a recovery for the period between the 5th day of August, 1904, and the date of the death of appellant's stepmother, November 1, 1905, at a rate of \$25 per week, that being the value of the board and lodging as given by two boarding house proprietors, called by plaintiff as experts, in answer to hypothetical questions.

[1] The appellant and a brother are the surviving issue of their father's first marriage. The second wife of the appellant's father was his first wife's sister, and therefore the plaintiff's testatrix, in behalf of whose estate a recovery for appellant's board and lodging is sought, was both appellant's stepmother and aunt. Moreover, appellant's mother died a week after appellant was born, and her aunt, who within about five years became her stepmother, cared for and brought her up as if she were her own child. The appellant continued to reside with her father and stepmother until about 1892, at which time she was about 40 years of age. Prior to appellant's birth, her mother's mind had been affected, and evidently the appellant inherited a weak mind, for she was and is of a melancholy disposition and eccentric, and her presence annoyed, and at time tested the patience of, those about the household, although, apparently out of consideration for her mental condition, no feeling of ill will was entertained against her. During the year last mentioned the appellant's father took her away from home on a visit, and, instead of bringing her back, left her as a boarder where they had visited, and from that time on until he died, in August, 1896, she did not again become a permanent member of his household, although from time to time she made short visits home, and she was visiting there when her father died. Appellant's stepmother left two sons, the issue of her marriage to appellant's father. On the death of appellant's father, she and her brother and her stepbrother William and her stepmother constituted the remaining members of the household. William was unable to, or would not, bear with appellant's eccentricities, and he insisted that she should not re-

main a member of the household; and he evidently induced his mother to visit her son, who was not living at home. The appellant, finding that she was left alone, went away and boarded again, and, except for occasional visits home, she boarded at numerous places, including the home of her stepbrother James, until about the 1st of September, 1901. About this time William ceased to be a member of the household, and thereupon his mother, with his consent, requested James to invite the appellant to return to the homestead and live with her, which the appellant did, and remained there until the death of her stepmother. In such circumstances, the law will not imply a promise to pay for board or lodging. *Collyer v. Collyer*, 113 N. Y. 442, 21 N. E. 114; *Sullivan v. Sullivan*, 6 Hun, 658; *Williams v. Hutchinson*, 3 N. Y. 312-319, 53 Am. Dec. 301.

[2] There is no evidence that any express contract was made between the appellant and her stepmother, either with respect to *the amount* to be paid or charged for board and lodging, or either, or that appellant was to pay for either board or lodging. There is no evidence that appellant's stepmother ever presented a bill for board or lodging, or ever demanded from her, or asked for, the payment of any amount for either board or lodging. The judgment against the appellant is predicated upon an implied agreement to pay the *reasonable value* of the accommodations furnished to the appellant by her stepmother. There is evidence in the record tending to show that the appellant *understood* that she was to pay for her board and lodging, and that she intended so to do, and that her stepmother intended to make a charge therefor, and that the appellant was desirous at different times of having the amount she was to pay agreed upon; but there is no evidence that there ever was any agreement with respect thereto between her and her stepmother. Considerable of the evidence tending to show that the plaintiff's testatrix intended to charge the appellant for board and lodging consists of declarations made by the testatrix, in the absence of the appellant, which appear to have been drawn out on cross-examination of a witness for plaintiff, or received without objection. With the exception of those declarations, made by the stepmother in her own interest, there is no evidence in the record from which it could be fairly inferred that there was an agreement between testatrix and appellant that the latter should pay for her board and lodging, excepting the evidence given by a nurse in the employ of the testatrix, who testified, in effect, that some six months prior to the testatrix's death she witnessed a conversation between the testatrix and the appellant, which arose from the fact that the appellant had ordered delicacies from the grocer's, and the witness says that the testatrix complained, and said that the appellant would have to pay "board," or "more board," or "higher board," if she wanted "such things" ordered. The witness, says, however, that the appellant asserted her right to live at home without paying board, and stated that, if she were to be charged board, she would leave. One version of that interview as given by the witness is entirely consistent with the absence of any agreement to pay board, and therefore a recovery on her testimony should not be permitted.

There is in the record competent evidence of declarations against interest made by the testatrix to her son and his wife, to the effect that she was not charging and did not intend to charge appellant for either board or lodging, notwithstanding the fact that her son William was insisting that she do so. There is evidence in the record upon which it is argued that it is not improbable that appellant was to be charged with board and lodging, and that the testatrix intended, as William testified she stated to him, to charge the appellant for board, but not for lodging. The appellant during these years had an income, from property left in trust by her father, of between \$1,500 and \$2,000 a year. The income of her stepmother could not have been much more than that amount, for she had the income from a trust fund of \$20,000 and the rent of a house in Lexington Avenue, borough of Manhattan, New York, which rented for \$1,200 a year. Prior to the time when the testatrix invited the appellant to return home, the appellant had been declared a paranoiac by a physician who had examined her, and it was thought that it would be necessary to send her to a sanatorium, where her income would have been insufficient to maintain her. She had, prior to her return home, been paying \$15 per week for board and lodging. There is evidence tending to show that the will of appellant's father, as construed by at least one member of the family, precluded a charge being made against appellant for lodging, and that the testatrix understood that her deceased husband intended that the appellant should be permitted to live at home. Her father by his will gave her the furniture in her room in the family mansion, which, together with the clause in his will by which he left the use of the homestead to his widow "as a house" for his "family," is some indication that the appellant had a right to the use of the room known and recognized by her father as her room.

The fact that appellant's brother and stepbrothers, prior to the time she returned home, had executed an agreement construing the will as entitling the stepmother to the use of the entire house, and that, while appellant was afforded a home there, she was induced to sign the same agreement, does not materially weaken the contentions made in her behalf on this appeal. If there was any evidence of an express contract between the testatrix and the appellant for the payment of her *board*, it would not be improbable, in the circumstances, that such an agreement was made; but in the absence of such evidence, and in the absence of any claim made by the testatrix during this period of over four years, for part of which period one of the sons of the testatrix was managing the property of the appellant under a power of attorney, and with income owing to appellant which might have been appropriated to the payment of her board, it is improbable that there was any agreement for the payment even of board, or that the testatrix intended to make any charge against the appellant therefor. The reasonable inference from the evidence is that the testatrix had great sympathy for the appellant, and an affection for her akin to that of a mother, and that, in so far as she administered to the wants, care, and accommodation of the appellant, she did so gratuitously and without any expectation of reward.

We are of opinion, therefore, that the findings in favor of the plaintiff are against the weight of the evidence. It follows that the judgment should be reversed, with costs to appellant to abide the event, and a new trial ordered before another referee.

INGRAHAM, P. J., and McLAUGHLIN and CLARKE, JJ., concur.

DOWLING, J. I dissent, and favor the reversal of the judgment and the granting of a new trial only if plaintiffs should refuse to agree to a reduction of the amount awarded to the sum of \$967.50, with interest, amounting in all to \$1,300.16, being at the rate of \$15 per week for the board and lodging furnished defendant; that, in my opinion, being a fair and reasonable compensation therefor.

MENDELSON et al. v. IRVING et al.

(Supreme Court, Appellate Division, First Department. February 7, 1913.)

1. SALES (§ 479*)—CONDITIONAL SALES—TITLE OF SELLER.

A seller, in a contract stipulating that title shall remain in him until payment of the price, and that in case of default he shall have the right to take possession, is not deprived of such right, on default in the payment of a note for a part of the price, merely because he attempted to exercise the right by void process of replevin, for the officer taking possession under the void writ must be deemed to have done so as the agent of the seller, and the buyer may not complain.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1438; Dec. Dig. § 479.*]

2. APPEAL AND ERROR (§ 1169*)—DISPOSITION OF CASE ON APPEAL.

Where the complaint should have been dismissed at the close of plaintiff's case, or a verdict directed for defendant at the close of the whole case, but no motion therefor was made at the close of the whole case, a judgment for plaintiff and an order denying a new trial must be reversed, and a new trial ordered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4531-4539; Dec. Dig. § 1169.*]

Appeal from Trial Term, New York County.

Action by Louis Mendelson and another against James D. Irving and others. From a judgment for plaintiffs, and from an order denying a new trial, certain defendants appeal. Reversed, and new trial ordered.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Charles A. Wilson, of New York City, for appellants Irving and Grosse.

Francis E. Neagle, of New York City, for appellant A. H. Andrews Co.

Harry M. Marks, of New York City, for respondents.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

McLAUGHLIN, J. On the 23d of March, 1910, the A. H. Andrews Company, a foreign corporation having a branch office in the city of New York, entered into a written contract with the plaintiffs for the sale and delivery to them of 298 chairs, to be thereafter installed in the plaintiffs' moving picture establishment in New York City. The contract provided that the purchase price should be \$447, of which \$50 was to be paid at the time the order for the chairs was sent in, and the balance when they were installed; that title to the chairs should remain in the Andrews Company until "full payment in cash" was made; that, if promissory notes were given on account of the purchase price, they were not to be considered as payment, but merely as evidence of the indebtedness; and if default were made in the payment of any part of the purchase price, "whether evidenced by promissory notes or otherwise," the Andrews Company had the right to retake the chairs, with or without force, and with or without legal process, and retain the portion of the purchase price then paid.

The chairs were delivered and installed in June, 1910. Plaintiffs did not pay for them, nor had they, up to the 2d of August, paid anything towards the purchase price, except \$100. On that day they paid an additional \$100, and gave two promissory notes for the balance. Each note was for \$123.50, and bore interest at the rate of 8 per cent.—one being payable on September 1st and the other on October 1st following. The notes were not paid when they became due, nor any part of them, and on the 13th of October 1910, the Andrews Company commenced an action against these plaintiffs in the Municipal Court of the City of New York to recover the purchase price, and on the same day obtained a writ of replevin, by which the marshal, acting under the direction of the defendant Grosse, took possession of the chairs and delivered them to the defendant Bowman, with whom they were stored in the name of the Andrews Company. Two days later the plaintiffs requested the return of the chairs, and offered a surety company's bond to secure the payment of the amount remaining due. The request was refused, and thereupon the plaintiffs obtained an order of the Municipal Court vacating the writ of replevin and directing any person who held possession of the chairs to return them to the plaintiffs. On the same day one of the plaintiffs, together with the marshal who had executed the writ, demanded the chairs from Bowman; but he, at the instigation of the defendants Irving and Grosse, who were representing the Andrews Company, refused to deliver them. A second demand for the possession was subsequently made, and, on its being refused, the plaintiffs caused Bowman, Irving, and Grosse to be adjudicated in contempt of court. The chairs were then returned to the plaintiffs, who set them up in their establishment, and they are still there. They have never been paid for, and nothing has since been paid upon the notes.

At the trial it was conceded that the writ of replevin was void, the court not having jurisdiction to issue it; but the defendants contended they had the right to take possession of the chairs by

virtue of the terms of the contract of sale. The court submitted to the jury the question whether the delivery and acceptance of the notes had not effected a payment of the amount due under the contract, thus abrogating the vendor's right to retake possession upon a default in payment. The jury found in favor of the plaintiffs, and awarded, as against the defendants Grosse, Irving, and the Andrews Company, \$500 compensatory damages and \$1,700 punitive damages, making \$2,200 in all. The action was discontinued against Bowman, the warehouseman. Judgment was entered accordingly, from which the Andrews Company, Irving, and Grosse appeal.

[1] A bare statement of the facts would seem to be sufficient to indicate that the judgment appealed from is erroneous. The Andrews Company has never been paid for its chairs. The title was in it. The contract gave it the right to take them in case the purchase price were not paid, with or without force, and with or without legal process. It did what the contract gave it the right to do, and yet finds itself with a judgment against it for \$2,200 because it did so. It was erroneous to submit to the jury the question whether the notes had been taken in payment, and by reason thereof the vendor's rights under the contract abrogated, because it was expressly provided in the contract, if notes were given, they should not be considered as payment, but merely evidence of the indebtedness. The contract could not be destroyed in this way, and the plaintiffs now concede that fact, but contend that the Andrews Company did not assume to take possession of the chairs by virtue of the contract, but by virtue of a writ of replevin, which was void. If the writ, as the parties concede, were void, by reason of want of jurisdiction of the court to issue it, then the marshal, when he took possession of the chairs, did so as the agent of the Andrews Company. *Day v. Bach*, 87 N. Y. 56; *Kerr v. Mount*, 28 N. Y. 659; *Hall v. Waterbury*, 5 Abb. N. C. 374. The Andrews Company had the right to the possession of the chairs and it is of no importance how it obtained possession. The evidence offered on the part of the plaintiffs themselves established that they had never paid for the chairs, and by reason of that fact the Andrews Company had a right to take them when it did. The contract expressly provided:

"In case default shall be made in the payment of the purchase price (whether evidenced by promissory notes or otherwise) aforesaid, or of any part thereof or interest thereon, on the day or days respectively on which payments shall become due and payable, * * * the party of the first part, its administrators or assigns, shall thereupon have the right to take immediate possession of said property, with or without force or process of law."

If one has the right to take possession of personal property without legal process, it is difficult to imagine upon what theory he could be deprived of that right, if he attempted to exercise it, by legal process which subsequently turned out to be void. In either case plaintiffs' position would be precisely the same.

[2] Giving to the plaintiffs' evidence the most favorable consideration possible, the complaint should have been dismissed at the

close of plaintiffs' case, or a verdict directed in favor of the defendants at the close of the whole case; but, as no such motion was made at the close of the whole case, the judgment and order appealed from, therefore, are reversed, and a new trial ordered, with costs to appellants to abide the event. All concur.

DICKS v. DICKS et al.

(Supreme Court, Appellate Division, Second Department. February 7, 1913.)

DIVORCE (§ 151*)—APPEARANCE BY CO-RESPONDENT—RIGHT TO RETRIAL.

Under Code Civ. Proc. § 1757, subd. 2, providing that, in an action for divorce on the ground of adultery, any co-respondent shall have the right, at any time before the entry of judgment, to appear and defend the action so far as the issues affect him, a co-respondent, who, a few days after learning of the pendency of the action, though after verdict rendered, served plaintiff's attorney with notice of appearance and demand for a copy of the complaint, which notice was accepted and a copy of the complaint furnished, was entitled to have his default opened and the interlocutory judgment set aside, so as to give him an opportunity to litigate the issues so far as they affected him.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 500-513; Dec. Dig. § 151.*]

Appeal from Special Term, Orange County.

Action for divorce by Joseph C. Dicks against Jennie E. Dicks, with Michael Sullivan as co-respondent. From an order of the Special Term, said Michael Sullivan appeals. Order reversed, and motion granted, vacating the interlocutory judgment previously entered in the case, and permitting the co-respondent to appear and defend such action so far as the issues thereof affected him.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and WOODWARD, JJ.

Wm. A. Parshall, of Port Jervis, for appellant.

Richard A. Rendich, of Middletown, for respondent.

BURR, J. It is not necessary to decide whether the co-respondent is entitled as matter of right to appear and defend this action so far as the issues affect him. Code of Civil Procedure, § 1757, subd. 2. In *Boller v. Boller*, 111 App. Div. 240, 97 N. Y. Supp. 609, relied upon by respondent, Mr. Justice Ingraham, writing for the majority of the court, says:

"I would have no doubt of the power of the court upon a proper case presented to set aside a verdict, decision, or any other proceeding that had been completed in the action before the appearance of the co-respondent, and thus give him an opportunity to defend; but no such application in this case was made, and no facts were presented that would justify the granting of such an application. * * * I have no doubt of the power of the court to set aside a verdict, where it is necessary to give the co-respondent a hearing for his protection; but certainly, where he had full knowledge of the action and the charges made, and was a witness on the trial, his subsequent appearance should not affect the validity of the determination of the issues,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and compel the plaintiff again to go through with the trial which has been determined in his favor."

In that case it appeared that the co-respondent had knowledge of the pendency of the action, appeared upon the trial thereof, was examined as a witness on behalf of the defendant, and took part in the trial. In the case at bar the contrary appears. In addition, within a few days after the co-respondent learned of the pendency of this action, he served a notice of appearance upon the attorney for plaintiff, and demanded a copy of the complaint. His notice of appearance, which contained a statement that it was served pursuant to the provisions of subdivision 2 of section 1757 of the Code of Civil Procedure, was accepted by plaintiff's attorney, and thereafter a copy of said complaint was served upon his attorney in accordance with such demand. If this appearance was timely, and appellant was entitled as a matter of right to a copy of said complaint, it must follow that he was equally entitled as matter of right to appear and defend such action, so far as plaintiff's allegations related to him. If his appearance was not timely, because after verdict rendered, then, if plaintiff's conduct in accepting his notice of appearance and serving upon his attorney a copy of the complaint did not constitute a waiver of his default, it is at least a cogent circumstance to be considered upon an application to open such default and to set aside the interlocutory decree which was not filed until nearly a month thereafter. We think, upon the facts here disclosed, that the co-respondent should be given an opportunity to litigate the issues so far as they relate to him.

It is urged that the effect of such a decision will be to compel plaintiff a second time to litigate an issue already decided in his favor. That may be. But it was entirely within his power to avoid such a result by serving a copy of his pleading on the co-respondent named therein. Code of Civil Procedure, § 1757, subd. 2. Having failed to do this, under the circumstances here disclosed, he may not be heard to object to a motion, promptly and seasonably made on behalf of the co-respondent, to protect himself against the effect of the verdict previously rendered.

The order appealed from should be reversed, with \$10 costs and disbursements, and the motion granted, with \$10 costs, to the extent of vacating the interlocutory judgment previously entered, and permitting the co-respondent to appear and defend such action, so far as the issues thereof affect him. All concur.

EDWARDS v. EDWARDS.

(Supreme Court, Appellate Division, Second Department. February 7, 1913.)

HUSBAND AND WIFE (§ 300*)—SEPARATION—DISMISSAL OF ACTION—SUPPORT.

The Appellate Division, affirming a judgment dismissing an action by a wife for separation, because her cruel treatment justified the husband in leaving his home, has no power to make provision in the judgment to compel him to support her, but the usual remedy must be resorted to.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1098; Dec. Dig. § 300.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Special Term, Kings County.

Action by Anna L. Edwards against Charles M. Edwards. From so much of a judgment as dismisses the complaint, plaintiff appeals. Affirmed.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

G. D. B. Hasbrouck, of New York City, for appellant.

Frank Parker Ufford, of New York City (Philip Carpenter, of New York City, on the brief), for respondent.

PER CURIAM. It has been found that defendant, in March, 1908, left his home, wife, and family, and took up his residence elsewhere, with the intention of not returning, but that it was not abandonment of her or her children. That conclusion must be predicated upon the finding of such cruel and inhuman treatment on her part as justified his departure. It may not be inferred, from the affirmance of the judgment, that the defendant is relieved from his duty to make due provision for the support of his wife. Under the decision in *Robinson v. Robinson*, 146 App. Div. 533, 131 N. Y. Supp. 260, it is not within the power of this court to make provision in the judgment constraining the defendant to furnish such support; but there is the usual remedy, should he not be moved to fulfill this duty. He did this amply before the action was begun, and even that did not interrupt a just regard for the welfare of his children. It may be inferred that he will not pursue other course in the future.

The judgment should be affirmed, without costs.

ZEGGIO et al. v. ROBINSON et al.

(Supreme Court, Appellate Division, First Department. February 7, 1913.)

DEPOSITIONS (§ 46*)—PROPOSED INTERROGATORIES—IMMATERIALITY.

Under Code Civ. Proc. § 892, giving either party the right to insert any question pertinent to the issue in a commission for the examination of a party, interrogatories proposed by the adverse party, not pertinent in view of the facts, and having no bearing on the issues, must on motion be stricken out.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 68-71; Dec. Dig. § 46.*]

Appeal from Special Term, New York County.

Action by Helen R. Zeggio and another against Duryea Remsen Robinson and others. From an order denying a motion of plaintiffs to strike out interrogatories proposed to be administered to a plaintiff under a commission, plaintiffs appeal. Reversed, and motion granted.

See, also, 137 N. Y. Supp. 1104.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Payson Merrill, of New York City, for appellants.

L. Laflin Kellogg, of New York City, for respondents.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DOWLING, J. This is an appeal from so much of an order as denies the motion of the plaintiffs to strike out certain interrogatories, numbered 50 to 58, inclusive, proposed by the defendants to be administered to Helen R. Zeggio, one of the plaintiffs, under a commission heretofore issued for her examination. The action is brought to remove defendants as trustees under the will of Phebe H. Robinson, for the appointment of a receiver, for an accounting, and for other relief. In *Wanamaker v. Megraw*, 168 N. Y. 125, 61 N. E. 112, it was said:

"The settlement of the interrogatories is in no sense a decision that they are competent or proper, and the judge has no power to change or amend them, or to reject any of them. The allowance or settlement is required only for the purpose of authenticating the interrogatories as the ones which the commissioner is authorized to propound to the witness. He cannot propound any other than such as are thus allowed and authenticated by the judge, but the allowance has no other effect. This is very clear, since by section 892 'either party must be allowed to insert therein any question, pertinent to the issue, which he proposes.' It is very plain, therefore, that the judge on the settlement cannot pass upon the competency of any question, and, of course, he cannot then know what answer will be given. Any question proposed by either party must be allowed, if pertinent to the issue."

Applying these principles to the proposed interrogatories, it is sufficient to say that their pertinency is not made to appear by any facts now before us, and so far as the record shows they can have no bearing upon the issues between these parties at this time.

The order appealed from will therefore be reversed, and the motion granted, to the extent of disallowing the interrogatories numbered 50 to 58, inclusive, with costs to the appellants. All concur.

WILUND v. NEW YORK CENT. & H. R. R. CO.

(Supreme Court, Appellate Division, Second Department. February 7, 1913.)

APPEAL AND ERROR (§ 1003*)—VERDICT—EVIDENCE.

Where, in a negligence case, the verdict is against the weight of evidence on questions of negligence and contributory negligence, a judgment for plaintiff will be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938–3943; Dec. Dig. § 1003.*]

Appeal from Trial Term, Kings County.

Action by Anna Wilund, as administratrix of Charles Wilund, deceased, against the New York Central & Hudson River Railroad Company. From a judgment for plaintiff, and an order denying new trial, defendant appeals. Reversed, and new trial granted.

Argued before JENKS, P. J., and THOMAS, CARR, WOODWARD, and RICH, JJ.

Robert A. Kutschback, of New York City, for appellant.

Frank W. Holmes, of Brooklyn, for respondent.

PER CURIAM. We think that the judgment and order should be reversed, and a new trial granted, costs to abide the event, on the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ground that the verdict is against the weight of evidence on the questions of the defendant's negligence and the decedent's freedom from contributory negligence. We think, also, that the evidence on the question of negligence on the part of Johnson was not sufficient to require submission of said question to the jury, and that it was likewise serious error to submit to the jury the question of wanton and reckless conduct on the part of the motorman.

JENKS, P. J., and THOMAS, CARR and RICH, JJ., concur. WOODWARD, J., concurs, on the ground that the verdict was against the weight of the evidence.

PEOPLE v. WINSTON.

(Supreme Court, Appellate Division, Second Department. February 7, 1913.)

HIGHWAYS (§ 186*)—OFFENSES—INFORMATION—MOTOR SPEEDING.

An information which does not charge that defendant operated a motor vehicle at a speed in excess of 30 miles an hour "for a distance of one-fourth of a mile" charges no crime under Laws 1910, c. 374, § 287, limiting the speed of motor vehicles.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 476, 477; Dec. Dig. § 186.*]

Appeal from Westchester County Court.

John Winston was convicted of crime, and he appeals. Reversed. Argued before JENKS, P. J., and HIRSCHBERG, BURR, WOODWARD, and RICH, JJ.

J. Henry Esser, of Mt. Vernon, N. Y., for appellant.

Francis A. Winslow, Dist. Atty., of New York City, for the People.

WOODWARD, J. The defendant was charged by an information with having "willfully, knowingly, and unlawfully" operated a motor vehicle, an automobile, "at a greater rate of speed than 30 miles an hour on said highway, in violation of and contrary to section 287, chapter 374, of Laws of 1910, constituting chapter 25 of the Consolidated Laws of New York as amended."

There is no charge that the defendant operated his automobile at a speed in excess of 30 miles an hour for a distance of one-fourth of a mile, and in the absence of such an allegation no crime is charged. Nor does the proof establish that the defendant in fact drove the car a distance of one-fourth of a mile in excess of 30 miles an hour. There was no violation of the statute, so far as the information or the testimony discloses, and it was error to hold that the conviction of the Court of Special Sessions was lawful.

The judgment of the County Court of Westchester County should be reversed, and the fine paid by the defendant should be remitted. All concur.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MANHATTAN STORAGE & WAREHOUSE CO. v. BENGUIAT ART MUSEUM et al.

(Supreme Court, Appellate Division, First Department. February 7, 1913.)

INTERPLEADER (§ 11*)—DIVERS CLAIMANTS—PLEADING—ATTACHMENTS.

A complaint by a warehouseman, alleging that goods in his hands are claimed by others, some by assignment from the depositor, others as owners, and by the sheriff under an attachment, and praying that a receiver be appointed and the ownership of the goods be determined, and the defendants be required to interplead, states a cause of action under General Business Law (Consol. Laws 1909, c. 20) § 103, providing that, if more than one person claims title or possession of the goods, the warehouseman may require all claimants to interplead, and section 104, providing that, where a person other than the depositor claims the goods, the warehouseman is excused from liability for refusing to deliver the same until he has a reasonable time to ascertain the owner or to bring legal proceedings to compel all claimants to interplead.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 13-34; Dec. Dig. § 11.*]

Appeal from Special Term, New York County.

Action by the Manhattan Storage & Warehouse Company against the Benguiat Art Museum and others. From an interlocutory judgment sustaining a demurrer to the complaint, the plaintiff appeals. Reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and DOWLING, JJ.

William W. Pellet, of New York City, for appellant.

Max D. Steuer, of New York City, for respondent.

John Godfrey Saxe, of New York City, amicus curiæ, on behalf of Bowling Green Storage & Van Co.

McLAUGHLIN, J. This appeal is from an interlocutory judgment sustaining a demurrer to a complaint in an action of interpleader, on the ground that it does not state facts sufficient to constitute a cause of action.

The complaint alleges, in substance, that the plaintiff is a warehouseman, and as such has on storage certain personal property, consisting of rugs, antiques, embroideries, and other works of art, inclosed in boxes and barrels; that the property was deposited with it by one H. Ephraim Benguiat and Mordecai Benguiat; that subsequent thereto the defendant Benguiat Art Museum claimed to be the owner, by virtue of an assignment from the depositors, and demanded possession from the plaintiff, and threatened to hold it responsible if delivery were not made in accordance with the demand; that Vitall Benguiat and Leopold Benguiat also claimed to be the owners of the property and have demanded the same from the plaintiff; that the defendant Harburger, as sheriff of the county of New York, also claims to be entitled to the possession of the property by virtue of a warrant of attachment issued in an action pending in the Supreme Court between Vitall Benguiat and another and Ephraim Benguiat and an-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

other, and "has levied upon said property by virtue of said warrant of attachment, claiming it to be the property of the defendant in said action"; that there are now pending several actions between the Benguiats and the Benguiat Art Museum with reference to the title and possession of the goods; and that the plaintiff retains and has possession of the goods as a warehouseman, and is unable to determine who is the true owner, or to whom the delivery should be made. The judgment demanded is, among other things, that the defendants be required to interplead concerning their respective claims to the property, that a receiver be appointed, and that the plaintiff be discharged from further liability upon delivering the property to him.

The facts alleged bring the case, as it seems to me, directly within the provisions of the statute which permit a warehouseman to maintain an action for interpleader. Section 103 of the General Business Law (Consol. Laws 1909, c. 20) provides that, if more than one person claims the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for nondelivery of the goods, or as an original suit, whichever is appropriate, require all known claimants to interplead. Section 104 provides that where a person other than the one depositing the goods makes a claim to them, or the warehouseman has information of such claim, he is excused from liability for refusing to deliver the same until he has had a reasonable time to ascertain the validity of the respective claims, or to bring legal proceedings to compel all claimants to interplead.

The Art Museum claims to be entitled to the property by virtue of an assignment from the original depositors, the sheriff by virtue of the warrant of attachment, and Vitall Benguiat and Leopold Benguiat as owners. The plaintiff does not know, nor has it the means of determining, who actually owns the property or is entitled to its possession. Under such circumstances, for its own protection, it asks that these different claimants be compelled to litigate among themselves their respective claims. The statute was designed to meet just such a situation. *Beebe v. Mead*, 101 App. Div. 500, 92 N. Y. Supp. 51. The demurrer was sustained, as appears from the opinion of the learned justice sitting at Special Term, because the complaint alleges that the sheriff had, under a warrant of attachment, levied upon the property; that such allegation necessarily implied that the sheriff had taken the goods into his actual custody. But the learned justice inadvertently overlooked other allegations of the complaint, setting forth that "since the delivery of the said goods, and the receipt thereof by the plaintiff, the plaintiff has retained and *still retains* said goods on storage as a warehouseman," and that it is "ready and willing to deliver" them to such persons as the court may direct.

The interlocutory judgment, appealed from, is reversed, with costs to the appellant, and the demurrer overruled, with costs, with leave to the demurring defendant to withdraw its demurrer and answer on payment of costs. All concur.

PEOPLE v. HAMMERSTEIN et al.

(Supreme Court, Appellate Division, First Department. February 7, 1913.)

1. CRIMINAL LAW (§ 1024*)—APPEAL—RIGHTS OF STATE.

Under Code Cr. Proc. § 518, the state may appeal from a judgment of the Court of Special Sessions sustaining a demurrer to an information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2590–2614; Dec. Dig. § 1024.*]

2. SUNDAY (§ 29*)—CRIMINAL PROSECUTION—PERSONS INDICTABLE—THEATER MANAGERS AND PERFORMERS.

Penal Law (Consol. Laws 1909, c. 40) § 2152, entitled "Theatrical and Other Performances on Sunday," forbids the performance of any negro or other dancing, or any performance or exercise of jugglers, on Sunday, and makes every person aiding in such performance, by advertisement, posting, or otherwise, and every owner or lessee of any building who leases or lets it for such performance, guilty of a misdemeanor. Performers at a theater were informed against, jointly with the managers thereof, in that the performers had given a stage exhibition of jugglery on Sunday of a kind forbidden by the Penal Law, and in that the managers, by advertisement and otherwise, aided the performance by permitting the stage to be used therefor, by admitting persons who had paid an admission and directing them to seats, and by distributing programmes containing notices of such jugglery acts. *Held*, on demurrer on the ground that the information charged more than one crime and that the facts did not constitute a crime, that the purpose of the statute was to prohibit theatrical performances on Sunday, and that, if given, the performers and any persons assisting the performance were all principals committing the same crime by violating the provision of the same statute.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 13, 67, 69–72; Dec. Dig. § 29.*]

3. SUNDAY (§ 29*)—CRIMINAL PROSECUTION—SENTENCE.

Penal Law (Consol. Laws 1909, c. 40) § 1937, providing an imprisonment for not more than one year, or a fine not more than \$500, or both, by its express terms fixes the punishment for giving theatrical performances on Sunday; Penal Law, § 2152, forbidding such performances, not providing a specific punishment therefor.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 13, 67, 69–72; Dec. Dig. § 29.*]

Appeal from Court of Special Sessions, New York County.

William Hammerstein and others were jointly informed against for unlawfully giving a theatrical performance on Sunday. From an order of the Court of Special Sessions, sustaining a demurrer to the information interposed by all the defendants, the People appeal. Reversed, demurrer overruled, and case remitted to the Special Sessions to proceed according to law.

See, also, 150 App. Div. 212, 134 N. Y. Supp. 730.

The information charged William Hammerstein, George Blumenthal, James Harrigan, and Jean Bedini with unlawfully giving a theatrical performance on Sunday, in that defendants Hammerstein and Blumenthal were the persons in charge and control and the managers of the theater, to which the public was admitted on payment of an admission fee, and that by advertisement and otherwise they aided in stage performances of jugglery and dancing, by causing and permitting the stage to be used therefor and in preparing it for such use, and by causing a ticket taker to admit into the theater

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

persons who had theretofore paid an admission fee, and by ushering them to seats, and by causing its employes to distribute programmes containing notices of such dancing and jugglery, and in that defendant Harrigan gave a stage performance in jugglery of the kind forbidden by Penal Law (Consol. Laws 1909, c. 40) § 2152, and in that defendant Bedini, together with an unknown person, gave a similar performance, and that other unknown persons gave stage performances of negro and other dancing.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and SCOTT, JJ.

Robert C. Taylor, of New York City, for the People.

Charles Goldzier, of New York City, for respondent Hammerstein.

McLAUGHLIN, J. The defendants were jointly charged with violating section 2152 of the Penal Law (Consol. Laws 1909, c. 40) by unlawfully giving a theatrical performance on Sunday. The information alleged the giving of a theatrical performance on Sunday, November 27, 1910, at the Manhattan Opera House, to which the public was generally invited, and to which divers persons came who had paid admission fees; that the defendants Hammerstein and Blumenthal were in charge, had control of, and were the managers of the theater; that by advertisement and otherwise they aided in the performance by permitting the stage to be prepared and used, and by causing and permitting persons to act as ticket takers, ushers, and to distribute programmes; that the defendants Harrigan and Bedini did a juggling performance of the kind forbidden by section 2152 of the Penal Law; and that other persons unknown, who were not made defendants, did certain dancing.

The defendants demurred to the information, on the ground that it charged more than one crime, and the facts set forth did not constitute a crime. The demurrer was sustained, as appears from the opinion delivered, on the ground that more than one crime was charged in a single count, for which different punishments were provided.

[1] The people appeal; the notice of appeal being served, so far as appears, only upon the defendant Hammerstein. He challenges the right of the people to appeal, and that presents the first question to be determined. That question was settled by this court on a motion to dismiss the appeal (*People v. Hammerstein*, 150 App. Div. 212, 134 N. Y. Supp. 730), and it was expressly held that, where the district attorney files an information before the Court of Special Sessions, and a demurrer of a defendant to the information is sustained, the people may, under section 518 of the Code of Criminal Procedure, appeal from the judgment thereon.

[2] The defendants, as indicated, were jointly charged with violating section 2152 of the Penal Law. This section is entitled "Theatrical and Other Performances on Sunday," and then follow provisions to the effect that certain acts, including "any performance or exercise of jugglers, acrobats, club performances or rope dancers on the first day of the week is forbidden," and that every person aiding in such exhibition, performance, or exercise, by advertisement, posting, or otherwise, and every owner or lessee of any garden, building, or other room, who leases or lets the same for the purpose of any such exhibi-

tion, performance, or exercise, or who assents to the use of the same for any such purpose, if it be so used, is guilty of a misdemeanor.

The purpose of the statute is obvious. It is to prohibit the giving of a theatrical performance on Sunday. If given, then any person who takes part in such performance in any way comes within its provisions and is guilty of a misdemeanor—the one who performs as well as the one who assists. They are all principals. They are all committing the same crime, by violating the provisions of the same statute, and this the information demurred to charges. It is true the section does not specifically provide what punishment shall be imposed upon one found guilty. It does provide that, in addition to the punishment therefor provided by statute, every person violating the section is subject to a penalty of \$500, to be recovered in the city of New York by the Society for the Reformation of Juvenile Delinquents, and in other cities or towns of the state by the overseers of the poor for the use of the poor.

[3] The punishment not being specifically provided for makes section 1937 of the Penal Law applicable.

The order appealed from, therefore, is reversed, the demurrer overruled, and the case remitted to the Special Sessions to proceed according to law. All concur.

DE BAUN v. PARDEE et al.

(Supreme Court, Special Term, Kings County. February 7, 1913.)

1. PARTITION (§ 48*)—PARTIES—RIGHTS OF ADVERSE PARTIES.

Although some of the defendants in partition are not tenants in common, their rights may be tried and determined.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 118-129; Dec. Dig. § 48.*]

2. BOUNDARIES (§ 20*)—MORTGAGES—HIGHWAYS—DESCRIPTIONS.

Descriptions in a mortgage of city lots beginning at the intersection of the exterior lines of two streets reserve the fee in the highway to the mortgagor.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 123-130, 132; Dec. Dig. § 20.*]

3. PARTITION (§ 16*)—HOLDER OF TAX TITLE—ENFORCEMENT OF RIGHTS.

The purchaser at a tax sale of the fee, conducted by the registrar of arrears pursuant to Laws 1883, c. 114, relating to tax sales, has a good title as against previous owners and all persons claiming under them, which can be enforced in partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 52; Dec. Dig. § 16.*]

Partition by Alonzo E. De Baun against Fred W. Pardee and others. Decree for plaintiff.

Charles C. Suffren, of Brooklyn, for plaintiff.

Albert W. Seaman, of New York City, for defendants Fred W. Pardee, Florence De Baun Pardee, and Agnes De Baun.

Hersey Egginton, of Brooklyn, for defendants John H. Stoddard, Philip M. Wheeler, Caswell W. Stoddard, and Agnes W. Dennett.

Gilbert Elliott, of Brooklyn, for defendant Princess Anne Co.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PUTNAM, J. [1] Although some of the defendants are not tenants in common with plaintiff, but claim adversely, still, with the broadened scope of the present jurisdiction in partition, the rights of such adverse parties may be here tried and determined. *Satterlee v. Kobbe*, 173 N. Y. 91, 65 N. E. 952; *Brown v. Feek*, 204 N. Y. 238, 97 N. E. 526.

[2] The defendants Stoddard et al. claim title to lands formerly parts of the beds of streets, as laid out upon the Ewer map of March 4, 1836. This issue depends upon the proper construction of the boundaries as stated in the 1843 mortgage from Ewer to Maxey, which underlies this title. It granted lots upon Monticello and Green streets, which proposed streets were mapped to cross at about a right angle. These lots were described as known and distinguished by the Ewer map, Nos. 92 to 111, both inclusive—

"which said lots, when taken together, are bounded and described, as follows: Beginning at the southeast corner of Monticello and Green streets; running thence southerly along Green street five hundred (500) feet; thence easterly ninety-seven (97) feet and nine (9) inches to ground now or late of Mrs. Ryerson; thence northerly along the same five hundred (500) feet to Monticello street; thence westerly along Monticello street one hundred and four (104) feet to the point or place of beginning, be the same dimensions more or less."

Under this, plaintiff claims title to the middle of the streets; but defendants Stoddard et al. claim that the fee of the streets was reserved by the mortgagor. *Tietjen v. Palmer* (1907) 121 App. Div. 233, 105 N. Y. Supp. 790, has decided that this mortgage did not include the bed of the street. Although this ruling of this department, as an adjudication between different parties, does not bind this plaintiff, its law, unless subsequently overruled, controls this Special Term.

Descriptions beginning at the intersection of the exterior lines of two streets are held to exclude the highway. Thus in *Trowbridge v. Ehrich* (1908) 191 N. Y. 361, 84 N. E. 297 (which dealt with a map filed, and a grant made, in 1882), the start was at the intersection of the northerly line of 163d street with the easterly line of Stebbins avenue, so that the bounds began at and followed the external street line, excluding title to the streets. Judge Haight, however, added:

"Had she commenced at the intersection of the two streets, and thence ran along the street, it would have been apparent that she intended to convey to the center of the street."

The First Department has held that a like description in a grant made in 1856, "beginning at the southwesterly corner" of the crossing streets, included the fee in half the adjacent highway. *Woolf v. Woolf*, No. 3 (1909) 131 App. Div. 751, 116 N. Y. Supp. 104.

The ordinary presumption that one conveying land bounded on a highway grants the fee to the middle line may be rebutted. This may be—

"by an express provision in the deed to the effect that the fee in the highway was not intended to be conveyed, or by the use of such words as necessarily exclude the highway from the description of the premises conveyed, as where the description of the premises is bounded upon the exterior line of a highway, or commences at a point upon one side thereof and thence runs

along the side to a point specified; but where the premises are bounded by, on, or along a highway, or running along a highway, without restricting or controlling words, the instrument must be construed as conveying the grantor's title in the land to the center of the highway." *Van Winkle v. Van Winkle*, 184 N. Y. 103, 203, 77 N. E. 33, 35.

Here the map referred to shows the southeast corner as formed by the exterior street lines, and that is the only street corner to satisfy the description of the initial point. It would therefore seem that this boundary starts upon such exterior street lines, and from a point upon one side thereof. What, indeed, is the difference between saying in words the intersection of the southerly line of Monticello street with the easterly line of Green street, and pointing out and delineating this precise intersection by a diagram, as is the office of the Ewer map? The reason that a grant bounded along a proposed street conveys the grantor's title to the middle line, even if such projected street is never opened, is that the grantee's right is to be determined as of the time the conveyance was made. *Trowbridge v. Ehrich*, 116 App. Div. 457, 458, 101 N. Y. Supp. 995.

But is not this imputed intent to convey beyond the stated metes and bounds to be also determined by the rules of construction as received and operative at the time of the grant? In December, 1842, less than a year before this mortgage, it was stated in the argument of Mr. Beardsley (afterwards Chief Justice) that this rule of construction, carrying a grant of land bounded on a road or river to the center of the highway or river, did not apply to the conveyance of city lots. *Childs v. Starr*, 4 Hill, 369, 370. If the rule of construction here invoked did not then exist, how could Mr. Ewer be presumed to have intended such a result? Even in case of conveyances of farm lands, such a canon of construction is applied with hesitation. Thus the deeds of 1799 of property along the Bloomingdale road were on appeal restricted to giving an easement, instead of a fee, in the highway. *Holloway v. Southmayd*, 139 N. Y. 390, 402, 34 N. E. 1047, 1048. In refusing to follow the General Term, Judge Gray deplored "the appearance of shaking the stability of decisions." Regarding the Althorp and Jauncey deeds he said:

"In either case, we are inclined to the view that the descriptive monuments, or starting points for the boundary lines, cannot be fixed in the center of the Bloomingdale road without straining too much the language used." 139 N. Y. page 413, 34 N. E. page 1052.

Certainly the rule of stability of decisions would be infringed if this court should pronounce these boundaries as taking in the fee of the streets, against the determination of the appellate court (in the suit by plaintiff's predecessor) that this mortgage description had excluded the title to the streets. The decision of *Tietjen v. Palmer*, *supra*, is therefore followed.

[3] The other defendant, however, the Princess Anne Company, holds subject to a tax sale of the fee conducted by the registrar of arrears of the former city of Brooklyn, pursuant to chapter 114 of the Laws of 1883. As all the requisite proceedings were complied with, the purchaser obtained a good title as against the previous owners and

all persons claiming under them (*Croner v. Cowdrey*, 139 N. Y. 471, 34 N. E. 1061, 36 Am. St. Rep. 716), and this superior title can be enforced in this action (*Obeymeyer v. Behn*, 123 App. Div. 440, 108 N. Y. Supp. 289; *Id.*, 195 N. Y. 588, 89 N. E. 1106).

Plaintiff is therefore entitled to judgment that he is seised in fee, subject to his wife's dower right, of an undivided three-fourths, and the defendant Pardee of an undivided fourth, of the parcel numbered 2 in the amended complaint, with costs against the Princess Anne Company. Defendants John H. Stoddard, Philip M. Wheeler, and Caswell Wheeler Stoddard, as executors and trustees, are entitled to judgment as to parcel No. 1.

Decree to be settled on notice.

KYLE v. CITY OF NEW YORK.

(Supreme Court, Appellate Division, Second Department. February 7, 1913.)

1. PLEADING (§ 248*)—AMENDMENT—SUBJECT-MATTER.

An amendment to a complaint for personal injuries, by inserting additional allegations as to the extent of such injuries, does not in any way change the cause of action originally stated, nor substitute a new cause of action therefor, and hence is allowable.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 709; Dec. Dig. § 248.*]

2. APPEAL AND ERROR (§ 1041*)—PREJUDICE—AMENDMENT OF PLEADING.

Where, upon an amendment adding allegations to the complaint as to the extent of plaintiff's personal injuries, no new answer was necessary, and where the only inconvenience was in being required to attend upon the motion to amend, and it was provided that the issues should remain as of the original date, requiring payment only of the costs of the motion was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106-4109; Dec. Dig. § 1041.*]

Appeal from Special Term, Richmond County.

Action by Ella Kyle against the City of New York. From an order of Special Term, granting plaintiff's motion to serve an amended complaint, defendant appeals. Affirmed.

Argued before JENKS, P. J., and BURR, THOMAS, CARR, and WOODWARD, JJ.

Clarence L. Barber, of New York City (Terence Farley, of New York City, on the brief), for appellant.

Eugene Lamb Richards, Jr., of New York City, for respondent.

BURR, J. Plaintiff brings this action to recover for personal injuries alleged to have been sustained by her through defendant's negligence in the operation and control of the ferryboat Nassau, running between Whitehall street, in the borough of Manhattan, and St. George, in the borough of Richmond. The case came on for trial at a term of this court held in Richmond county in November, 1912. At the trial plaintiff moved to amend her complaint by inserting additional allegations as to the extent of her injuries. Defendant claiming sur-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

prise, plaintiff asked leave to withdraw a juror, which was granted, and then moved at Special Term to amend her complaint in this respect only. The motion was granted upon payment of \$10 costs, and the order contained a provision that the answer of defendant to the original complaint should be deemed its answer to the amended complaint, and that the issue should remain as of the original date. Defendant appealed from each and every part of the order, but upon the argument of the appeal confined its objections to two: First, that the terms imposed are inadequate; and, second, that the order deprives defendant of a right to serve a new answer to the amended complaint.

[1] The amendment here allowed does not in any manner change the cause of action originally stated, nor substitute a new cause of action therefor. In this respect it differs from that class of cases cited by appellant, of which *McEntyre v. Tucker*, 40 App. Div. 444, 58 N. Y. Supp. 146, and *Palazzo v. Degnon-McLean Contracting Co.*, 115 App. Div. 172, 100 N. Y. Supp. 681, are types. It is of a character which might have been granted upon the trial, except for the fact that defendant claimed surprise. It might well be that it could not be justly expected to meet the additional claim for damages arising out of facts not originally pleaded because, as plaintiff alleges, unknown to her at the time when the action was commenced.

[2] The purpose of imposing terms as a condition of amendment is to recompense a party for the additional labor devolved upon it by reason of such amendment. In this case the situation is similar to that which would have arisen if plaintiff had moved at Special Term before the case came on for trial. It does not appear that any new answer is required on the part of defendant, for, in the absence of proof to the contrary, which does not appear in this record, since the original complaint and answer are not made a part thereof, it may be presumed that the nature and extent of plaintiff's injuries were put in issue. It is true that defendant has been put unnecessarily to the burden of preparing for a trial which at plaintiff's request was suspended; but defendant's compensation for that might be met by imposing, as terms for the withdrawal of a juror and the postponement of the trial, the payment of a trial fee. It does not appear in this case whether such terms were imposed, or whether defendant acquiesced in the postponement of the trial. Upon this record, all the inconvenience that defendant seems to have suffered arises out of being required to attend upon the motion to amend. The granting of motion costs is sufficient compensation for that. The order further provided that the issue should remain as of the original date. This cannot prejudice the defendant.

The order should be affirmed, with \$10 costs and disbursements. All concur.

PERLMAN v. I. BLYN & SONS.

(Supreme Court, Appellate Division, First Department. February 7, 1913.)

TRIAL (§ 127*)—CONDUCT OF COUNSEL—APPEAL TO PREJUDICE.

A question by counsel for plaintiff to a witness, as to whether he was connected with the insurance company that was in the case, was reversible error, on the ground that it sought to prejudice the rights of the defendant to a fair and impartial trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 275; Dec. Dig. § 127.*]

Appeal from Trial Term, New York County.

Action by David A. Perlman, an infant, etc., against I. Blyn & Sons. From a judgment entered on verdict, and from an order denying motion for new trial, defendants appeal. Judgment and order reversed.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Edward J. Redington, of New York City, for appellants.

Reuben M. Cohen, of New York City, for respondent.

PER CURIAM. The judgment and order appealed from should be reversed, and a new trial ordered, with costs to appellant to abide the event, on the ground that the counsel for the plaintiff asked a witness on the stand:

"Are you connected with this insurance company that is in this case?"

That question having been asked, counsel for the defendant moved to withdraw a juror, and to have a mistrial declared, on the ground that it was sought to prejudice the rights of the defendant to a fair and impartial trial. See *Akin v. Lee*, 206 N. Y. 20, 99 N. E. 85.

WENTWORTH v. RIGGS.

(Supreme Court, Appellate Term, First Department. February 11, 1913.)

INNKEEPERS (§ 11*)—RESTAURANTS—WRAPS OF GUESTS—DELIVERY TO BAILEE—“ACTUAL DELIVERY”—LIABILITY FOR LOSS.

Plaintiff entered defendant's restaurant, which consisted of a large room, along the walls of which, between the tables, were hooks for hanging wraps, as well as around columns in the room. Plaintiff removed his overcoat, hung it on a hook about two feet from the table at which he had seated himself, and while he was eating his meal the coat was removed. *Held*, that the coat laid off by plaintiff at defendant's invitation was actually delivered to the temporary custody and exclusive possession of defendant, and that defendant was therefore liable to plaintiff for its loss.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 17-40; Dec. Dig. § 11.*]

For other definitions, see Words and Phrases, vol. 1, p. 156.]

Seabury, J., dissenting.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Municipal Court, Borough of Manhattan, Ninth District.

Action by Reginald De M. Wentworth against Leon C. Riggs. From a Municipal Court judgment in favor of plaintiff, defendant appeals. Affirmed.

Argued October term, 1912, before SEABURY, GUY, and BIJUR, JJ.

C. V. Oden Hughes, of New York City (Hugo Wintner, of New York City, of counsel), for appellant.

Claudius A. Hand, of New York City (Frank P. Woglom, of New York City, of counsel), for respondent.

BIJUR, J. Plaintiff sues to recover the value of an overcoat, which disappeared after he had hung it upon a hook about two feet from the table at which he had seated himself in defendant's restaurant. The restaurant is situated at No. 43 West Thirty-Third street, in the heart of a high-class retail shopping district, and the room in which plaintiff was seated is a large, open one, accommodating from 300 to 400 people.

"Along the walls between the tables are hooks on which you hang your coats. I think there were four columns in the center of the room, located around; and around those columns are rows of hooks upon which you hang your coats. * * * I hung mine on a hook which was immediately behind the table at which I sat—within two feet of it."

There was no place for checking coats or other personal property, but the cashier was accustomed to allow persons to place satchels and similar articles "behind the counter, * * * inside of a gate," in "a large place, about half as large as that jury box"; but no notice to this effect was given to patrons, and the plaintiff was not aware of such practice. According to defendant, it is a rule that waiters are not allowed to take into their possession the coats or belongings of guests. The bills of fare, as well as a very few placards on the walls, carried the inscription:

"Not responsible for hats, overcoats, umbrellas, etc."

Plaintiff had not noticed this inscription until after his attention was called to it at the time of the loss of his coat.

It seems to be undisputed that in this restaurant, as distinguished from the one involved in *Harris v. Childs* (Sup.) 84 N. Y. Supp. 260, plaintiff was impliedly invited to remove his outer clothing. The difficulty, after conceding the invitation to remove the garments, seems to consist in determining whether they remained thereafter in the custody of the owner or were committed to the care of the proprietor—in short, whether there was a bailment.

I am not prepared to say that any clear rule of universal application can be found in the cases. See *Buttman v. Dennett*, 9 Misc. Rep. 462, 30 N. Y. Supp. 247; *Simpson v. Rourke*, 13 Misc. Rep. 230, 34 N. Y. Supp. 11; *Duckworth v. Codrington* (Sup.) 136 N. Y. Supp. 68; *Bird v. Everard*, 4 Misc. Rep. 104, 23 N. Y. Supp. 1008; *Montgomery v. Ladjing*, 30 Misc. Rep. 92, 61 N. Y. Supp. 840.

In *Bunnell v. Stern*, 122 N. Y. 539, 543, 25 N. E. 910, 10 L. R. A. 481, 19 Am. St. Rep. 519, the proprietors of a large retail store were held liable as "voluntary custodians for profit to themselves," where a customer, invited to try on wraps, had laid off her coat.

"It was necessary for her to lay it down somewhere. No place was provided for that purpose; there was no chair, even, in sight. She put it in the only place that was available, unless she threw it on the floor, and, as she did so, in contemplation of law, the defendants stood looking at her."

The last clause evidently refers to the fact that the clerk, who waited upon her, as well as a clerk behind the counter, saw her lay it down.

In *Wamser v. Browning, King & Co.*, 187 N. Y. 87, 79 N. E. 861, 10 L. R. A. (N. S.) 314, the plaintiff, desiring to purchase a vest, was told by a clerk, then otherwise engaged, that the vests were piled up on a table some distance away, *and that he could go over and help himself*. His own coat and vest, while he was trying on a new one—but not in the presence of, or even near, any clerk of the establishment—was lost; and the conclusion of the court is:

"We, therefore, are of the opinion that the loss occurred through the negligence of the plaintiff."

The absence of the clerk and of his invitation to lay off plaintiff's clothing was commented on. See, also, *Powers v. O'Neill*, 89 Hun, 129, 34 N. Y. Supp. 1007.

In *Pattison v. Hammerstein*, 17 Misc. Rep. 375, 39 N. Y. Supp. 1039, it was held that occupants of a box in a theater, who hung their outer clothing upon hooks affixed to the wall of the box, did not commit them to the custody of the proprietor; and, no "evidence of negligence being apparent from some act of commission or omission" on the part of the proprietor, it was decided that he had not been shown to be liable. The box, in which the clothing was hung, was screened off from the rest of the house, and plaintiff permitted persons, not of his party, to enter the box freely, without any objection on his part.

It is significant that, in the case last cited, the clothing was hung in an inclosure exclusively engaged by the plaintiffs and separated from the balance of the house; whereas, in the case at bar, plaintiff's coat was hung upon the wall of a large, open room, filled with the employes of the defendant, to every one of whom it was in full view. Under these circumstances, it seems to me to be the natural, if not the only, conclusion that the coat laid off by plaintiff, at the defendant's invitation, was as much "actually delivered" (as defined by Mr. Justice SEABURY, in his opinion) to the temporary custody and exclusive possession of the defendant as if it had been hung in a coat room provided by the defendant, and that, had there been any reason for such action, defendant might have rightly prevented the plaintiff from resuming possession of the coat until defendant or its agents had been satisfied of plaintiff's title thereto by some appropriate means. Surely this is a far more rational inference to be drawn from the circumstances than to argue that the coat, hung on a hook two feet from the

plaintiff and behind him, was in his personal care and custody while he was engaged in eating the meal provided by the defendant.

I think, also, that upon the evidence adduced by the defendant himself, regardless of the question of bailment, there was an absence of due and adequate care and supervision over the property of his guests, under circumstances in which he became necessarily obliged to exercise the same; but I prefer to rest my decision upon the ground of actual bailment.

The judgment should be affirmed.

GUY, J. I concur, on the ground that the evidence establishes a constructive delivery to defendant.

SEABURY, J. (dissenting). I am unable to agree with the views expressed in the prevailing opinion. In view of the precautions taken by the defendant to police and care for the property of his patrons, I think it is evident that he cannot be held liable for the loss of the overcoat upon any theory of negligence, unless there was a bailment. If the defendant is to be held liable at all, it can only be upon this latter theory.

Confusion has been engendered by certain cases, which seem to discuss constructive bailment as if it were identical with constructive delivery. The two things are distinct. Formerly delivery was regarded as the essence of a bailment. As this branch of the law has developed, cases of constructive bailment have been recognized, covering cases where there had been no delivery, either actual or constructive, as where one held the possession of a chattel under such circumstances that the law placed upon the person having the possession of the chattel the obligation to deliver it to another. The typical instance of such a constructive bailment is where one sells a chattel to another, who pays the price thereof, and the vendor refuses to deliver it to the vendee. Here the law implies the contract of bailment, and holds the vendor answerable as bailee. In such a case it is apparent that there has been no delivery by the bailor to the bailee, and yet the bailment exists constructively. All the other examples of constructive bailment which are given in the books, as in the case of a finder, of a captor or salvor, of an attaching officer, are cases where the person having the *possession* of the chattel is held to be a bailee, although there has never been either an actual or a constructive delivery of the chattels to the bailee by the bailor. In other words, the essential fact of legal significance in all these cases is possession. It certainly is not delivery; for, in none of these cases of constructive bailment, is there either an actual or a constructive delivery.

The older definitions of the term "bailment" seem to accentuate merely the necessity for a delivery. Chief Justice Holt, in his celebrated opinion in *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Smith Lead. Cas. 354, which is supposed to have laid the foundations of the English law of bailment, divides bailment into six different sorts or classes and defines each. Delivery is in every case the essential element in Lord Holt's definition. So, also, Sir William Jones, Blackstone, Mr.

Justice Story, and Chancellor Kent all give definitions of the term "bailment" which state that there must be a delivery. Jones on Bailment, 1, 117; 2 Black. Comm. 451; 2 Kent's Comm. lect. 40, p. 558 (4th Ed.); Story on Bailment, p. 5. Mr. Schouler, in his American notes to *Coggs v. Bernard*, in the ninth American Edition of Smith's Leading Cases (volume 1, p. 400), quotes the following definition of the term "bailment" from Bouvier's Dictionary:

"A delivery of some chattel by one party to another, to be held according to the special purpose of the delivery, and to be returned or delivered over when that special purpose is accomplished."

After commenting upon the conciseness of this definition, and admitting that it conforms fairly to the term "bailment" itself, Mr. Schouler says:

"But this writer finds such a scope too narrow to meet a number of instances which are properly referred to in this branch of the law, as where there is no strict delivery, as in the case of a finder, of a captor or salvor, of an attaching officer, of a person selling goods and retaining possession for the new owner, and the like; *for, while bailment imports literally delivery, the rights and duties fasten rather upon a possession acquired by the person in question than upon any contract or delivery.* Hence we may essay this new definition of our own, that *bailment consists in the holding of a chattel by some party under an obligation to return or deliver it over after some special purpose is accomplished.*"

This definition includes within its scope constructive bailments; whereas the earlier definitions of Holt, Jones, Blackstone, Story, and Kent in terms cover only cases of actual bailment.

I. In an actual bailment there must be a delivery of the chattels to the bailee or his agent. The delivery may be either actual or constructive.

(a) An actual delivery consists in giving to the bailee or his agents the real possession of the chattel. *Shindler v. Houston*, 1 Denio, 48.

(b) A constructive delivery comprehends all of those acts which, although not truly comprising real possession of the goods transferred, have been held constructive *juris* equivalent to acts of real delivery, and in this sense includes symbolical or substituted delivery. *Shindler v. Houston*, *supra*; *Bolin v. Huffnagle*, 1 Rawle (Pa.) 9; 35 Cyc 189. In 5 Cyc. 165, in discussing the sufficiency of the delivery in order to constitute an actual bailment, it is said:

"Such a full delivery of the subject-matter must be made to the bailee as will entitle him to exclude for the time of the bailment the possession of the owner, as will make him liable as its sole custodian to the latter in the event of his neglect or fault in discharging his trusts with respect to the subject-matter, and as to require a redelivery of it by him to the owner or other person entitled to receive it after the trusts of the bailment have been discharged. Where the delivery can be constructive only, there must be an intention to transfer the possession of the property."

In *Fletcher v. Ingram*, 46 Wis. 202, 50 N. W. 425, the court said:

"To constitute a person a bailee of property, he must have such full and complete possession of it as to exclude, for the time of the bailment, the possession of the owner (*Benjamin on Sales*, § 174), and he should have so far assumed the charge and control of the property as to be the custodian of it,

as to be liable to the owner for any losses or damages occasioned by his neglect or fault in the manner in which he discharges his trusts with respect to it."

II. A constructive bailment arises where the person having the possession of a chattel holds it under such circumstances that the law imposes upon him the obligation of delivering it to another.

From the definition of the two subdivisions of actual bailment, and from the definition of a constructive bailment, there ought to be no difficulty in determining whether there was in the case at bar a bailment of the plaintiff's overcoat. Neither the defendant nor his agents ever had the real possession of the overcoat, and therefore there was not an *actual* delivery of the coat. The facts proved are inconsistent with the hypothesis that the plaintiff intended to transfer to the defendant or his servants such a possession of the coat as would exclude, for the time of the bailment, the possession of the owner. The overcoat hung upon a hook within two feet of where the plaintiff was sitting during the meal, and it does not seem to be capable of dispute that during that time the defendant did not have such a possession of it as to exclude the possession of the plaintiff. If the plaintiff had wished to reach his overcoat at any time during the meal, either to take something from one of the pockets of the coat or for any other purpose, he was entirely free to do so, without requiring any act on the part of the defendant or his servants. The presence of the hooks may be construed into a invitation to the patron to hang his coat upon them; but hanging the coat upon the hook cannot be reasonably held to constitute a delivery of the coat to the *exclusive* possession of the defendant. The hooks were obviously placed there for the convenience of the patron, provided he wished to retain possession of his coat. If he wished to deposit the coat in the exclusive possession of the defendant, he should have availed himself of the accommodations which the defendant provided for that purpose. If he had done this, the defendant would have been liable. *Buttman v. Dennett*, 9 Misc. Rep. 462, 30 N. Y. Supp. 247. The frequency with which the plaintiff was accustomed to visit the defendant's restaurant leaves no room for doubt that he knew of the accommodations provided by the defendant for caring for the hats, coats, and other articles of his patrons.

In the case at bar it does not appear that the defendant or any of his servants ever saw, much less received, the overcoat. How the defendant, under all the circumstances disclosed, can be held to have had exclusive possession of the overcoat, is not clear to me. *Bunnell v. Stern*, 122 N. Y. 539, 25 N. E. 910, 10 L. R. A. 481, 19 Am. St. Rep. 519, *Bird v. Everard*, 4 Misc. Rep. 104, 23 N. Y. Supp. 1008, *Buttman v. Dennett*, 9 Misc. Rep. 462, 30 N. Y. Supp. 247, and *Delmour v. Forsythe* (Sup.) 128 N. Y. Supp. 649, were decided upon the ground that the special circumstances disclosed warranted the inference that the bailee assumed the temporary custody of the chattel. Even though the decision in *Bunnell v. Stern*, *supra*, was placed upon this ground, I think that that case extended the rule applicable to this subject very far, and the decision of the Court of Appeals in *Wamser v. Browning, King & Co.*, 187 N. Y. 87, 79 N. E. 861, 10 L.

R. A. (N. S.) 314, I interpret to mean that the rule declared in *Bunnell v. Stern* will not be extended to cover cases not identical with it.

In *Pattison v. Hammerstein*, 17 Misc. Rep. 375, 39 N. Y. Supp. 1039, it was held that the manager of a theater, in the absence of special agreement, was not liable for his patrons' property, though it consisted of apparel which is usually laid aside by them while attending the play, and is not responsible for the loss thereof while it is hanging on a hook in the box occupied by the patrons, unless he or his servants have been guilty of negligence or wrongful act. In that case Mr. Justice Bischoff said:

"A bailment implies the delivery of a chattel; and, to subject one to liability as a bailee, it is a constituent that he had voluntarily assumed or retained the custody of the chattel alleged to have been bailed. * * * There was no invitation to the plaintiff, express or implied, held out by the defendant, that the former should yield his personal vigilance even for a moment. The hooks provided by the defendant were a means of enabling the occupants of the box to care for their apparel with greater ease and comfort to themselves; but an effort to imply from the mere presence of such hooks an assumption by the defendant of the custody of whatever the occupants of the box might place thereon tortures reason."

I think that the views herein expressed are further fortified by *Wamser v. Browning, King & Co.*, 187 N. Y. 87, 79 N. E. 861, 10 L. R. A. (N. S.) 314, *Harris v. Child's Unique Dairy Co.* (Sup.) 84 N. Y. Supp. 260, *Montgomery v. Ladjing*, 30 Misc. Rep. 92, 61 N. Y. Supp. 840, and *Duckworth v. Codington Co.* (Sup.) 136 N. Y. Supp. 68.

The facts of this case, viewed in the light of the foregoing authorities, seem to me to establish that there was no actual bailment, because there was neither an actual nor a constructive delivery of the coat. That this is not a case of constructive bailment is apparent from the fact that the defendant never had the actual possession of the coat.

It follows that there was neither an actual nor a constructive bailment, and, as there is no other ground, under the facts in this case, upon which the defendant's liability can be predicated, the judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event.

RAFSKY v. FREDERICK A. SMITH CO., Inc., et al.

(Supreme Court, Special Term, New York County. February 4, 1913.)

BILLS AND NOTES (§ 497*)—BONA FIDE PURCHASER—BURDEN OF PROOF.

A purchaser for a valuable consideration of notes given by a buyer for the price of goods, with knowledge of the terms of sale and of the seller's representations, must, to recover from the buyer, show that he acted in good faith and had no knowledge of the seller's fraud inducing the buyer to purchase.

[Ed. Note.—For other cases, see Bills and Notes, Cent Dig. §§ 1448, 1675-1681, 1683-1687; Dec. Dig. § 497.*]

Action by Irving Rafsky against the Frederick A. Smith Company, Incorporated, and another. Judgment for plaintiff.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Deutsch & Peyser, of New York City, for plaintiff.

Wm. A. Schumacher, of New York City, for defendant Smith Co.

J. Lester Fierman, of New York City, for defendant Motor Finance Co.

NEWBURGER, J. Plaintiff purchased from the defendant Smith Company an auto car truck for \$1,100. The agreement provided that the plaintiff should pay the same as follows: Four hundred dollars in cash, and the balance of \$700 in monthly installments of \$100. The agreement further provided that all parts of the car were to be perfect and to carry at least one ton. After signing the agreement, Smith, the president of the company, stated to plaintiff that he could not finance the matter, and that he would have to call with him on the defendant Motor Finance Company to take care of the matter, to which the plaintiff replied:

"If it will help you, I will go. It makes no difference to whom I pay the notes."

Thereupon the parties called at the office of the Finance Company, informed Mr. Black, an officer of the company, of the agreement between plaintiff and the Smith Company, repeating the representation that Smith had made to the plaintiff, and showing Mr. Black the agreement. Subsequently all the parties met in the office of the Motor Finance Company, and the notes and the chattel mortgage were signed by the plaintiff. The plaintiff and his witnesses testified that the car was of a certain model, which is borne out by the chattel mortgage prepared by the Finance Company. It also appears that Smith paid the finance company a bonus of 10 per cent., and that the sum of \$700, the amount of the notes, was paid by the Motor Finance Company to the Smith Company, and no part thereof to the plaintiff.

The representations made by Smith as to the car were undoubtedly false and untrue, and that the Motor Finance Company had knowledge that such representations were made and were false there can be no question. The mere fact that the Motor Company claims to have paid a valuable consideration for the notes is not sufficient. It must not only show it has acted in good faith, but that it had no knowledge of the fraud from the inception of the transaction. See *Bank v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; *Lawrence Bros. v. Heylman*, 111 App. Div. 848, 98 N. Y. Supp. 121, affirmed 189 N. Y. 573, 82 N. E. 1128. I therefore find that the plaintiff was induced to purchase the car through the fraudulent representation of the defendant Smith Company, and that the Motor Finance Company had knowledge of said fraudulent representation.

Judgment for plaintiff. Findings signed. Submit decree.

OBERNDORF v. FARMERS' LOAN & TRUST CO. et al.

(Supreme Court, Special Term, New York County. February 4, 1913.)

WILLS (§ 741*)—GIFT FOR BENEFIT OF LEGATEE'S FAMILY—RIGHTS OF WIFE.

Where a testator bequeathed one-half of the income of his residuary estate to his son, for the benefit of himself and his family, the son's wife could not sue to impress a lien thereon in her favor, but must resort to a matrimonial action to enforce her right to support.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1896-1899; Dec. Dig. § 741.*]

Action by Minnie G. Oberndorf against the Farmers' Loan & Trust Company and others. On motion to dismiss complaint. Motion granted.

See, also, 148 App. Div. 227, 132 N. Y. Supp. 1004.

May & Jacobson, of New York City, for plaintiff.

Geller, Rolston & Horan, of New York City, for defendant Farmers' Loan & Trust Co.

Willis Bruce Dowd, of New York City, for defendant William D. Oberndorf.

NEWBURGER, J. Plaintiff and William D. Oberndorf were married on October 3, 1893. They separated in 1907. On October 21, 1896, Julius Oberndorf, the father of William D., died, leaving a will and codicil in which he provided that one-half of the income of the residuary estate should be paid to William D., for the benefit of himself and family. William D. and the plaintiff entered into an agreement on December 31, 1907, with one Bigger, as trustee, to live apart, and empowering the trustees under the will of the father to pay to Bigger for the benefit of the plaintiff the sum of \$1,000 per year. Subsequently the Farmers' Loan & Trust Company was substituted as trustee under the will. The Trust Company refused to recognize the assignment of income, whereupon William D. Oberndorf executed a power of attorney to the plaintiff and Bigger, authorizing them to demand and receive from the estate \$1,000 per year. The payments were made until November, 1909, when William D. Oberndorf revoked the power of attorney, and no payments have since been made.

The plaintiff brought an action to construe the will of Julius Oberndorf, claiming that the provision for William D. Oberndorf and family included herself as the wife of said William D. The trial justice found for the plaintiff, but the Appellate Division reversed the judgment. See 148 App. Div. 227, at page 229, 132 N. Y. Supp. 1004, at page 1006. From a reading of the opinion it is clear that whatever right the wife has to support from her husband must be determined in a matrimonial action. This action, however, is brought to impress a lien in favor of plaintiff upon the income of the trust fund directed to be paid to William D., and the Appellate Division said:

"The trustees under the will were vested with no discretionary powers. They were not directed to apply the income in any way, nor to supervise its

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

distribution. They were ordered to pay the entire share of the income over to the son, and their powers and duties ended there. The wife was not named as a beneficiary, except in the event of her husband's death, when the trustees were instructed specifically what to do in the contingencies that might then arise. The cases cited by respondent are those wherein the trustees had duties to perform in respect to the fund and were charged with the responsibility of seeing that it was applied to certain designated purposes. That is not this case. Here the only direction to the trustees is to pay to the son. Nor is there any method by which it may be determined that the testator meant that any specified part of the income should go to his daughter-in-law. Whatever rights plaintiff may have to support from her husband must be determined in an appropriate action for separation, when the requisite facts to justify an allowance of alimony can be established. Under the will of Julius Oberndorf she took nothing directly. The trustees were to set apart no sum for her support, and she is without recourse against the estate. We are not now concerned with the question of what her husband's duties towards her may be, whether under the will or apart from it."

The motion to dismiss the complaint must be granted. Findings passed upon.

In re BENJAMIN.

(Supreme Court, Appellate Division, First Department. February 7, 1913.)

1. DEATH (§ 2*)—PRESUMPTION OF DEATH FROM ABSENCE.

An unmarried woman of 34, who in 1873 disappeared from her home without explanation or known cause, taking nothing with her, from whom nothing was afterwards heard, though diligent search was made, will be presumed to have been dead after 7 years from the date of her disappearance.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 1-3; Dec. Dig. § 2.*]

2. EXECUTORS AND ADMINISTRATORS (§ 507*)—SETTLEMENT OF ACCOUNTS—MATTERS DETERMINED—DEATH OF ONE OF NEXT OF KIN.

The fact of the death of one of the next of kin should be determined by the Surrogate's Court, when called upon to do so upon a judicial settlement of the account of an administrator, and not necessarily in a separate proceeding for that purpose.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2004, 2005, 2178-2191; Dec. Dig. § 507.*]

3. DESCENT AND DISTRIBUTION (§ 21*)—NEXT OF KIN—SISTER.

Where the death of a woman without issue has been judicially determined as of a certain date before the death of her sister intestate the share which she otherwise would have taken must be divided among the intestate's next of kin.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 57-62; Dec. Dig. § 21.*]

Appeal from Surrogate's Court, New York County.

In the matter of the judicial settlement of the account of Mary Benjamin, as administratrix of the goods, chattels, and credits which were of Anna Shannon, deceased. From final decree of the surrogate (77 Misc. Rep. 434, 137 N. Y. Supp. 758), directing deposit of one-fourth of surplus in the state treasury, the appeal is taken. Reversed, and proceeding remanded to Surrogate's Court for decree in accordance with opinion.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ARGUED before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

F. R. Minrath, of New York City, for appellants.

Robert P. Beyer, of New York City, for respondent.

DOWLING, J. This is an appeal from a decree of the Surrogate's Court adjudging that it has not been established by adequate proof or with sufficient particularity that Bridget Shannon is dead, or that she did not survive her sister, Anna Shannon, the intestate, and that the remaining one-fourth of the estate of Anna Shannon, reserved by the administratrix pursuant to a prior decree, which would have gone to Bridget Shannon, shall be paid by the administratrix into the treasury of the state for the benefit of the persons who may hereafter appear to be entitled thereto.

The question involved in this appeal is whether, upon the papers presented by the petitioners, it satisfactorily appears that Bridget Shannon had died before the death of the intestate, which occurred on November 12, 1910. This court has so recently laid down rules as to the presumption of death arising from long-continued and unexplained absence that no further discussion of that question is now required. See *Matter of Wagener*, 143 App. Div. 266, 128 N. Y. Supp. 164; *Cerf v. Diener*, 148 App. Div. 150, 132 N. Y. Supp. 1026.

[1] In this case it appears that Bridget Shannon arrived in America in 1863, being then about 24 years of age. She obtained employment at Belleville, N. J., in the home of Dr. Ward, where Margaret Fitzpatrick, another sister, was also employed. She remained with this family for 10 years, or until 1873, when, without a word to any one as to her purpose or intention, with no known or assignable cause, and with no suggestion of any reason therefor, she suddenly disappeared from the place of her employment, leaving behind her a trunk containing her clothes, and taking with her nothing save her then wearing apparel. She was then unmarried, and there is no suggestion that she married thereafter. From that time until the time of making the application herein, no letter or message of any kind had ever been received from her. She had not been seen by any of her family. They had never received any information as to any other person having seen or heard from her, and she disappeared effectually and completely from human vision. Were she living, she would now be about 73 years of age. At the time of her disappearance, her sister, Mary Benjamin, who came to this country with her, was employed and living in the city of Newark, N. J., and she has been in that vicinity ever since. Her sister, Margaret Fitzpatrick, with whom she worked at Dr. Ward's, visited the Ward household after leaving their employment, and at the time of Bridget's disappearance was living in Orange, N. J., where she lived until 1901, and where her family have ever since resided. Mrs. Ward, who is still living, has never heard of Bridget since. Effort has been made by search through the various bureaus of vital statistics, and in insane asylums, as well as by calls upon persons likely to know of her continued existence, to ascertain whether

any trace of Bridget Shannon could be found, but in every instance without success.

Applying the principles laid down in the cases just cited, it seems clear that under the facts in this case Bridget Shannon must be presumed to have been dead at the expiration of 7 years from the date of her disappearance, and at the latest by December 31, 1882, which is 7 years from the latest date, by the most liberal calculation, that can be deemed to have been the time of her disappearance.

[2] That the fact of the death of one of the next of kin should be determined by the Surrogate's Court, when called upon so to do, upon the judicial settlement of the account of an administrator, and not necessarily made in a separate proceeding for that purpose, is determined in the Matter of Wagener, above cited. In this proceeding the citation has been properly published as against Bridget Shannon, if living, or her unknown next of kin, if any there be, and the provisions of section 2523, Code Civ. Pro., have been duly complied with.

[3] Her death without issue at the date mentioned being judicially determined, the share which otherwise would have been hers must therefore be divided among the next of kin of Anna Shannon.

The decree appealed from will therefore be reversed, and the proceeding remitted to the Surrogate's Court for an entry of a proper decree, in accordance with this opinion, with costs to appellant payable out of the estate. All concur.

CROXSON v. FLYNN PLUMBING & HEATING CO.

(Supreme Court, Special Term, New York County. July, 1912.)

1. FIXTURES (§ 27*)—MORTGAGEE OF LAND AND VENDOR OF CHATTELS.

Where plumbing fixtures, sold pursuant to a contract stipulating that they should preserve their character as personalty after their physical annexation to the realty of the buyer, became, on installation, a part of the realty, so that they could not be removed without substantial injury to the freehold, they became, when annexed, subject to a prior recorded mortgage on the realty.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 5, 22, 25, 44, 45, 54; Dec. Dig. § 27.*]

2. FIXTURES (§ 27*)—MORTGAGEE OF LAND AND VENDOR OF CHATTELS.

Plumbing fixtures, consisting of washout closets, oak tanks, iron backs, cocks and overflows, basins with cocks and traps, trays, covers, and legs, hot water boiler, and heater, were, as between seller and buyer for installation in a building, proper subjects for an agreement that they should retain their character as personalty, notwithstanding their installation, and a mortgage on the goods to secure the price, executed and recorded before installation, gave the seller an interest therein, unaffected by notice of a prior recorded mortgage on the realty; and the real estate mortgagee, chargeable with knowledge of the chattel mortgage, who stood by and saw the goods annexed to the realty, with knowledge that the seller expected to retain a lien on them, had no priority over the lien of the seller.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 5, 22, 25, 44, 45, 54; Dec. Dig. § 27.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by Mary S. Croxson against the Flynn Plumbing & Heating Company for an injunction to restrain defendant from foreclosing a chattel mortgage and from removing thereunder any plumbing fixtures installed in a building. Judgment for defendant.

On October 28, 1910, the owners of certain real property in the city of New York entered into a building loan agreement with the plaintiff providing for the erection of two apartment houses thereon. This agreement provided for the loan of \$47,000, to be paid in 12 installments, and was secured by a bond and mortgage covering the real property in that sum. On November 28, 1910, the owners contracted with defendant for plumbing materials and fixtures. On February 3, 1911, the owners executed to defendant a chattel mortgage covering certain plumbing fixtures by the following description: "All washout closets, oak tanks, enameled iron backs, nickel-plated cocks and overflows, enameled iron basins with nickel-plated cocks and traps, white porcelain trays, covers and legs, enameled hot water boiler and heater, and all other plumbing and gas fixtures now installed or which may be hereafter installed in the two five-story buildings owned by the party of the first part hereto [located on the east side of Hoe avenue, 125 feet south of 173d street, in the borough of the Bronx, city and state of New York]; the said fixtures herein granted, bargained, and sold being all the fixtures mentioned and described in a certain contract dated November 28, 1910, between the respective parties hereto, and all fixtures installed or hereafter to be installed in said premises under said contract." On April 13, 1911, the chattel mortgage was filed in the office of the register of the county of New York. On the 13th day of April, 1911, bathtubs were delivered and placed on the street in front of the buildings. None of the fixtures described in the chattel mortgage were in the building prior to the 20th day of April, 1911, and were all installed subsequent to that date.

Frank Harvey Field, of New York City, for plaintiff.

Rolland R. Rasquin, of New York City, for defendant.

GIEGERICH, J. [1] If the plumbing fixtures supplied by the defendant had been of such character that, once affixed, they could not have been removed without substantial injury to the freehold, they would have become, upon installation, a part of the real property, and so subject to the plaintiff's mortgage, which was then of record; and this would have been so, notwithstanding any agreement made between the vendor and vendee of the fixtures with the intention of preserving their character as personal property after their physical annexation to the realty. *Ford v. Cobb*, 20 N. Y. 344; *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Davis v. Bliss*, 187 N. Y. 77, 79 N. E. 851, 10 L. R. A. (N. S.) 458. The defendant, furnishing fixtures of that character, and yet seeking to retain a lien upon them, would be attempting to acquire an interest in the real property, and the record of the prior mortgage upon that property would be notice to it.

[2] The fixtures here in question, however, were of a different character, and whether they should be regarded, when affixed, as still retaining their character as chattels or as having become a part of the real property to which they were annexed, might depend upon various considerations, and even upon the relations of the parties between whom the question arose. It was, at any rate, the proper subject of an express agreement between the vendor and the vendee, and the chattel mortgage was such an agreement, and clearly shows that the parties intended the fixtures to retain their character as chattels, even

after they were put in the building. *Tift v. Horton*, supra; *Fitzgibbons Boiler Co. v. Manhasset Realty Corp.*, 198 N. Y. 517, 92 N. E. 1084, reversing on dissenting opinion of Scott, J., 125 App. Div. 764, 766, 110 N. Y. Supp. 225. It follows, therefore, that since the defendant was merely contracting to supply certain chattels to the owner of the freehold, and was not acquiring or attempting to acquire any interest in the land, the record of the existing mortgage upon the land was not notice to him.

It is urged, however, that the chattel mortgage was void, as to the plaintiff, because when it was made the mortgagor had neither actual nor potential ownership of the chattels, and also because it was not filed until two months after it was made. However forcible these objections might be in a case proper for their application, they cannot prevail here. The plaintiff was chargeable with knowledge of the chattel mortgage, through the knowledge of her agent before the chattels were brought to the premises, or, at any rate before they were annexed thereto. She stood by and saw these chattels annexed to the realty under an agreement by virtue of which, as she knew, the vendor expected to retain a lien upon them. It seems to me impossible to hold that she can now be permitted to come into a court of equity and assert the superiority of her own lien, of which the defendant had no notice.

There must be judgment for the defendant, with costs. Submit, with proof of service, requests for findings in accordance with these views.

(78 Misc. Rep. 557.)

HAMILTON et al. v. HAMILTON et al.

(Supreme Court, Special Term, New York County. December, 1912.)

1. QUIETING TITLE (§ 34*)—PROCEDURE—PLEADING.

A complaint, under Code Civ. Proc. § 1639, to quiet title to a portion of real property formerly held by plaintiff and another as tenants in common, which portion was not covered by mutual conveyances between them, alleging the facts out of which the ownership arises, that plaintiffs had been in possession one year, and that defendants unjustly claimed, or that it appears from the public records that they might so claim, a title adverse to plaintiffs, is sufficient; other allegations or an inappropriate prayer for relief being immaterial.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 69, 71, 72, 76, 77; Dec. Dig. § 34.*]

2. QUIETING TITLE (§ 23*)—RIGHT OF ACTION—POSSESSION BY PLAINTIFFS.

Where tenants in common made mutual conveyances, and one of them immediately after the execution of the deed to him went into possession, erected two houses on the land, and he or his devisees continued in open and notorious possession of the land, which was substantially inclosed, over 30 years, collected the rents and profits to the exclusion of the cotenant, his heirs and devisees, and in an application for a building permit, made by the former tenant shortly after the deed to him, he described himself as the sole owner, possession in him and his devisees sufficient to maintain an action under Code Civ. Proc. § 1639, to determine a claim to real property, was shown, regardless of a mistake in the deed; and in the absence of evidence on behalf of the cotenant or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

his devisees, the devisees of the former tenant were entitled to the relief asked.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 55, 56; Dec. Dig. § 23.*]

3. ESTOPPEL (§ 93*)—EQUITABLE ESTOPPEL—GROUNDS.

Where cotenants made mutual deeds, and afterwards entered into a party wall agreement relating to a line between a portion omitted from the conveyances and the property of one of the cotenants, and such cotenant in a schedule in bankruptcy expressly stated that he owned no real property, he and his heirs were estopped to claim title, after the lapse of over 30 years, to the portion omitted from the conveyances.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 264-275; Dec. Dig. § 93.*]

Action by Gertrude Ray Hamilton and others against Alexander S. Hamilton and others to compel the determination of a claim of real property under Code Civ. Proc. §§ 1638, 1639. Judgment for plaintiffs.

Edward R. Vollmer, of New York City (John O'Connell, of New York City, of counsel), for plaintiffs.

John C. Ten Eyck, of New York City, for guardian ad litem.

Frederick E. Barnard, of New York City, for executors of estate of Schuyler Hamilton.

GAVEGAN, J. This action is brought by the plaintiffs, as heirs and devisees of Robert Ray Hamilton, against defendants, as heirs, devisees, and executors of the estate of Schuyler Hamilton, to compel the determination of a claim to real property under sections 1638 and 1639 of the Code of Civil Procedure, and arose out of the following undisputed facts:

Robert Ray Hamilton and Schuyler Hamilton, his brother, prior to 1881 were the owners of a large number of parcels of real property in the city of New York as tenants in common, including among other parcels certain vacant land on the northerly side of Twenty-Eighth street, beginning 125 feet east of Ninth avenue, and certain other vacant lots on the southerly side of Twenty-Ninth street, east of Ninth avenue. By deed dated the 16th day of May, 1881, Robert Ray Hamilton conveyed to his brother Schuyler 66 feet 8 inches on the northerly side of Twenty-Eighth street, which included a plot running from a point 158 feet 4 inches east of Ninth avenue to a point 225 feet east of Ninth avenue (the latter being the point of beginning); and at the same time Schuyler Hamilton, Jr., conveyed to his brother 50 feet on the southerly side of Twenty-Ninth street and 8 feet 4 inches on the northerly side of Twenty-Eighth street, running easterly from a point 150 feet easterly from Ninth avenue to the westerly line of land conveyed to Schuyler Hamilton. This left the record title to 25 feet on the northerly side of Twenty-Eighth street, beginning at a point 125 feet east of Ninth avenue and running 25 feet easterly therefrom, unconveyed.

[1] The complaint alleges ownership in fee, the facts out of which such ownership arises, that plaintiffs have been in possession

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

one year, and that defendants unjustly claim, or it appears from the public records that the defendants might unjustly claim, a title adverse to the plaintiffs. These allegations are sufficient to satisfy all the requirements of section 1639 of the Code, and it is immaterial whether other allegations are set forth, or whether the prayer for relief is inappropriate. *Norris v. Hoffman*, 133 App. Div. 596, 118 N. Y. Supp. 156, affirmed 197 N. Y. 578, 91 N. E. 1118; *Doscher v. Wyckoff*, 132 App. Div. 139, 116 N. Y. Supp. 389. Defendants' motion to dismiss the complaint is, therefore, denied.

[2] Robert Ray Hamilton, immediately after the execution of the aforesaid deed, went into possession of the property in dispute, erected two houses thereon, and he or his devisees have ever since continued in notorious possession thereof for a period of over 30 years. The testimony shows that the property was inclosed by a substantial inclosure. Robert Ray Hamilton and his heirs and devisees collected the rents and profits, to the exclusion of Schuyler Hamilton, his heirs and devisees, and in an application for a building permit, made shortly after the deed was given, Robert Ray Hamilton described himself as the sole owner of the premises in question. It is clear, therefore, that plaintiffs have made out their ownership of the property, regardless of whether there was a mistake in the deed, and such possession is sufficient to maintain this action. *King v. Townshend*, 78 Hun, 380, 29 N. Y. Supp. 181; *Baker v. Oakwood*, 123 N. Y. 16, 25 N. E. 312, 10 L. R. A. 387. Neither is it material that one of the defendants is an infant. Code Civ. Proc. § 1686.

[3] The testimony also shows that Schuyler Hamilton and Robert Ray Hamilton entered into a party wall agreement before the houses were erected thereon, from which it clearly appears that it was the intention of Schuyler Hamilton to convey to Robert Ray Hamilton the 25 feet in dispute; also that Schuyler Hamilton, in filing a schedule in bankruptcy, expressly stated that he owned no real property. By these facts, taken in conjunction with the facts that Robert Ray Hamilton acted on the assumption that he was the true owner, and expended money, as stated before, without any objection from Schuyler Hamilton or any of his privies, but rather with their acquiescence, the defendants are estopped, after the great lapse of time, from asserting any title adverse to Robert Ray Hamilton or to these plaintiffs. *Brown v. Bowen*, 30 N. Y. 519, 541, 86 Am. Dec. 406; *Reeves Real Prop.* § 1013.

The plaintiffs have proved *prima facie* every element necessary to maintain this action, and, in the absence of any evidence on the part of defendants, they are entitled to the relief asked. *Hill v. Mowbray*, 146 App. Div. 507, 131 N. Y. Supp. 727. Judgment for plaintiffs.

Judgment for plaintiffs.

**TRUSTEES OF LEAKE AND WATTS ORPHAN HOUSE IN CITY OF
NEW YORK v. HOYLE et al., Bronx Valley Sewer Commission.**

(Supreme Court, Special Term, Westchester County. February 15, 1913.)

1. LANDLORD AND TENANT (§ 90*)—VACATION—HOLDING OVER.

Where a lessee, on removing from the leased premises, left only some lumber, broken tools, broken wheelbarrows, etc., scattered about, and some spiles close to the edge of a river, the leaving of such material did not constitute a holding over beyond the term.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 284-289; Dec. Dig. § 90.*]

2. LANDLORD AND TENANT (§ 90*)—LEASE—RENEWAL.

Where a lessee had an option to extend or renew the lease for from three to nine months from July 1, 1911, as it might elect, the lessee, by holding over without stating which period it elected to renew for, would be deemed to have elected the shortest period under the privilege.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 284-289; Dec. Dig. § 90.*]

3. LANDLORD AND TENANT (§ 90*)—LEASE—RENEWAL—HOLDING OVER—EXTENSION.

A lease providing for renewal for from three to nine months from July 1, 1911, at the lessee's election, also declared that, if it were renewed for a term less than six months, the rent should be paid monthly during the renewed period, and not quarterly. *Held*, that the lessee, by paying the rent quarterly, extended the term of its renewal of the lease to six months, or January 1, 1911, and by holding over after that date again extended the lease for another six months, to July 1st following.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 284-289; Dec. Dig. § 90.*]

4. CONTRACTS (§ 127*)—LEGALITY—EXCLUSION OF EVIDENCE.

A provision in a lease that it should not be admissible in evidence in any legal proceeding or action then pending between the parties or thereafter to be commenced for any purpose whatever was invalid, as the court could not be ousted of the right to consider competent evidence by a contract between the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 608-615; Dec. Dig. § 127.*]

Action by the Trustees of the Leake and Watts Orphan House in the City of New York, a corporation, against Frank J. Hoyle and others, as the Bronx Valley Sewer Commission, appointed pursuant to Act June 16, 1911 (Laws 1911, c. 361). Judgment for plaintiff.

R. E. & A. J. Prime, of Yonkers, for plaintiff.

Edgar C. Beecroft, of New York City, for defendants.

TOMPKINS, J. The defendants constitute the Bronx Valley Sewer Commission. About January 1, 1910, the Bronx Valley Sewer Commission leased two parcels of land in the city of Yonkers, N. Y., from the plaintiff—the first parcel for the term of one year from that date, at a yearly rental of \$960, payable quarterly; the second parcel for the term of 6 months, at a monthly rental of \$110, payable quarterly. As to the first parcel, there was a privilege for renewal of the lease

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for a period not less than 2 months and not more than 12 months, upon the Commission giving 20 days' notice of desire to renew, and stating the period for which the lease was to be renewed. There was a similar privilege of renewal of the lease on the second parcel, except that the renewal period was for from 3 to 9 months.

[1] The Commission remained in possession of both parcels until the middle of April, 1911, at which time it removed its entire plant, leaving only some lumber, broken tools, broken wheelbarrows, etc., scattered about, and some spiles close to the edge of the Hudson river. The leaving of these odds and ends on the land did not constitute a hold-over by the Commission beyond the term of the tenancy created by the presence of the commissioners' plant on the land, which was until the middle of April, 1911. *Gibbons v. Dayton*, 4 Hun, 451; *McCabe v. Evers* (City Ct. N. Y.) 9 N. Y. Supp. 541; *Rorbach v. Crossett*, 19 N. Y. Supp. 450; ¹ *Manly v. Clemmens* (City Ct. N. Y.) 14 N. Y. Supp. 366.

[2] As the Commission had an option to extend or renew the lease on the second parcel a term of from 3 to 9 months, from July 1, 1911, as it might elect, by holding over, without stating which period it elected to renew the lease for, it will be deemed to have held over for the shortest period under that privilege, namely, 3 months. *Falley v. Giles*, 29 Ind. 114; *Lanham v. McWilliams*, 6 Ga. App. 85, 64 S. E. 294.

[3] But the lease required that, if it were renewed for a term less than 6 months, the rent should be paid monthly during the renewed period, and not quarterly. So the Commission, by paying this rent quarterly, extended the term of its renewal of the lease to 6 months, to January 1, 1911, and by holding over after January 1, 1911, again extended the lease for another 6 months, to July 1, 1911. So the Commission, by holding over on the first parcel after January 1, 1911, and paying the rent quarterly, and not monthly, similarly extended the lease on that parcel 6 months, to July 1, 1911.

[4] To establish the plaintiff's case, the lease was offered in evidence, and was objected to on the ground that by its terms it was expressly made inadmissible. The lease contained the following provision:

"And it is further covenanted and agreed between the parties that neither this instrument, nor the leasing of said rights hereby, nor any of the negotiations or agreements leading up to or concerning the same, nor the rental of said premises, nor the amount of such rental shall be used in evidence in any legal proceeding or action now pending between the parties hereto, or hereafter to be commenced between the parties, for any purpose whatever."

Decision upon this objection and the inadmissibility of the lease was reserved. I think the lease should be received in evidence, and I have therefore overruled the defendant's objection. The court cannot permit itself to be ousted of the right to consider competent evidence by a provision in a contract that it shall not be put in evidence in any action between the parties relating to the subject-matter of the contract.

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 64 Hun, 637.

The plaintiff is entitled to judgment for \$570, with interest from July 1, 1911, with the costs of this action. Requests to find may be submitted within five days,

DOUGHERTY v. SOUTHERN PAC. CO.

(Supreme Court, Appellate Term, First Department. February 14, 1913.)

PLEADING (§ 321*)—BILL OF PARTICULARS—GROUNDS.

A plaintiff, suing for the balance due on a contract for furnishing to defendant men and guards during a strike, who shows that defendant's time sheets will show the names of the men and the number of hours worked, and that he cannot give the names of the men and the number of hours they worked without an inspection of the books and records of defendant and examination of its officers, will not be required to furnish a bill of particulars disclosing the names and addresses of the men and the number of hours they worked until after completion of an examination of the officers and an inspection of the books and time sheets, but must furnish such particulars after examination and inspection before trial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 973; Dec. Dig. § 321.*]

Appeal from City Court of New York, Special Term.

Action by Harry V. Dougherty, doing business as Dougherty's Detective Agency against the Southern Pacific Company. From a portion of an order of the City Court of the City of New York requiring plaintiff to serve a verified bill of particulars, he appeals. Modified and affirmed.

Argued February term, 1913, before SEABURY, GERARD, and BIJUR, JJ.

Richard S. Harvey, of New York City (Lewis Squires, of New York City, of counsel), for appellant.

Esselstyn & Haughwout, of New York City, for respondent.

GERARD, J. This action was brought to recover a balance of \$4,040.67, alleged in the complaint to be due the plaintiff under a contract by which it is alleged that he was to furnish to the defendant men at \$4 per day per man on its docks during a strike of its regular employes, and also such guards at the rate of \$6 per day per guard as should be necessary to guard these men. Defendant moved for a bill of particulars, and among other things the court directed the plaintiff to furnish a bill of particulars containing the full name of each man so put to work and the exact number of hours each man is claimed to have worked each day.

I do not think that there is any justification for requiring plaintiff to specify the number of hours of work done by the men he furnished under the contract on which he sues. Plaintiff claims that he is unable to furnish the full name of each man, and that the defendant's own time sheets will show, not only the names of the men, but the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

number of hours that they worked, and the plaintiff swears in his affidavit opposing the motion that he cannot give the information without an inspection of the books and records of the defendant and examination of its officers.

I think, therefore, that the order appealed from should be modified, by striking therefrom the requirement as to the exact number of hours during each day that the men furnished by plaintiff worked for the defendant, and that the plaintiff be not required to furnish the name and address of each of the men and each of the guards alleged to have been furnished by him to defendant until 10 days after the completion of an examination of the officers of defendant and an inspection and examination of defendant's books and time sheets, but that the plaintiff furnish such particulars after such examination and inspection before trial, and, as thus modified, affirmed, without costs, but with disbursements to the appellant. All concur.

JAFJE et al. v. WELD et al.

(Supreme Court, Appellate Division, First Department. February 7, 1913.)

1. TRUSTS (§ 349*)—CONSTRUCTIVE TRUSTS—GROUNDS—FRAUD.

One deprived of his property by fraud may, if he can identify it or trace the proceeds derived from its sale, impress a trust on it or the proceeds, whether in the hands of the wrongdoer or any person taking title through him, unless title is taken in good faith and for value, though the wrongdoer or the person to whom title has been transferred is insolvent.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 514; Dec. Dig. § 349.*]

2. TRUSTS (§ 358*)—CONSTRUCTIVE TRUSTS—FOLLOWING TRUST PROPERTY.

To follow trust funds into other property and impress it with a trust, the funds must be clearly traced and distinctly proved to have been invested in other property, and there must be a direct and unbroken connection between the two.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 523, 553; Dec. Dig. § 358.*]

3. TRUSTS (§ 358*)—CONSTRUCTIVE TRUSTS—FOLLOWING TRUST PROPERTY.

A dealer drew drafts, to which forged bills of lading were attached, and the same were forwarded to its agent, with directions to sell. Plaintiff, relying on the bills, purchased the drafts from the agent, and paid him therefor. To facilitate the remittance to the dealer of the money paid by plaintiff to the agent, the dealer drew currency drafts on the agent and deposited them in a bank, which gave a credit therefor to the dealer and forwarded them to its correspondent, where they were paid by the agent with the money received from plaintiff. The deposit of the currency drafts was made for the purpose of crediting the same to the account of the dealer. The dealer, by means of the credit, purchased cotton, which was subsequently transferred to defendant for an antecedent debt. *Held*, that plaintiff could not impress the cotton in the hands of defendant with a trust, since it was not purchased with his money.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 523, 553; Dec. Dig. § 358.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from Special Term, New York County.

Action by Max Jaffe and others against Stephen M. Weld and others. From an order sustaining a demurrer to the complaint, and from an order providing for the dismissal of the complaint, unless amended within 20 days, plaintiffs appeal. Affirmed.

See, also, 149 App. Div. 942, 133 N. Y. Supp. 1127.

Argued before INGRAHAM, P. J., and McLAUGHLIN, LAUGHLIN, CLARKE, and DOWLING, JJ.

George T. Hogg, of New York City, for appellants.

Edward H. Blanc, of New York City, for respondents Weld and others.

R. L. Von Bernuth, of New York City, for respondent Pyle.

McLAUGHLIN, J. Action to impress a trust upon certain cotton in the possession of the defendants, upon the theory that it was purchased with funds obtained from the plaintiffs by fraud, and that defendants obtained possession of the cotton with notice of the fraud, and without paying value therefor. The defendants demurred to the complaint, upon the ground, among others, that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, with leave to serve an amended complaint (132 N. Y. Supp. 505), and on appeal the order sustaining the demurrer was affirmed (149 App. Div. 942, 133 N. Y. Supp. 1127). The plaintiffs thereafter served an amended complaint, to which the defendants again demurred, on substantially the same ground as before. After the demurrer had been interposed, the plaintiffs moved for judgment on the pleadings, and from an order sustaining the demurrer, and an order dismissing complaint, unless further amended within 20 days, the plaintiffs appeal.

The amended complaint alleges, in substance, that between the 5th and 20th of April, 1910, the firm of Steele, Miller & Co., merchants doing business in the state of Mississippi, drew five foreign drafts, payable to its own order, aggregating upwards of \$68,000; that attached to these drafts were eight forged bills of lading, each one purporting to cover 100 bales of cotton, deliverable to its own order at a foreign port named; that it indorsed the drafts and bills of lading, and forwarded the same to one Van Gerpen, its New York agent, with direction to sell the same; that the plaintiffs, bankers doing business in the city of New York, relying upon the forged bills of lading, purchased the drafts from Van Gerpen, and after deducting exchange, etc., paid him therefor \$68,676.25; that cotton called for by the bills of lading was never shipped, nor was any part of the drafts paid, though duly presented for payment; that to facilitate the remittance to Steele, Miller & Co. of the money paid by plaintiffs to Van Gerpen, Steele, Miller & Co. drew certain "currency" drafts upon Van Gerpen, and deposited them in banks in Mississippi, which, in turn, forwarded them to their correspondents in New York, where the same were paid by Van Gerpen with the money received from the plaintiffs; and that the balance in excess of the "currency" drafts was transmitted by Van Gerpen in other unspecified ways.

There is no allegation in the complaint that the "currency" drafts

were deposited for collection. On the contrary, it is alleged, or is fairly to be inferred from the allegations upon that subject, that the banks, immediately upon receipt of the "currency" drafts, placed them to the credit of Steele, Miller & Co.; it having previously given to them security to insure the acceptance and payment thereof. The amount thus credited was mingled with other credits in the general credit account which Steele, Miller & Co. had in such banks. Subsequently Steele, Miller & Co. purchased the cotton on which it is now sought to impress a trust, and paid for the same by checks on such accounts. Some of the cotton thus purchased was transferred to the defendant Stephen M. Weld & Co. The transfer was made in consideration of an antecedent indebtedness, and with the intent of giving to Stephen M. Weld & Co. a preference over other creditors of Steele, Miller & Co.; it in the meantime having become insolvent, and thereafter being adjudicated a bankrupt. The balance of the cotton passed to and is held by its trustee in bankruptcy. The judgment demanded is, among other things, that a trust be impressed upon the cotton, or the proceeds derived therefrom by the defendants, and for an accounting.

[1] One who has been deprived of his property by fraud may, in case he can identify it or trace the proceeds derived from its sale, impress a trust upon it or the proceeds, whether in the hands of the wrongdoer or any person who takes title through him, unless it be in good faith and for value (*Lightfoot v. Davis*, 198 N. Y. 261, 91 N. E. 582, 29 L. R. A. [N. S.] 119, 139 Am. St. Rep. 817, 19 Ann. Cas. 747; *Welch v. Polley*, 177 N. Y. 117, 69 N. E. 279; *Newton v. Porter*, 69 N. Y. 133, 25 Am. Rep. 152); and this even though, at the time the trust is sought to be impressed, the wrongdoer, or the person to whom the title has been transferred, is insolvent and unable to pay his other creditors (*Matter of Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504; *Pennell v. Deffell*, 4 De G., M. & G. 387). This is upon the theory that the property, or the proceeds, belongs to the person defrauded, and the one who defrauded him, or the transferee, holds it as trustee for his benefit. *Lightfoot v. Davis*, *supra*.

[2] But in every case the property upon which it is sought to impress the trust must be shown to be either the property of which the cestui que trust was defrauded, or proceeds derived therefrom. There must be a direct and unbroken connection between the two. This was pointed out in *Ferris v. Van Vechten*, 73 N. Y. 113, the court saying:

"To follow money into lands and impress the latter with a trust, the money must have been clearly traced and distinctly proved to have been invested in the lands."

And in *Matter of Cavin v. Gleason*, *supra*:

"But it is the general rule, as well in a court of equity as in a court of law, that in order to follow trust funds and subject them to the operation of the trust they must be identified."

See, also, *Matter of Hicks*, 170 N. Y. 195, 63 N. E. 276, *Holmes v. Gilman*, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. Rep. 463, and *Cole v. Cole*, 54 App. Div. 37, 66 N. Y. Supp. 314.

[3] It does not appear from the allegations of the amended com-

plaint that the cotton which has come into the hands of the defendants was purchased with the plaintiffs' money. In fact, it was purchased with money which had been on deposit to the credit of Steele, Miller & Co. in their Mississippi banks. That money, or a part of it, had been credited by the banks by reason of the "currency" drafts deposited and which were afterwards paid by Van Gerpen with plaintiffs' money. The deposit of the "currency" drafts was not made for collection, but for the purpose of being credited immediately to the account of Steele, Miller & Co., as it in fact was. The title to the drafts passed immediately to the banks and the money which they advanced was really the purchase price of the drafts. *Kirkham v. Bank of America*, 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714; *Metropolitan Bank v. Loyd*, 90 N. Y. 530; *Cragie v. Hadley*, 99 N. Y. 131, 1 N. E. 537. The amount thus credited was not the money paid by the plaintiffs. It was the proceeds of the "currency" drafts, and for the acceptance and payment of which the banks had taken security from Steele, Miller & Co. The fact that the "currency" drafts were accepted and paid by Van Gerpen with moneys fraudulently obtained from the plaintiffs by means of other drafts and forged bills of lading did not, for the reasons above given, enable them to have a trust impressed upon the cotton, because the same had not been purchased with their money.

I am of the opinion that the complaint fails to state a cause of action, and for that reason the orders appealed from should be affirmed, with costs. All concur.

MADISON REAL PROPERTY & SECURITY CO. v. HUTTON et al.

(Supreme Court, Appellate Division, First Department. February 7, 1913.)

PLEADING (§ 367*)—MOTIONS TO MAKE MORE DEFINITE AND CERTAIN.

Where, from many of the allegations of the complaint, the cause of action might either have been for conversion or for the recovery of a deposit of money induced by fraudulent representations, and allegations on one theory were irrelevant on the other, defendant's motion to strike out such irrelevant allegations, or to compel plaintiff to separately state and number the causes of action, must be granted, to the extent of requiring the complaint to be made more definite and certain, and requiring plaintiff, if desiring to plead alternative causes of action, to separately state and number them.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 64, 1173-1193; Dec. Dig. § 367.*]

Appeal from Special Term, New York County.

Action by the Madison Real Property & Security Company, a domestic corporation, against Edward F. Hutton and others. From an order denying a motion to strike out certain paragraphs of the complaint, or compel plaintiff to separately state and number the causes of action, defendants appeal. Order reversed, with directions to grant motion.

Argued before INGRAHAM, P. J., and McLAUGHLIN, CLARKE, SCOTT, and DOWLING, JJ.

Millard F. Tompkins, of New York City, for appellants.

E. M. Bullows, of New York City, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SCOTT, J. It is not easy to determine from reading the complaint just what cause of action the pleader intended to state. Many of the allegations seem to indicate an intention to state a cause of action for damages for conversion, and, indeed, that word is freely used as characterizing the defendants' acts. If this is the cause of action intended to be pleaded and relied upon, the allegations sought to be stricken out are clearly irrelevant. On the other hand, many of the allegations of the complaint seem to point to an intention to sue for the recovery of money deposited with defendants; such deposit having been induced by fraudulent representation.

In so far as the allegations sought to be stricken out refer to an existing fact, and not a mere promise or representation as to what would or might be expected to occur in the future, they may not be irrelevant to the cause of action we are now considering. The defendants are certainly entitled to know what they must meet, and the motion should therefore have been granted, to the extent of requiring the complaint to be made more definite and certain, and requiring plaintiff, if she seeks to plead alternative causes of action, to separately state and number them.

The order must therefore be reversed, with \$10 costs and disbursements, and the motion granted, to the extent indicated, with \$10 costs. All concur.

In re SWARTZ'S WILL.

(Surrogate's Court, New York County. February 6, 1913.)

1. WILLS (§ 300*)—PROBATE—INSTRUMENTS ENTITLED TO PROBATE.

The factum of a will being established by proof under oath of execution, the will is prima facie entitled to probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 697; Dec. Dig. § 300.*]

2. WILLS (§ 215*)—PROBATE—CONSTRUCTION OF WILL.

In a probate proceeding, where it is sought to reject a part of a will on the ground of mistake, the matter is addressed to the powers of the surrogate sitting as a probate judge, and not to his power as a court of construction, under Code Civ. Proc. § 2624.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 522, 523; Dec. Dig. § 215.*]

3. WILLS (§ 253*)—SURROGATE'S COURT—JURISDICTION.

While the powers of the surrogate as a court of probate are due primarily to Code Civ. Proc. § 2472, conferring jurisdiction "to take the proofs of wills and to admit wills to probate," yet, in the absence of more precise definition, his powers in probate matters are referable to established precedents and to the Constitution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 589; Dec. Dig. § 253.*]

4. WILLS (§ 216*)—PROBATE—PARTIAL PROBATE.

The surrogate, as an incident of his probate jurisdiction, may refuse probate to part of a will, if fraud or mistake is established.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 524; Dec. Dig. § 216.*]

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5. COURTS (§ 98*)—SURROGATE'S COURT—SOURCES OF DECISION.

Cases in the ecclesiastical courts of England, although decided since our independence, are still of some indirect authority in the Surrogate's Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 324; Dec. Dig. § 98.*]

6. WILLS (§ 203*)—PROBATE—NATURE OF PROCEEDING.

Probate is a proceeding in rem.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 502, 503; Dec. Dig. § 203.*]

7. COURTS (§ 198*)—SURROGATE'S COURT—JURISDICTION.

A jurisdiction is not for the benefit of the judge, but a matter of public concern, and for that reason, if no other, the surrogate should not be slow to assert and protect his jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 469, 471–475, 478; Dec. Dig. § 198.*]

8. WILLS (§ 215*)—PROBATE—POWER TO ADD WORDS TO WILL.

A court of probate has no power, incidental to its general probate jurisdiction, to add words to a will, even if omitted by mistake.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 522, 523; Dec. Dig. § 215.*]

9. COURTS (§ 98*) — SURROGATE'S COURT — SOURCES OF DECISION — ENGLISH CASES PRIOR TO REVOLUTION.

An English decision in 1771 is binding here.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 324; Dec. Dig. § 98.*]

10. WILLS (§ 346*)—PROBATE—SCOPE OF DECREE.

The factum of a will may be formally adjudged by the same decree which construes the will so found entitled to probate; but the adjudications rendered in the separate spheres of jurisdiction are nevertheless distinct acts of the surrogate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 803; Dec. Dig. § 346.*]

11. WILLS (§ 698*)—SURROGATE'S COURT—JURISDICTION.

In the absence of a definition as to the jurisdiction of the surrogate as a court of construction, the measure of such jurisdiction is to be found either in the jurisdiction of the courts invested with equitable powers, or that of the courts proceeding according to the course of the common law, or both.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1676; Dec. Dig. § 698.*]

12. WILLS (§ 698*)—PROBATE—JURISDICTION—CORRECTION OF MISTAKE.

A court of law has no jurisdiction to correct a mistake in a devise; the exercise of its power over devises being confined to the single issue of devisavit vel non, and relating wholly to legal titles under wills, or to matters in pais.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1676; Dec. Dig. § 698.*]

13. WILLS (§ 698*)—CONSTRUCTION — EQUITY — GROUNDS OF JURISDICTION — "COURT OF CONSTRUCTION."

The power of courts of equity over wills is referable to the want of jurisdiction of courts of law, but more particularly to their jurisdiction over mistakes, which they have jurisdiction to correct in some instances.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

By a "court of construction," with reference to wills, a court of equity is intended.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1676; Dec. Dig. § 698.*]

14. WILLS (§ 698*)—CONSTRUCTION—GROUNDS OF JURISDICTION—TRUSTS—WILLS.

The powers of courts of equity to construe wills are referable more particularly to their jurisdiction over trusts, and where no trust is involved jurisdiction is generally to be declined; but for purposes of jurisdiction executors are regarded in equity as trustees.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1676; Dec. Dig. § 698.*]

15. WILLS (§ 440*)—MISTAKE IN WILL—CORRECTION.

A court of equity will in no case correct an erroneous supposition of the testator, if he knew the contents of his will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.*]

16. WILLS (§ 695*)—PROBATE—SURROGATE'S JURISDICTION.

Under Code Civ. Proc. § 2624, authorizing the surrogate to construe or determine the validity of a testamentary disposition of personal property, no trust or mistake need be involved in order to invoke such jurisdiction, and he may pass on the validity of legal, as well as equitable, titles derived under the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1665-1669; Dec. Dig. § 695.*]

17. WILLS (§ 487*)—PROBATE—CONSTRUCTION BY SURROGATE'S COURT—ORAL AND EXTRINSIC EVIDENCE.

Under Code Civ. Proc. § 2624, authorizing the surrogate to construe or determine the validity of a testamentary disposition of personal property, he may in a proper case consider oral or extrinsic evidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 1026-1032; Dec. Dig. § 487.*]

18. WILLS (§ 698*)—PROBATE JURISDICTION—REJECTION OF PARTS OF WILL—STATUTE.

Code Civ. Proc. § 2624, which authorizes the surrogate to construe or determine the validity and effect of a testamentary disposition of personal property, does not authorize him to construe clauses out of the will on the ground of mistake; any such relief having reference to his power as a probate judge.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1676; Dec. Dig. § 698.*]

19. COURTS (§ 472*)—PROBATE JURISDICTION—EXCLUSIVE JURISDICTION.

The only remedy in cases of mistake on the face of a will is in a court of probate, and after such will is admitted to probate there is no remedy in any other court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1199-1224, 1247-1259; Dec. Dig. § 472.*]

20. WILLS (§ 220*)—PROBATE—OBJECTION TO PROBATE ON GROUND OF MISTAKE—TIME OF OBJECTION.

It is not too late for parties who have propounded a will to object to the probate of parts of the will on the ground of mistake.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 532-537; Dec. Dig. § 220.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

21. WILLS (§ 344*)—PROBATE—CORRECTION OF MISTAKE—FORM OF DECREE.

Where a mistake in a will is such that it may be corrected by a court of probate, only that part of the will entitled to probate will be annexed to the decree of probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 800, 801; Dec. Dig. § 344.*]

22. WILLS (§ 440*)—PROBATE—CORRECTION OF MISTAKE AS TO LEGAL EFFECT.

While mistakes of draftsmen or engrossers, or those induced by fraud, may possibly be corrected in the Surrogate's Court in a proper case, the mistake of a testatrix as to the legal effect or revocability of a trust conveyance cannot be corrected.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.*]

23. COURTS (§ 98*)—SOURCES OF DECISION—CIVIL AND CANON LAW.

It is only in case of an original question devoid of modern authority that the surrogate may resort to the principles of the civil or canon law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 324; Dec. Dig. § 98.*]

Proceedings for the probate of the will of Henriette Swartz, deceased. Probate decreed as offered.

Phillips, Mahoney & Wagner, of New York City (Jeremiah T. Mahoney and Warren C. Fielding, both of New York City, of counsel), for petitioner.

Cardozo & Nathan, of New York City (Edgar J. Nathan and Raymond Rubenstein, both of New York City, of counsel), for respondent Lyon.

Simpson & Cardozo, of New York City (Benjamin N. Cardozo and Walter H. Pollak, both of New York City, of counsel), for respondent Eisenbach.

FOWLER, S. This is an appeal to the jurisdiction of the surrogate for relief against an alleged mistake on the part of the testatrix. It involves the whole scope of the surrogate's present jurisdiction in a proceeding for probate and construction. The arguments of counsel in this cause suggest to my mind important questions, the consideration of which can no longer be postponed or passed over by me. The arguments of counsel have been unusually thorough and profound.

[1, 2] Prima facie the script propounded as a will in this matter is, on the proofs of its execution, given under oath, entitled to probate. Factum of will, in other words, is established. This is conceded by all the counsel in the cause. But in a rather vague way, notwithstanding this attitude, the effect of a part of the will is sought to be rejected from probate. A mistake is alleged on the part of the testatrix, and this is made the basis of an opposition to the probate of the thirteenth and fourteenth clauses of the will propounded. This appeal is addressed to the powers of the surrogate sitting as a probate judge, and not to his power as a court of construction, under section 2624, Code of Civil Procedure.

[3] The powers of the surrogate as a court of probate are due primarily to the statute. Section 2472, Code of Civil Procedure. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

section is very general in phrase. It confers jurisdiction on the surrogate "to take the proofs of wills and to admit wills to probate." The statute does not define "proof of wills" or "probate," and such definition and the powers of the surrogate in probate matters are referable to the jurisprudence established in this state by the Constitution itself. Section 2481, subd. 11, Code of Civ. Pro. See *Matter of Work*, 76 Misc. Rep. 403, 405, 137 N. Y. Supp. 97; *Matter of Connell*, 75 Misc. Rep. 574, 578, 136 N. Y. Supp. 166; *Matter of Carter*, 74 Misc. Rep. 1, 6, 133 N. Y. Supp. 722; *Matter of Meyer*, 72 Misc. Rep. 566, 568, 131 N. Y. Supp. 27; but more particularly the authorities cited in these cases. Were these judicial powers not so defined, the surrogate's powers and procedure in proceedings for probate would be left much too vague. A surrogate was not intended in probate proceedings to be a law unto himself, but to proceed according to established precedents, and with reference to the general law imposed by the Constitution of the state. *Campbell v. Logan*, 2 Bradf. Sur. 90, 93; *Martin v. Dry Dock, etc.*, R. R., 92 N. Y. 70, 74; *Jones v. Hamersley*, 4 Dem. Sur. 427; *Matter of Carter*, 74 Misc. Rep. 1, 7, 133 N. Y. Supp. 722; *Dayton, Surrogate's Practice*, 9; *Redfield, Law and Practice in Surrogates' Courts*, 26; *Jessup, Surr. Pr.* 5.

[4] Long prior to any statutes conferring on surrogates those powers incidental to courts of construction it was held by Surrogate Bradford that the surrogate as an incident of his probate jurisdiction had power to refuse probate to part of a will if fraud or mistake was established. *Burger v. Hill*, 1 Bradf. Sur. 360, confirmed by *Hill v. Burger*, 10 How. Prac. 264. This notable decision of this very learned probate judge has been much objected to in several states, while followed in others. Right or wrong, the decision in *Hill v. Burger* is binding on me.

[5] It may be remarked that such power is distinctly recognized in the law which is commonly taken as the exemplar of our own authority in cases of doubt and difficulty not settled by the law and practice of this state. *Allen v. McPherson*, 1 Ho. L. 191; *Goods of Duane*, 2 Swabey & Tristram, 590; *Goods of Oswald*, L. R. 3 P. & D. 162; *Morrell v. Morrell*, L. R. 7 P. D. 68, 1882; *Plume v. Bedle*, 1 P. Wms. 388; *Billinghurst v. Vickers*, 1 Phill. 187. Cases in the ecclesiastical courts of England, although decided since our independence of England, are still of some indirect authority here.

[6] The foreign law of probate, like the foreign law relating to notaries or to admiralty matters, stands on a different footing in this court from other foreign law, by reason of the similarity and universality of operation of probate law; probate being a proceeding in rem. *Betts v. Jackson*, 6 Wend. at page 177. It would be quite at variance with propriety for me to express my own opinion on the power of the surrogate to refuse probate to a part of a will, in view of the decision in *Hill v. Burger*, although I am free to say that I should never be inclined to stretch the jurisdiction of this court beyond the most well-defined limits. *Matter of Meyer*, 72 Misc. Rep. 566, 131 N. Y. Supp. 27. But within those limits I should be much more tenacious of my jurisdiction.

[7] A jurisdiction is not for the benefit of a judge, but a matter of public concern, which demands the greatest consideration, and for that reason only the surrogate should not be slow to assert and protect his jurisdiction.

[8] That a court of probate has no power incidental to its general probate jurisdiction to add words to a will, even if omitted by mistake, is often asserted. Theobald on Wills, 29; Mortimer, Probate Law, 103; 1 Jarman, Wills (6th Ed.) 486; *Burger v. Hill*, 1 Bradf. Sur. 374; *Creely v. Ostrander*, 3 Bradf. Sur. 107.

[9] While this is generally true, these statements all appear to have overlooked a decision to the contrary in *White v. Barker* (in the year 1771) 5 Burr. 2703. This case before the Revolution is binding here. *Castell v. Tagg*, 1 Curteis, 298, proceeds to the same point, and there are others to the same effect. A power to strike out of a will *prima facie* would seem to imply a correlative power to insert proper words sometimes omitted by mistake. But much depends on the statute of wills for the time being in force. In *re Goods of Wilson*, 2 Curteis, 853. But as this particular point is not now here, it need not be considered at this time.

The correction of the alleged mistake of this testator is not addressed to the jurisdiction committed to the surrogates of this state by section 2624, Code of Civil Procedure. It may be well, in passing, to consider the general scope and purport of that section. By reference to it, it will be perceived that it is only after a will is determined to be entitled to probate that the surrogate may sit as a court of construction.

[10] It is true that the factum of will may be formally adjudged by the same decree which construes the will so found entitled to probate, but the adjudications rendered in the separate spheres of jurisdiction are nevertheless distinct acts of the surrogate. *Matter of Davis*, 182 N. Y. at page 475, 75 N. E. 530. The validity, construction, or effect of any disposition contained in a will of a resident of this state, when entitled to probate, may now in a proper case be determined by the surrogate sitting as a court of construction, but not as a probate judge. Section 2624, Code Civ. Pro.

[11] The precise extent of jurisdiction of the surrogate as a court of construction is nowhere defined. Consequently we must look to the law of this state regulating similar jurisdictions. *Betts v. Jackson*, 6 Wend. at page 177; *Matter of Carter*, 74 Misc. Rep. 1, 7, 133 N. Y. Supp. 722; *Matter of Matthews*, 75 Misc. Rep. 449, 453, 136 N. Y. Supp. 636. The measure of the surrogate's jurisdiction as a court of construction will be found either in the jurisdiction of the courts invested with equitable powers, or that of the courts proceeding according to the course of the common law, or both.

[12] It cannot be maintained for an instant, I think, that a court of law ever entertained a jurisdiction to correct a mistake in a devise. The exercise of power of a court of law over devises was confined, whether in ejectment actions or otherwise, to the single issue of *devisavit vel non*. Common-law jurisdictions related wholly to legal titles under wills or to matters in pais. Mistakes were *prima facie* of

equitable cognizance only. As nothing is to be found in the constitution of courts of law, we must next resort to the law regulating the jurisdiction of courts vested with powers of construction over wills for the necessary limitations on the powers of the surrogates.

The extent and the exercise of the jurisdiction of the surrogate as a court of construction are controlled either by the new section 2624, Code of Civil Procedure, or by the decisions of our own state, or in the absence of such decision by the law imposed on us by constitutional limitation. So clear a proposition needs no citation of authority.

[13, 14] The power of courts of equity over wills is referable to the want of jurisdiction of courts of law, but more particularly to their jurisdiction over mistakes and trusts. For this purpose executors have been regarded in equity as trustees. Story, Eq. Jurisp. §§ 164, 1067. By a "court of construction" a court of equity is intended. *Burger v. Hill*, 1 Bradf. Sur. 372. In regard to mistakes in wills there is no doubt that courts of equity had jurisdiction to correct them in some instances to be hereafter noticed. 1 Jarman, Wills (4th Am. Ed.) note p. 359. But the power of equity, independent of statute, to construe wills, is referable to a jurisdiction over trusts, and where no trust is involved jurisdiction is generally to be declined. *Dill v. Wisner*, 88 N. Y. 153, 160; *Matter of Keleman*, 126 N. Y. 73, 26 N. E. 968; *Matter of Mellen*, 139 N. Y. 210, 217, 34 N. E. 925; *McKinlay v. Van Dusen*, 76 App. Div. 200, 78 N. Y. Supp. 377.

[15] A court of equity would in no case correct an erroneous supposition of the testator, if he knew the contents of his will. *Burger v. Hill*, 1 Bradf. Sur. 372; *Walpole v. Cholmondeley*, 7 T. R. 138 loc. cit.; *Lord Walpole v. Lord Orford*, 3 Ves. 42; *Re Bywater*, 18 Ch. D. 17. The earlier editions of Jarman on Wills review the English cases on this point, although the sixth edition omits them. 1 Jarman (4th Ed.) 353-359.

[16] The language of section 2624, Code Civil Procedure, invests the surrogate with a larger jurisdiction over the construction, validity, and effect of wills than that formerly possessed by courts of equity I have no doubt. *Matter of Mount*, 185 N. Y. 162, 167, 77 N. E. 999. No trust or mistake need be involved in order to invoke the jurisdiction granted to the surrogate, and he may now pass on the validity of legal as well as on equitable titles derived under the will before him. *Matter of Mount*. But this at bar is not a case of construction, but of probate law only.

[17] That the surrogate may, under section 2624, Code Civil Procedure, sometimes consider oral or extrinsic evidence in a proper case, in order to enable him to construe or determine the validity of a will, is, in my mind, not open to doubt, and I shall remain of this opinion until directly advised to the contrary by my superiors in the appellate courts. Unless the surrogate has power to consider extrinsic evidence in a proper case of construction falling under section 2624, the beneficial effect of that section will be nullified. The surrogate's jurisdiction of construction will in that event be confined to the single issue of validity or invalidity on the face of the testamentary scripts probated in the proceeding. He will be unable to consider an ambiguity

or uncertainty raised by extrinsic circumstances and removable in any other court of construction by extrinsic evidence. The few adjudicated cases bearing on this section cannot be taken to intend to restrict a jurisdiction so plainly conferred on the surrogate by the Legislature. Cf. *Matter of Will of Keleman*, 126 N. Y. 73, 26 N. E. 968; *Morton Trust Co. v. Sands*, 195 N. Y. 28, 87 N. E. 783. Such decisions do not cover the hypothetical case. The surrogate has all the powers fairly implied in the grant of jurisdiction.

[18] But the point here is that section 2624, Code Civil Procedure, is not an authority for the surrogate's jurisdiction to construe the offensive clauses out of the will. If any relief is to be granted by the surrogate, it must have reference to the power of the surrogate as a probate judge. In this view section 2624, C. C. P., becomes quite immaterial, and is outside of consideration in this matter now before me. This is not a case of construction, and construction is not properly invoked or involved. *Jones v. Hamersley*, 4 Dem. Sur. 437; *Matter of Mount*, 185 N. Y. 162, 167, 77 N. E. 999. It is possible that a court of equity may consider some form of relief for discrepancies apparent on the face of the will as proved, taking into just consideration the claims of those entitled also under the trust deeds. But such matters are not properly cognizable here (*Milner v. Milner*, 1 Ves. Sr. 106), and their consideration should not be volunteered.

[19] Formerly and at present the only remedy in cases of mistake on the face of a will is in a court of probate. 1 *Jarman on Wills* (6th Ed.) 493, and cases there cited; *Burger v. Hill*, 1 Bradf. Sur. 372, 373; *Allen v. McPherson*, 1 House of Lords, 191. If such will is admitted to probate, there is no remedy in any other court. *Burger v. Hill*, 1 Bradf. Sur. 373.

[20] While I think that the parties before me may have by the course hitherto taken virtually have put themselves out of court and technically assented to the probate of the script propounded, and in consequence I might be relieved from any further consideration of this matter, yet this is too technical. It is not too late for them, I think, to object to the probate of parts of this will by reason of the alleged mistake. I shall assume that this is their desire, and will now proceed to the consideration of the merits of this controversy. It may be assumed that it is discernible on the face of the will that the testatrix mistook the legal effect of the trust deeds referred to by her in the thirteenth clause of her will. Does that fact, if established, enable the surrogate to refuse probate to the tenth and fourteenth clauses of a will duly executed under such mistake? That is the only question in the cause.

[21] If the mistake is of that character which may be corrected by a court of probate, only that part of the will entitled to probate will be annexed to the decree of probate. *Billinghurst v. Vickers*, 1 Phill. 187; *Wood v. Wood*, 1 Phill. 357; *In the Goods of Duane*, 2 Sw. & Tr. 590; *Burger v. Hill*, 1 Bradf. Sur. 373; *Creely v. Ostrander*, 3 Bradf. Sur. 107; *Strahan on Wills*, 68; *Matter of the Estate of Finn*, 1 Misc. Rep. 280, 283, 22 N. Y. Supp. 1066. This is not a case of dependent relative revocation, and that doctrine in-

voked by counsel has no application. This is the case of an alleged mistake on the part of testatrix and its legal effect on probate alone.

[22] While I am bound to hold, in view of the decisions of this state already noticed, that there are some kinds of mistake on the part of testatrix, such as mistakes of draftsmen in preparing wills or of engrossers in the engrossment of the same, or mistakes induced by fraud on testators, which may possibly be corrected in this court in a proper case, yet the mistake of this testatrix concerning the legal effect or revocability of her trust conveyances is not such a mistake as can be corrected here. The same point is adjudged in England. In *bonis Davy*, 1 Sw. & T. 263; *Guardhouse v. Blackburn*, 1 P. & D. 109; *Harter v. Harter*, 3 P. & D. 11; *Collins v. Elstone*, [1893] P. 1; *Beamish v. Beamish*, [1894] 1 Ir. 7; *Theobald on Wills*, 719. The true principle applicable in this cause is, as I conceive, well stated in the sixth edition of *Jarman on Wills*, 486, and in this cause that passage has my approval:

"If, however, the testator knows the contents of his will, and erroneously supposes that it will not have the effect which the law gives it, the general rule applies, and evidence of his real intention is not admissible."

In other words, such a mistake as that here alleged is not the basis of a correction by a court of probate. The cases of established intention of testators to make wills other than those actually made are not to be mistaken for cases where testators have placed in their wills just what they intended, but with effects different from those which they intended. The latter class of mistakes are not remediable in a court of probate under the existing statute of wills. This case belongs to the latter class.

The principle of all the American and English adjudications bearing on the point before me has now been briefly considered. It remains to consider two remarkable instances cited from the Roman law in the very elaborate argument of the learned counsel for Mrs. Eisenbach.

[23] I may remark that there are many occasions in this court when it is held that the civil or canon law well serves to illustrate a derivative principle frequently applied in this court, or, in the total absence of modern authority, as a guide for this court. I referred to the authorities on this point in my judgment on the Will of Van Ness, 78 Misc. Rep. 592, 139 N. Y. Supp. 485. But I fear the instances now cited by the learned counsel in this matter are not within the limitations there stated. Let us examine them. In the Latin of counsel's argument, the first instance is taken from the *De Oratore* of Cicero (1, 38, 175) as follows:

"*Pater credens filium suum esse mortuum alterum instituit hæredem; filio domum redeunte, hujus institutionis vis est nulla.*"

I do not find the exact quotation in the *De Oratore*. But the case is there mentioned in other words not materially different. On its face this case would appear to be addressed to a mistake of fact by a testator, and to be very much in point here, but it is not so.

Cicero, it will be observed, does not furnish us with the judgment in the case. The judgment is, however, given by Valerius Maximus (VII. 7, 1). The son in question was a soldier, and he succeeded in the case. By the merest chance I happened to have read in a late book a discussion on this very case or I should know little of it. Girard, Manuel de Droit Romain, 853 et seq. The case in Cicero did not turn at all on a mistake of fact on the part of testator, but on the law relating to the exherison of a son. At that time a son was a sort of joint proprietor with the father. It was a case of condominium, and unlawful for the father to disinherit a son. It was on that ground the judgment proceeded, and not on the ground of a mistake of fact of the testator.

The second instance cited to me by counsel is taken from the Digest (28, 5, 92). In the language of counsel for Mrs. Eisenbach this case is as follows:

"A striking case on revocation under a mistake is stated in the Digest. Lib. 28, tit. 5, 92. The testator named Pactumeja Magna as his sole beneficiary, and her father as substituted beneficiary after her. The father was put to death, and the report was that the daughter, too, had been killed. The testator then modified his will, explaining: 'Quia heredes quos volui habere, mihi continere non potui Novius Rufus esto.' As a matter of fact the daughter had not been executed and survived the testator. The inheritance was decreed to pass to her. The law as to wills was precisely the same as upon the point of revocation. Code, 6, 23, 5."

Whether this citation from the Digest also refers to the law relating to exheredatio I am not sufficiently learned to determine for myself, and I do not think it important here to take time to investigate the matter. There are some things, however, in this second case, mentioned in the Digest, which also point to the law relating to exherison. Justinian, or his adviser, Tribonian, in a decree (C. 6, 28, 4) placed daughters in the same position as sons. But if it were otherwise, in this matter and the case in point, I must go by the latter cases in our own courts or in their exemplar, as there is modern authority and the point is no longer open. This being so, the Roman law is in any event quite out of all consideration. It is only in the instance of original question devoid of modern authority that we may resort to the civil or canon law. Jenks' History English Law, 195; Matter of Youngs, 73 Misc. Rep. 335, 339, 132 N. Y. Supp. 689.

The proponents are entitled to a literal probate of the script propounded as the last will and testament of Mrs. Henriette Swartz. For the reasons fully stated, no construction is necessary or proper at this time in this court.

Decree accordingly.

MEMORANDUM DECISIONS

ALBANY HOSPITAL v. ALBANY GUARDIAN SOCIETY AND HOME FOR THE FRIENDLESS et al. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by the Albany Hospital against the Albany Guardian Society and Home for the Friendless and others. No opinion. Interlocutory judgment unanimously affirmed, without costs. See, also, 131 N. Y. Supp. 1017.

ALDRIDGE, Respondent, v. AETNA LIFE INS. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by Alfred E. Aldridge against the Aetna Life Insurance Company.

PER CURIAM. Judgment and order reversed, and new trial granted, with costs to appellant to abide event. Held, that the verdict of the jury on the question of whether plaintiff had received medical attendance within two years before the date of the application to defendant for a policy is contrary to and against the weight of the evidence. See, also, 136 App. Div. 915, 120 N. Y. Supp. 1112.

KRUSE and ROBSON, JJ., dissent.

ALEXANDER, Appellant, v. WRIGHT & ALEXANDER CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by David A. Alexander against the Wright & Alexander Company. No opinion. Judgment affirmed, with costs.

ALSENS AMERICAN PORTLAND CEMENT WORKS, Respondent, v. NEW JERSEY DOCK & BRIDGE BLDG. CO., Appellant. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by the Alsens American Portland Cement Works against the New Jersey Dock & Bridge Building Company. C. D. Van Name, of New York City, for appellant. A. A. Mitchell, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

ANDRIUSZIS, Respondent, v. PHILADELPHIA & READING COAL & IRON CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by John Andriuszis against the Philadelphia & Reading Coal & Iron Company. No opinion. Motion denied, without costs. See, also, 149 App. Div. 924, 133 N. Y. Supp. 1111.

ANGELL, Respondent, v. TOWN OF CHATHAM, Appellant. (Supreme Court, Appellate Division, Third Department. December 30,

1912.) Action by Mabel H. Angell against the Town of Chatham.

PER CURIAM. Judgment and order affirmed, with costs.

KELLOGG and HOUGHTON, JJ., dissent.

ARMOUR v. SOUND SHORE FRONT IMPROVEMENT CO. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by J. Ogden Armour against the Sound Shore Front Improvement Company. No opinion. Motion granted, unless appellant complies with terms stated in order. Order filed. See, also, 71 Misc. Rep. 253, 129 N. Y. Supp. 1112.

ARTHUR J. THOMPSON CO., Respondent, v. SENECA DRIED FRUIT CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by the Arthur J. Thompson Company against the Seneca Dried Fruit Company. No opinion. Judgment affirmed, with costs.

A. SCHWOERER & SONS, Inc., Respondent, v. ROSS, Appellant. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by A. Schwoerer & Sons, Incorporated, against Sylvester Ross, Jr. J. W. Carpenter, of Brooklyn, for appellant. P. Cohen, of New York City, for respondent.

PER CURIAM. Judgment and order affirmed, with costs. Order filed.

DOWLING, J., dissents.

BALDWIN'S BANK OF PENN YAN, Respondent, v. SMITH et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by Baldwin's Bank of Penn Yan against Albert L. Smith and another.

PER CURIAM. Judgment (136 N. Y. Supp. 349) affirmed, with costs.

FOOTE, J., dissents.

BANCHETTI, Respondent, v. LAKE SHORE & M. S. RY. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 15, 1913.) Action by Giovanni Banchetti, as administrator, etc., of Matteo Mandica, deceased, against the Lake Shore & Michigan Southern Railway Company.

PER CURIAM. Order affirmed, with \$10 costs and disbursements.

LAMBERT, J., not sitting.

BARTHOLOMAY BREWERY CO., Respondent, v. **DAVENPORT et al.,** Appellants. (Supreme Court, Appellate Division, Third Department. January 16, 1913.) Action by the Bartholomay Brewery Company against Herman B. Davenport and another. No opinion. Motion denied, without costs.

BARUCH, Respondent, v. **YOUNG,** Appellant. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Emanuel Baruch against George W. Young. A. C. Coxe, Jr., of New York City, for appellant. J. A. Leve, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed. See, also, 149 App. Div. 466, 134 N. Y. Supp. 53.

BAYSIDE NAT. BANK, Respondent, v. **WALSH et al.,** Appellants. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by the Bayside National Bank against Charles H. Walsh and another. No opinion. Judgment affirmed by default, with costs.

BENEDICT et al., Respondents, v. **SECURITY INS. CO.,** Appellant. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Seelye Benedict and others against the Security Insurance Company. I. Henderson, of New York City, for appellant. G. A. Strong, of New York City, for respondents. No opinion. Judgment affirmed, with costs, on the authority of *Benedict v. Security Ins. Co.*, 147 App. Div. 810, 133 N. Y. Supp. 165. Order filed.

BENIGSOHN v. NEWCOMB. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Sarah H. Benigsohn against William H. Newcomb. No opinion. Motion granted, with \$10 costs. Order filed.

BENJAMIN, Respondent, v. **ERIE IRON & STEEL CO.,** Appellant. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by Gustave Benjamin against the Erie Iron & Steel Company.

PER CURIAM. Judgment and order reversed, and new trial granted, with costs to appellant to abide event. Held, that the admission of evidence of the characterization of the quality of the pig iron to and by the secretary of the defendant corporation prior to the purchase was error, and that the verdict of the jury is contrary to and against the weight of the evidence.

In re **BENSEL et al.** (Supreme Court, Appellate Division, Second Department. January 24, 1913.) In the matter of the application and petition of John A. Bensele and others, etc.,

to acquire real estate, etc., in the towns of Mt. Pleasant and Greenburg, etc. Southern Aqueduct Department, Sections 15 and 17, Parcels 1072, etc.

PER CURIAM. Order affirmed, with \$10 costs and disbursements. See, also, 137 N. Y. Supp. 1111.

BURR and CARR, JJ., concur, except as to the 16 lots for which an award was made to unknown owners.

BERGER, Respondent, v. **HOPPER,** Appellant. (Supreme Court, Appellate Division, First Department. January 3, 1913.) Action by John Berger against Isaac A. Hopper. W. P. Maloney, of New York City, for appellant. J. P. Donellan, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

BIGGS, Respondent, v. **SEA GATE ASS'N,** Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Helen W. Biggs against the Sea Gate Association.

PER CURIAM. Motion for stay granted, on condition (1) that plaintiff perfect her appeal, and place the cause upon the next Court of Appeals calendar; (2) that plaintiff stipulate that pending such an appeal she will make no alteration upon the buildings on said premises, so as to increase the demands made on the sewer and water systems of defendant; and (3) that she forthwith pay the amount of her indebtedness to defendant for dues, and water furnished to her by it. If the parties cannot agree upon the amount thereof, a reference may be had to determine the same. In default of compliance with these conditions, or any of them, the motion is denied, with \$10 costs. See, also, 138 N. Y. Supp. 53, 1107.

BIRD v. PRESS PUB. CO. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Hobart S. Bird against the Press Publishing Company. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 139 N. Y. Supp. 88.

In re **BIRDSEYE.** (Supreme Court, Appellate Division, First Department. February 7, 1913.) In the matter of Clarence F. Birdseye, an attorney. No opinion. Reference ordered to official referee. Settle order on notice. See, also, 152 App. Div. 885, 136 N. Y. Supp. 1131.

BISHOP, Respondent, v. **WHITCOMB,** Appellant (two cases). (Supreme Court, Appellate Division, First Department. January 3, 1913.) Actions by Bennett Bishop against James A. Whitcomb. J. M. Gazzam, of New York City, for appellant. R. H. Koehler, of Buffalo, for respondent. No opinion. Judgments and orders affirmed, with costs. Orders filed. See, also, 139 N. Y. Supp. 1117.

BISHOP v. WHITCOMB. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Bennett Bishop against James A. Whitcomb. No opinion. Motion granted. Settle order on notice. See, also, 139 N. Y. Supp. 1116.

BISHOP v. WHITCOMB. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Bennett Bishop against James A. Whitcomb. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 139 N. Y. Supp. 1117.

BISTANY, Respondent, v. FARGO, Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Khalil A. Bistany against James C. Fargo, as president of the American Express Company.

PER CURIAM. Judgment and order reversed, and new trial granted, with costs to the appellant to abide event, unless the plaintiff shall within 20 days stipulate to reduce the verdict to the sum of \$897, with interest thereon from the 15th day of July, 1908, in which event the judgment is modified accordingly, and, as so modified, is, together with the order, affirmed, without costs of this appeal to either party. *Held*, that there was no sufficient evidence to warrant the submission to the jury of the question of defendant's liability in respect to the three unbroken barrels. See, also, 149 App. Div. 929, 134 N. Y. Supp. 207.

KRUSE, J., dissents, and votes for reversal.

BLACK et al., Appellants, v. MANUFACTURERS' COMMERCIAL CO., Respondent. (Supreme Court, Appellate Division, First Department. January 24, 1913.) Action by George M. Black and another against the Manufacturers' Commercial Company. H. Barry, of New York City, for appellants. E. L. Adams, of New York City, for respondent. No opinion. Judgment affirmed, with costs, on *Richards v. Wiener Co.*, 145 App. Div. 353, 129 N. Y. Supp. 951. Order filed.

BOHRINGER, Respondent, v. CAMPBELL, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1913.) Action by Leonhard Bohringer, as administrator, etc., against Samuel O. Campbell.

PER CURIAM. The former decision in this case (137 N. Y. Supp. 241) was not dependent upon the fact to which the learned counsel for defendant directs our attention. Judgment and order unanimously affirmed on reargument, with costs. See, also, 137 N. Y. Supp. 1111.

BONART, Respondent, v. THORN, Appellant. (Supreme Court, Appellate Division, First Department. January 24, 1913.) Action by Abraham H. Bonart against Max Thorn. H. R. Limburg, of New York City, for appellant. C. Goldzier, of New York City, for re-

spondent. No opinion. Judgment and order affirmed, with costs. Order filed.

BON TON TAILORING CO. v. CHAMPION LAUNDRY. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by the Bon Ton Tailoring Company against the Champion Laundry. No opinion. Motion to dismiss appeal granted, with \$10 costs, unless appellant complies with terms stated in order. Order filed.

BOTTEGA, Respondent, v. CAMPBELL, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Vincent Bottega against Peter C. Campbell. No opinion. Motion denied, with \$10 costs. See, also, 138 N. Y. Supp. 1108.

BOYNTON et al., Respondents, v. TROY AUTOMOBILE EXCHANGE, Inc., Appellant. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by Kellogg Boynton and another against the Troy Automobile Exchange, Incorporated. No opinion. Order affirmed, with \$10 costs and disbursements.

BOZOVSKY, Respondent, v. BUFFALO & L. E. TRACTION CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Vacil D. Bozovsky against the Buffalo & Lake Erie Traction Company. No opinion. Motion for reargument (of 138 N. Y. Supp. 1108) denied, without costs. Motion for leave to appeal to Court of Appeals granted.

BRAKER, Respondent, v. NEW YORK FINANCE CO., Appellant, et al. (Supreme Court, Appellate Division, First Department. February 7, 1913.) Action by Conrad M. Braker against the New York Finance Company, impleaded with others. A. L. Carter, of New York City, for appellant. S. A. Crummey, of New York City, for respondent. No opinion. Motion to dismiss appeal denied, without costs. Judgment affirmed, with costs. Orders filed. See, also, 138 N. Y. Supp. 1108.

BRAUN, Appellant, v. BUFFALO GENERAL ELECTRIC CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. January 15, 1913.) Action by Charles Braun, as administrator, etc., against the Buffalo General Electric Company. No opinion. Judgment and order affirmed, with costs. See, also, 134 App. Div. 910, 118 N. Y. Supp. 1096.

BROADWAY IMPROVEMENT CO. v. HARRIS et al. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by the Broadway Improvement Company against Simon D. Harris and others. No opin-

ion. Application denied, with \$10 costs. Order signed.

BROOKLYN HEIGHTS R. CO., Respondent, v. **BROOKLYN CITY R. CO.,** Appellant. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Action by the Brooklyn Heights Railroad Company against the Brooklyn City Railroad Company.

PER CURIAM. Motion to resettle order granted, by making the second paragraph thereof read as follows: "Unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby unanimously affirmed, except as to the findings that Hollins & Co. on the 14th day of February, 1903, were the owners of all of the capital stock of the plaintiff; that there had been a general examination of all of the accounts, so as to make possible an accurate statement showing the respective indebtedness of the companies to each other; that interest should be awarded from September 1, 1894, amounting to \$1,616,680.15; and that September 1, 1894, was the date prior to which \$1,740,258.38 over and above expenditures for which the plaintiff had been reimbursed by the defendant, had been expended by the plaintiff—without costs to either party in this court." See, also, 151 App. Div. 465, 135 N. Y. Supp. 990.

BUENTE, Respondent, v. **COLLINS,** Appellant. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Charles F. Buente against Matthew G. Collins. G. Glenn, of New York City, for appellant. Moses Cohen, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed. See, also, 150 App. Div. 929, 135 N. Y. Supp. 1102.

BURGGRAF v. CITY OF NEW YORK (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by John B. Burggraf against the City of New York. No opinion. Motion granted, with \$10 costs. Order filed.

In re BURKE. (Supreme Court, Appellate Division, First Department. January 31, 1913.) In the matter of William J. Burke, an attorney. No opinion. Reference ordered to official referee. Settle order on notice. See, also, 150 App. Div. 899, 134 N. Y. Supp. 1127.

BURNETT, Respondent, v. **NEW YORK, O. & W. RY. CO.,** Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Miner Burnett against the New York, Ontario & Western Railway Company. No opinion. Judgment and order affirmed, with costs.

BUTCHER v. COLE et al. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Judson W. Butcher

against Harrison D. Cole and another, impleaded with others. No opinion. Judgment affirmed, with costs.

In re CITY OF NEW YORK. (Supreme Court, Appellate Division, First Department. January 31, 1913.) In the matter of the City of New York.

PER CURIAM. Application granted. Order filed.

DOWLING, J., dissents.

In re BUTLER AVE. IN CITY OF NEW YORK. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) In the matter of the application of the City of New York, etc., as to opening and extending Butler avenue, etc. From the order, the Wood-Harmon Richmond Realty Company appeals. No opinion. Order affirmed, with \$10 costs and disbursements.

CAIN, Respondent, v. **THOMPSON-STARRETT CO.,** Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Neri Cain against the Thompson-Starrett Company. No opinion. Motion for leave to appeal to the Court of Appeals (from 138 N. Y. Supp. 472) denied. See, also, 139 N. Y. Supp. 1118.

CAIN, Respondent, v. **THOMPSON-STARRETT CO.,** Appellant. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Action by Neri Cain against the Thompson-Starrett Company. No opinion. Motion for reargument (of 138 N. Y. Supp. 472) denied, without costs. See, also, 139 N. Y. Supp. 1118.

CALENDO, et al., Respondents, v. **FLEMING,** Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Vincenzo Calendo and another against William H. Fleming. No opinion. Motion denied, on condition that appellant perfect his appeal, place the cause on the next calendar, and be ready for argument when reached; otherwise, motion granted, with \$10 costs.

CANAVAN BROS. CO., Respondent, v. **BENDHEIM et al.,** Appellants. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by the Canavan Bros. Company against Adolph M. Bendheim and others. A. Freyer, of New York City, for appellants. F. Nevius, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed. See, also, 148 App. Div. 894, 132 N. Y. Supp. 1123.

CAPSUTO, Respondent, v. **FISHER, et al.,** Appellants. (Supreme Court, Appellate Division, First Department. February 7, 1913.)

Action by Yousoule Halm Capsuto against John T. Fisher and others. E. M. Grout, of New York City, for appellants. M. Feltenstein, of New York City, for respondent.

PER CURIAM. Judgment and order affirmed, with costs. Order filed.

INGRAHAM, P. J., and SCOTT, J., dissent.

CARNEGIE TRUST CO. v. CHAPMAN. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by the Carnegie Trust Company against Charles W. Chapman. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 138 N. Y. Supp. 715.

CARNEGIE TRUST CO., Appellant, v. WEIL, Respondent. (Supreme Court, Appellate Division, First Department. February 7, 1913.) Action by the Carnegie Trust Company against Aron Weil. H. B. Twombly, of New York City, for appellant. F. M. Patterson, of New York City, for respondent.

PER CURIAM. Judgment and order affirmed, with costs. Order filed.

SCOTT, J., dissents.

CASEY v. WHEATON et al. (Supreme Court, Appellate Division, Third Department. January 16, 1913.) Action by Michael Casey against Armond E. Wheaton and another.

PER CURIAM. Motion granted, with costs of appeal and \$10 costs of this motion, unless within 15 days the appellant shall serve upon the respondent's attorney three printed copies of the case on appeal, which he may do without costs, and, in case he shall so serve, the motion is denied, without costs.

CAVANAGH v. CREST REALTY CO. (Supreme Court, Appellate Term, First Department. January 15, 1913.) Appeal from City Court of New York, Trial Term. Action by Raymond Cavanagh, an infant, by Mary Cavanagh, his guardian ad litem, against the Crest Realty Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed, and new trial ordered. Simpson & Cardozo (Benjamin N. Cardozo, of New York City, of counsel), for appellant. Edward A. Scott (S. J. Bischoff, of New York City, of counsel), for respondent.

PER CURIAM. Upon the record we fail to find any evidence which shows that the defendant is responsible, either on the theory of respondent superior or on the theory of nuisance, for the acts of the persons creating a dangerous condition on the sidewalk in front of the lot adjoining the premises controlled by the defendant. The judgment is therefore reversed, and a new trial ordered, with costs to appellant to abide the event.

LEHMAN and PAGE, JJ., concur.

In re CERTAIN LAND IN BOROUGH OF BROOKLYN, CITY OF NEW YORK. (Su-

preme Court, Appellate Division, Second Department. January 24, 1913.) In the matter of acquiring title by the City of New York to certain land and premises, situated in the block bounded by Chauncey street, Marion street, Hopkinson avenue, and Rockaway avenue, in the Borough of Brooklyn, etc. No opinion. Motion denied, with \$10 costs. See, also, 151 App. Div. 891, 135 N. Y. Supp. 1104.

In re CITY OF NEW YORK. **In re HEALY.** (Supreme Court, Appellate Division, First Department. January 17, 1913.) In the matter of the application of the City of New York to acquire title, etc. In the matter of Florence Healy. No opinion. Order affirmed, without costs. Order filed.

In re CITY OF NEW YORK. **In re TOWN OF CARMEL et al.** (Supreme Court, Appellate Division, Second Department. January 28, 1913.) In the matter of the applications of the City of New York to acquire real estate in the towns of Carmel and Southeast, etc. Croton Falls Dam and Reservoir, Reservoir K. No opinion. Reargument ordered, and case set down for Monday, March 10, 1913.

CITY OF NEW YORK, Appellant, v. WHITE STAR TOWING CO., Respondent. (Supreme Court, Appellate Division, First Department. February 7, 1913.) Action by the City of New York against the White Star Towing Company. L. Leale, of New York City, for appellant. J. M. Zurn, of Brooklyn, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

In re CITY OF ROCHESTER. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) In the matter of the application of the City of Rochester to acquire certain lands in said city for the opening and widening of Frank street. The Otis Elevator Company appeals.

PER CURIAM. Confirmation of report of commissioners modified, so as to provide that the appellant shall be entitled to taxable costs as in an action, and, as so modified, affirmed, with the costs of this appeal to appellant.

In re CITY OF ROCHESTER. **In re KOMENSKI.** (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) In the matter of the application of the City of Rochester to acquire certain lands for the opening of Hamburg street, situate in said city. In the matter of award to Ellis Komenski. No opinions. Appeal dismissed, without costs, upon stipulation filed.

CLAMAN, Respondent, v. CLAMAN, Appellant. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Max Claman against Morris Claman. H. S. Mansfield, of New York City, for appellant. C. B. Ruskay, of New York City, for respondent.

ent. No opinion. Judgment affirmed, with costs. Order filed. See, also, 144 App. Div. 934, 129 N. Y. Supp. 1116.

COLLELLI, Appellant, v. RUTTER et al., Respondents. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Antonio Collelli against Frank Rutter and another. No opinion. Motion denied, with \$10 costs.

COLLINS et al., Respondents, v. PHIPPS, Appellant. (Supreme Court, Appellate Division, First Department. February 7, 1913.) Action by Jesse T. Collins and another against Genevieve C. Phipps. A. Benedict of New York City, for appellant. R. D. Thurber, of New York City, for respondents. No opinion. Judgment and order affirmed, with costs. Order filed.

CORDAY v. SULZBACH. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Jacob Corday against Jacob Sulzbach. No opinion. Application denied, with \$10 costs. Order signed.

COYLE v. LINCH. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Susan Coyle against Geo. W. Linch. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 137 N. Y. Supp. 1116.

CRANTZ, Respondent, v. NASSAU ELECTRIC R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. December 6, 1912.) Action by Julius Crantz against the Nassau Electric Railroad Company. No opinion. Reargument ordered, and case set down for Friday, December 13, 1912. See, also, 138 N. Y. Supp. 966.

CRAWFORD, Respondent, v. O'BRIEN CONST. CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1913.) Action by Cornelius Crawford against the O'Brien Construction Company. No opinion. Judgment and order unanimously affirmed, with costs.

CROSMAN, Respondent, v. FORBUSH SHOE MFG. CO. et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by Cortland Crossman against the Forbush Shoe Manufacturing Company and others. No opinion. Judgment reversed, and complaint dismissed, without costs, in accordance with stipulation filed.

CURNOW, Respondent, v. MORSE DRY DOCK & REPAIR CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 28, 1913.) Action by Edwin H. Cur-

now against the Morse Dry Dock & Repair Company. No opinion. Motion denied, without cost.

CUTHBERT, Respondent, v. CYLINDER PAPER CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Robina Cuthbert, as administratrix, against the Cylinder Paper Company. No opinion. Motion for leave to appeal to Court of Appeals (from 138 N. Y. Supp. 1113) denied, with \$10 costs.

DANZIGER et al. v. GOTTLIEB. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Charles S. Danziger and others against Joseph Gottlieb. No opinion. Motion denied, with \$10 costs, without prejudice to an application to the Special Term. Order filed. See, also, 143 App. Div. 902, 127 N. Y. Supp. 1117.

DAUCHY et al., Appellants, v. POWERS et al., Respondents. (Supreme Court, Appellate Division, Third Department. January 8, 1913.) Action by William P. Dauchy and another, as administrators with the will annexed, etc., of Albert E. Powers, deceased, and Richard J. Welch, suing on behalf of themselves and all other persons similarly situated, against Edward F. Powers and another, as executors, and Eliza Powers, individually and as executrix, etc., of Nathaniel B. Powers, deceased. No opinion. Motion denied.

DAVID v. EINHORN et al. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Morris David against William Einhorn and others. No opinion. Motion to dismiss appeal granted, with \$10 costs. Order filed.

DAVIDSON v. METROPOLITAN BRIDGE & CONSTRUCTION CO. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Chas. Davidson against the Metropolitan Bridge & Construction Company. No opinion. Motion granted, with \$10 costs. Order filed.

DEAN v. EAKINS. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by William H. Dean against William C. Eakins. No opinion. Application denied, with \$10 costs. Order signed.

DECKER v. STILWELL. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Margaret Decker against Stephen J. Stilwell. No opinion. Motion granted, with \$10 costs. Order filed.

DEKKER v. RICHEY, BROWN & DONALD. (Supreme Court, Appellate Division, First Department. January 3, 1913.) Appeal

om Trial Term, New York County. Action by Lambert Dekker against Richey, Brown & Donald. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Reversed, and new trial ordered, unless plaintiff accept a reduced amount, in which event the judgment is affirmed, as so modified. T. H. Lord, of New York City, for appellant. Henry Leon Slobodin, of New York City, for respondent.

PER CURIAM. The judgment and order should be reversed, and a new trial ordered, with costs to appellant to abide event, unless the plaintiff stipulates to reduce the verdict to \$3,500, in which event, judgment, as so modified, affirmed, and order affirmed, without costs; the reason being that in the opinion of the court the verdict as rendered must have been based upon a finding that the plaintiff suffered tuberculosis as a result of the accident, and, if the jury did so find, it was against the weight of evidence. The other injuries were not sufficiently severe, in the opinion of the court, to justify a larger recovery than the amount to which the judgment should be reduced as before indicated. Ordered accordingly.

DELEVAN et al. v. NEW YORK, N. H. & I. R. CO. et al. (Supreme Court, Appellate Division, First Department. December 27, 1912.) Action by Tompkins C. Delevan and others against the New York, New Haven & Hartford Railroad Company and others. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 139 N. Y. Supp. 17.

DE MESQUITA v. HERBERT KAUFMAN CO. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Julius B. De Mesquita against the Herbert Kaufman Company. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 138 N. Y. Supp. 1113.

DEMPSEY, Respondent, v. MORSE DRY DOCK & REPAIR CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Michael Dempsey against the Morse Dry Dock & Repair Company. No opinion. Judgment and order unanimously affirmed, with costs. See, also, 139 N. Y. Supp. 1121.

DEMPSEY, Respondent, v. MORSE DRY DOCK & REPAIR CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 28, 1913.) Action by Michael Dempsey against the Morse Dry Dock & Repair Company. No opinion. Motion denied, without costs. See, also, 139 N. Y. Supp. 1121.

DE NEGRO v. CHRISTMAN. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Amina De Negro against Chas. A. Christman. No opinion. Application denied, with \$10 costs. Order signed.

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See, also, 77 Misc. Rep. 147, 136 N. Y. Supp. 364.

DICKINSON, Appellant, v. HILLSINGER, Respondent. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by Arthur L. Dickinson against Charles Hillsinger.

PER CURIAM. Judgment affirmed, with costs.

LYON, J., dissents.

DI DOMENICO, Appellant, v. NEW YORK CENT. & H. R. R. CO., Respondent. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by Amelia Di Domenico, as administratrix, etc., of Salvatore Di Domenico, deceased, against the New York Central & Hudson River Railroad Company.

PER CURIAM. Judgment and order affirmed, with costs. See, also, 140 App. Div. 942, 125 N. Y. Supp. 1117.

LYON, J., not voting.

DIETZ v. STRAUSS. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Julius Dietz against Louis Strauss. No opinion. Application granted. Order signed.

DRAHMS, Appellant, v. GOETZ, Respondent. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by Emma F. Drahms against Anna Goetz. No opinion. Judgment and order affirmed, with costs.

DRUMMOND, Respondent, v. CITY OF NEW YORK et al., Appellants. (Supreme Court, Appellate Division, First Department. January 3, 1913.) Action by Francis Drummond against the City of New York and others. L. Leale, of New York City, for appellants. R. H. Roy, of Brooklyn, for respondent.

PER CURIAM. Judgment and order affirmed, with costs. Order filed.

INGRAHAM, P. J., dissents as to the city.

DUDLEY, Appellant, v. RAYMOND, Respondent. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Guilford Dudley, as ancillary administrator, etc., against Harry Raymond. W. M. Beard, of New York City, for appellant. D. P. Hays, of New York City, for respondent.

PER CURIAM. Judgment and order affirmed, with costs, on the authority of Dudley v. Raymond, 148 App. Div. 886, 133 N. Y. Supp. 17.

INGRAHAM, P. J., dissents. Order filed.

DUNN, Respondent, v. STEWART et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Clarence W. Dunn against James C. Stewart and another. No opinion. Judgment and order affirmed, with costs.

DURR, Respondent, v. INTERNATIONAL RY. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 15, 1913.) Action by Abram Durr against the International Railway Company. No opinion. Judgment and order affirmed, with costs.

EAGLE SAVINGS & LOAN CO. v. COLLINS et al. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by the Eagle Savings & Loan Company against Ada M. Collins and others. No opinion. Motion denied, on condition that appellant perfect her appeal, place the cause on the next calendar, and be ready for argument when reached; otherwise, motion granted, with \$10 costs.

EGAN v. EGAN. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Mary H. Egan against William H. Egan. No opinion. Motion granted, with \$10 costs. Order filed.

ELLIOTT, Respondent, v. EMPIRE LIMESTONE CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by Alexander C. Elliott against the Empire Limestone Company.

PER CURIAM. Judgment and order affirmed, with costs.

FOOTE, J., not sitting.

ELLISON, Respondent, v. EDELMAYER, Appellant. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by William B. Ellison against Walter S. Edelmeyer. D. Nicholson, of New York City, for appellant. O. B. Goldsmith, of New York City, for respondent. No opinion. Order reversed, with \$10 costs and disbursements, and motion denied, with \$10 costs. Order filed.

EQUITABLE TRUST CO. OF NEW YORK v. LEICHTER. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by the Equitable Trust Company of New York against Solomon Leichter. No opin-

ion. Application denied, with \$10 costs. Order signed.

ERDTMANN, Appellant, v. STACK et al., Respondents. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Frederick W. Erdtmann, individually and as trustee, etc., against Thaddeus J. G. Stack and another. No opinion. Motion denied, on condition that appellant perfect his appeal, place the cause on the next calendar, and be ready for argument when reached; otherwise, motion granted, with \$10 costs.

EVANS et al. v. PELTA et al. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Bertha Evans and others against Charles Pelta and others. No opinion. Order signed. See, also, 146 App. Div. 749, 131 N. Y. Supp. 411.

FARJEON, Appellant, v. INDIAN TERRITORY OIL CO., Respondent. (Supreme Court, Appellate Division, First Department. January 24, 1913.) Action by Albert Farjeon against the Indian Territory Oil Company. W. E. Kisselburgh, for appellant. W. F. Parker, for respondent. No opinion. Judgment affirmed, with costs, in 146 App. Div. 23, 130 N. Y. Supp. 532. Order filed. See, also, 151 App. Div. 935, 135 N. Y. Supp. 1111.

In re FEDERAL UNION SURETY CO. (Supreme Court, Appellate Division, First Department. January 24, 1913.) In the matter of the application of the Federal Union Surety Company. No opinion. Judgment affirmed, with costs. Order filed. See, also, 73 Misc. Rep. 28, 132 N. Y. Supp. 196; 139 N. Y. Supp. 1122.

In re FEDERAL UNION SURETY CO. (Supreme Court, Appellate Division, First Department. January 24, 1913.) In the matter of the Federal Union Surety Company. No opinion. Order (73 Misc. Rep. 28, 132 N. Y. Supp. 196) affirmed, with \$10 costs and disbursements. Order filed. See, also, 139 N. Y. Supp. 1122.

FIDELITY MUT. LIFE INS. CO. v. RICHLAND. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by the Fidelity Mutual Life Insurance Company against Harris Richland. No opinion. Motion granted. Order filed. See, also, 138 N. Y. Supp. 763.

ROGOWSKI v. BRILL (two cases). (Supreme Court, Appellate Division, First Department. February 7, 1913.) Appeal from Appellate Term. Action by Henri Rogowski against Iax Brill. From a determination of the Appellate Term (132 N. Y. Supp. 1144) reversing judgments of the Municipal Court in actions on promissory notes, plaintiff appeals. Reversed. See, also, 153 App. Div. 894, 137 N. Y. Supp. 140. Swan & Moore, of New York City (Joseph R. Swan, of New York City, of counsel), for appellant. S. Charles Sugarman, of New York City (M. Spencer Bevins, of New York City, of counsel), for respondent.

PER CURIAM. These are two appeals, argued together, from determinations of the Appellate Term reversing judgments of the Municipal Court in actions on promissory notes brought by the payee against the indorser. The cases have twice been appealed to the Appellate Term and twice reversed, and have been tried by three different Municipal Court judges, who have every time decided in favor of the plaintiff. The defense is that the defendant was an accommodation indorser for the benefit of the plaintiff. The trial court found that he was an indorser for the benefit of the maker. Plaintiff is a printer. The maker of the note was the president of a company which published a newspaper. A careful examination of the facts presented by the record has convinced us that these notes were given for a good consideration, and that the indorsement was obtained in the interests of the publishers to procure its printing by the plaintiff, the printer, and therefore that the judgment of the trial court was right, and the conclusion reached by the Appellate Term erroneous. It follows, therefore, that the determination appealed from should be reversed and the judgments of the Municipal Court reinstated, with costs to the appellant in all courts.

FIRST NAT. BANK OF AMITYVILLE v. THOMAS KELLS SONS CO. et al. (Supreme Court, Appellate Division, Second Department. January 10, 1913.) Action by the First National Bank of Amityville against the Thomas Kells Sons Company and others. Defendant Louis H. Strouse, assignee, appeals.

PER CURIAM. Order affirmed, with \$10 costs and disbursements, upon the ground that the assignee did not disclose the facts upon which rested the defense that plaintiff took the check with notice that it was issued without authority, but without prejudice to a new application to Special Term by the appellant, to papers which disclose facts which prima facie support his defense.

FITZGERALD. Appellant, v. BROOKLYN UNION ELEVATED R. CO., Respondent. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by John Fitzgerald against the Brooklyn Union Elevated Railroad Company. No opinion. Judgment and order unanimously affirmed, with costs.

FLOCKER, Respondent, v. HUDSON & M. R. CO., Appellant. (Supreme Court, Appellate Division, First Department. January 24, 1913.) Action by Ludwig Flocker, as administrator, against the Hudson & Manhattan Railroad Company. B. L. Pettigrew of New York City, for appellant. M. L. Heidenheimer, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed. See, also, 149 App. Div. 942, 133 N. Y. Supp. 1121.

FORCIAREZ, Respondent, v. AMERICAN GYPSUM CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 15, 1913.) Action by Josephine Forciarez, as administratrix, etc., against the American Gypsum Company. No opinion. Judgment and order affirmed, with costs.

FRENCH, Respondent, v. WRAY, Appellant. (Supreme Court, Appellate Division, Third Department. January 16, 1913.) Action by Harma D. French, as committee of the person and property of William A. Cook, an incompetent person, against Emma Mann Wray. No opinion. Motion for reargument (139 N. Y. Supp. 339) denied.

FRENCH, Respondent, v. WRAY, Appellant. (Supreme Court, Appellate Division, Third Department. January 16, 1913.) Action by Harma D. French, as committee, etc., of William A. Cook, an incompetent person, against Emma Mann Wray.

PER CURIAM. Decision (139 N. Y. Supp. 339) amended, so as to read as follows: "Judgment and order reversed on law and facts, and new trial granted, with costs to appellant to abide event. The specific findings of fact of which this court disapproves as against the weight of evidence are the findings that the defendant's land was included in the descriptions of the deeds under which the plaintiff claims title, that the boundary line between the plaintiff's property and the defendant's was not practically located north of the lands in question, and that the defendant had not acquired title to said lands by adverse possession. All concur; LYON, J., in result."

In re FRINDEL. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) In the matter of Benjamin Frindel, an attorney.

PER CURIAM. Further affidavits may be submitted by the petitioner or the Bar Association on or before January 24, 1913, upon the question whether the respondent has abstained from practice during the period of two years. See, also, 142 App. Div. 901, 127 N. Y. Supp. 1121.

In re FRINDEL. (Supreme Court, Appellate Division, Second Department. January 28,

1913.) In the matter of Benjamin Frindel, an attorney.

PER CURIAM. This proceeding is referred to Hon. William D. Dickey, official referee, to take testimony upon the question of obedience to the direction of this court suspending petitioner from practice, and report thereon, with his opinion. See, also, 139 N. Y. Supp. 1123.

GABEL, Respondent, v. HASTINGS HOMES CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by George Gabel against the Hastings Homes Company. No opinion. Motion denied.

GAINES v. CITY OF NEW YORK. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by David H. Gaines against the City of New York. No opinion. Application granted. Order signed. See, also, 138 N. Y. Supp. 1116.

GAYETTY, Appellant, v. THOMPSON et al., Respondents. (Supreme Court, Appellate Division, First Department. January 3, 1913.) Action by Harry K. Gayetty against Ralph H. Thompson and others. S. C. Crane, of New York City, for appellant. A. G. N. Vermilya, of New York City, for respondents. No opinion. Judgment affirmed, with costs. Order filed.

GENESEE FRUIT CO., Respondent, v. EMPIRE STATE PICKLING CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by the Genesee Fruit Company against the Empire State Pickling Company.

PER CURIAM. Judgment and order affirmed, with costs.

FOOTE, J., not sitting.

GEORGE E. LOEFFLER LAND & IMPROVEMENT CO. v. ENGLAR. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by the George E. Loeffler Land & Improvement Company against D. Roger Englar. No opinion. Application denied, with \$10 costs. Order signed.

GERLACH-BARKLOW CO., Respondent, v. HALEY, Appellant. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by the Gerlach-Barklow Company against John W. Haley. No opinion. Judgment unanimously affirmed, with costs.

GIBSON, Appellant, v. BARNUM, Respondent. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by Malcolm Gibson against Lawrence Barnum. No opinion. Interlocutory judgment affirmed, with costs, with usual leave to plaintiff to withdraw demurrer and answer, upon payment of

costs of demurrer and in this court. See, also, 134 App. Div. 989, 119 N. Y. Supp. 1126.

GILBRANDSEN, Appellant, v. LORD ELECTRIC CO., Respondent. (Supreme Court, Appellate Division, First Department. January 24, 1913.) Action by Michael A. Gilbrandsen against the Lord Electric Company. C. J. Farley, of New York City, for appellant. E. C. Sherwood, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs. Order filed.

SCOTT, J., dissents.

GLEASON, Appellant, v. MERCHANTS' REFRIGERATING CO., Respondent. (Supreme Court, Appellate Division, First Department. January 24, 1913.) Action by Timothy Gleason against the Merchants' Refrigerating Company. J. B. Leavitt, of New York City, for appellant. F. G. Mann, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

GODLEY v. CRANDALL & GODLEY CO. et al. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Elizabeth McM. Godley against the Crandall & Godley Company and others.

PER CURIAM. Motion granted, upon defendant executors giving additional bond, and proceedings stayed until determination of appeal to Court of Appeals. Settle order on notice. See memorandum per curiam. See, also, 139 N. Y. Supp. 236.

GOLDBERG, Appellant, v. BEINLICH, Respondent. (Supreme Court, Appellate Division, First Department. February 7, 1913.) Action by Clara Goldberg against Paul Beinlich. J. A. Hilton, of New York City, for appellant. C. S. Petrasch, of New York City, for respondent. No opinion. Judgment affirmed, with costs, on 145 App. Div. 912, 130 N. Y. Supp. 1112. Order filed.

GOTTHELF v. KRULEWITCH. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Samuel Gottself against Julius Krulewitch. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 138 N. Y. Supp. 756.

GRAHAM, Appellant, v. GAMMACK, Respondent. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by William E. Graham, as administrator, etc., against John Gammack. No opinion. Judgment affirmed, with costs.

GRAVES, Respondent, v. VILLAGE OF NEW BERLIN, Appellant. (Supreme Court, Appellate Division, Third Department. De-

ember 30, 1912.) Action by Francis Graves against the Village of New Berlin.

PER CURIAM. Judgment and order unanimously affirmed, with costs; the court holding that the verdict is supported by sufficient evidence, and that the declarations of the trustee, claimed to have been erroneously admitted, were not properly objected to, nor was a motion made to strike them out, and in any event, if error was committed in receiving the same, the error was not sufficient to call for a reversal. See, also, 139 N. Y. Supp. 1125.

LYON, J., not sitting.

GRAVES, Respondent, v. VILLAGE OF NEW BERLIN, Appellant. (Supreme Court, Appellate Division, Third Department. January 16, 1913.) Action by Francis Graves against the Village of New Berlin. No opinion. Motion denied. See, also, 139 N. Y. Supp. 1124.

GREENE v. GREENE et al. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Action by Annie M. Greene against Mary A. Greene and others. No opinion. Judgment affirmed, with costs.

GROTHER et al., Respondents, v. SCHIERENBECK, Appellant. (Supreme Court, Appellate Division, First Department. January 1, 1913.) Action by Herman Grotheer and others against Fred Schierenbeck. J. J. Fitzgerald, for appellant. B. Reass, of New York City, for respondents. No opinion. Judgment and order affirmed, with costs. Order filed.

GROTTE, Respondent, v. HUDSON, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Edward B. Grotte against George C. Hudson. No opinion. Judgment affirmed by default, with costs.

GUGEL et al., Respondents, v. HISCOX et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Action by May M. Gugel and another against Everett S. Hiscox and another. No opinion. Interlocutory judgment affirmed, with costs. See, also, 143 App. Div. 943, 127 N. Y. Supp. 122.

GUTTA PERCHA & RUBBER CO. v. HOLMAN. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by the Gutta Percha & Rubber Company against Chas. J. Holman. No opinion. Motion granted. Question certified. Order filed. See, also, 138 N. Y. Supp. 1118.

HAGEDORN BROS. v. MARQUARDT. (Supreme Court, Appellate Term, First Department. January 9, 1913.) Appeal from Municipal Court, Borough of Manhattan, Sixth Dis-

trict. Action by Hagedorn Bros. against John Marquardt. From a judgment for defendant. Plaintiffs appeal. Reversed. Samuel Ecker, of New York City, for appellants. Martin G. Lippman, of New York City, for respondent.

PER CURIAM. Judgment reversed, on authority of *Hagedorn Bros. v. O'Rourke* (Sup.) 134 N. Y. Supp. 528, and judgment awarded to the plaintiff for \$44 and costs in this court.

HAGEDORN BROS. v. O'ROURKE et al. (Supreme Court, Appellate Term, First Department. January 9, 1913.) Appeal from Municipal Court, Borough of Manhattan, Sixth District. Action by Hagedorn Bros. against Charles O'Rourke and another. From a judgment for defendants, plaintiffs appeal. Reversed. Samuel Ecker, of New York City, for appellants. C. Arthur Arnstein, of New York City, for respondents.

PER CURIAM. Judgment reversed, on authority of *Hagedorn Bros. v. O'Rourke* (Sup.) 134 N. Y. Supp. 528, and judgment awarded to the plaintiff for \$57.50 and costs in the Municipal Court and in this court.

HAKANSON, Appellant, v. KINGSLEY, Respondent. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Terese Hakanson against Hope Kingsley. A. Josephsson, of New York City, for appellant. C. Steckler, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

HALL v. CENTRAL FISH CO. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Richard F. Hall against the Central Fish Company. No opinion. Motion to dismiss appeal granted, with \$10 costs, unless appellant complies with terms stated in order. Order filed.

HANCOCK, Respondent, v. CLARK, Appellant. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by Robert M. Hancock against Charles E. Clark. No opinion. Judgment and order affirmed, with costs.

HANDY v. VAN CORTLANDT REALTY CO. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Henry Handy against the Van Cortlandt Realty Company. No opinion. Application granted. Order signed. See, also, 139 N. Y. Supp. 1125.

HANDY v. VAN CORTLANDT REALTY CO. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Henry Handy against the Van Cortlandt Realty Company. No opinion. Motion granted. Order filed. See, also, 139 N. Y. Supp. 1125.

HARTMAN et al., Respondents, v. NETSCHERT, Appellant. (Supreme Court, Appellate Division, Second Department. January 28, 1913.) Action by Samuel I. Hartman and another against Frank Netschert.

PER CURIAM. Motion to dismiss appeal from order denied, on condition that appellant perfect his appeal, place the cause on the next calendar, and be ready for argument when reached; otherwise, motion granted, with \$10 costs. See, also, 139 N. Y. Supp. 1126.

HARTMAN et al., Respondents, v. NETSCHERT, Appellant. (Supreme Court, Appellate Division, Second Department. January 28, 1913.) Action by Samuel I. Hartman and another against Frank Netschert.

PER CURIAM. Motion to dismiss appeal from judgment denied, on condition that appellant perfect his appeal, place the cause on the next calendar, and be ready for argument when reached; otherwise, motion granted, with \$10 costs.

In re HASBROUCK. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) In the matter of the judicial settlement of the accounts, etc., of Louis H. Hasbrouck, as executor, etc. No opinion. Motion denied, with \$10 costs. See, also, 138 N. Y. Supp. 620.

HATCH, Respondent, v. WALKUP, BALDWIN & CO., Appellants. (Supreme Court, Appellate Division, First Department. January 24, 1913.) Action by Edward W. Hatch, trustee, against Walkup, Baldwin & Co. C. F. Birdseye, of New York City, for appellants. H. A. Rubino, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed. See, also, 138 N. Y. Supp. 1120.

HAWKINS, Respondent, v. GESELLSCHAFT FUR DRAHTLOSE TELEGRAPHIE TELEFUNKEN, Appellant. (Supreme Court, Appellate Division, Second Department. January 28, 1913.) Action by Frederick Hawkins against the Gesellschaft fur Drahtlose Telegraphie Telefunken. No opinion. Motion to dismiss appeal denied. The appeal will be held on the calendar of this court until the expiration of the time in which the action may be remanded from the United States court.

HAYES, Appellant, v. ROCHESTER, S. & E. R. CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by William J. Hayes against the Rochester, Syracuse & Eastern Railroad Company. No opinion. Appeal dismissed, without costs, upon stipulation filed.

HEILBRUNN v. GERMAN ALLIANCE INS. CO. OF NEW YORK. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Simon Heilbrunn against the German Alliance Insurance Company of New York. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 151 App. Div. 937, 135 N. Y. Supp. 1117.

In re HELDMAN'S ESTATE. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) In the matter of the Estate of George Heldman, deceased.

PER CURIAM. Motion granted, and order dismissing appeal and order of affirmance, both entered November 13, 1912, amended, so as to provide that the dismissal and affirmance, respectively, shall be without costs to either party, in accordance with the stipulation of the attorneys, dated July 9, 1912. See, also, 138 N. Y. Supp. 1120.

In re HEMLOCK ST. IN BOROUGH OF BROOKLYN, CITY OF NEW YORK. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) In the matter of the application of the City of New York relative to acquiring title to Hemlock street, from Jamaica avenue to Atlantic avenue, in the Borough of Brooklyn, etc. No opinion. Motion granted, without costs.

In re HEYMANN. (Supreme Court, Appellate Division, First Department. January 24, 1913.) In the matter of Henry M. Heymann. No opinion. Reference ordered to official referee. Settle order on notice. See, also, 149 App. Div. 947, 134 N. Y. Supp. 1134.

HICKEY, Respondent, v. NEW YORK CENT. & H. R. R. Co., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Elizabeth A. Hickey, as administratrix, etc., against the New York Central & Hudson River Railroad Company.

PER CURIAM. Judgment and order reversed, and new trial granted, with costs to appellant to abide event, upon the ground that the plaintiff did not prove that the injury which caused the death of her intestate was due to the negligence of the defendant. See, also, 149 App. Div. 895, 132 N. Y. Supp. 1132.

HIRSCH v. MAYER. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Elvora Hirsch against David Mayer. No opinion. Motion granted with \$10 costs. Order filed.

HITCHINGS v. BARR et al. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) (Actions 1 and 2.) Actions

by Hector M. Hitchings against Henry Barr and others; Ella B. Rupert, appellant. No opinion. Orders affirmed by default, with \$10 costs and disbursements. See, also, 138 N. Y. Supp. 1121.

HOFFERBERTH v. SMITH & UHLIG CO. et al. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Charles Hofferberth against Smith & Uhlig Company and others. No opinion. Application denied, with \$10 costs. Order signed.

HOGAN, Respondent, v. NEW YORK CENT. & H. R. R. Co., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Margaret A. Hogan, as administratrix, etc., against the New York Central & Hudson River Railroad Company.

PER CURIAM. Judgment (136 N. Y. Supp. 1047) and order affirmed, with costs.

McLENNAN, P. J., and LAMBERT, J., dissent, upon the grounds that the defendant was not shown guilty of actionable negligence, and that the plaintiff's intestate was guilty of contributory negligence as matter of law.

HOLLANDER, Respondent, v. MELNICK, Appellant. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by Abram Hollander against Abraham Melnick. No opinion. Judgment affirmed, with costs.

HOOKER, Respondent, v. SHARRETT, Appellant. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Action by Thomas Hooker against Clinton J. Sharrett. No opinion. Judgment affirmed, with costs.

HORN v. BREAKSTONE. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Joseph Horn against Isaac Breakstone. No opinion. Application denied, with \$10 costs. Order signed. See, also, 75 Misc. Rep. 343, 133 N. Y. Supp. 285.

HOUGH, Respondent, v. F. W. WOOLWORTH & CO., Appellants. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by William J. Hough against F. W. Woolworth & Co. No opinion. Judgment and order unanimously affirmed, with costs.

HOURIHAN, Respondent, v. DELAWARE, L. & W. R. CO., Appellant. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by Patrick Hourihan, as

administrator, etc., against the Delaware, Lackawanna & Western Railroad Company.

PER CURIAM. Judgment and order affirmed, with costs.

SMITH, P. J., dissents, upon the ground that there is no evidence upon which the jury was authorized to find substantial damages. **HOUGHTON, J., not sitting.**

HUNTER v. CITY OF ALBANY. (Supreme Court, Appellate Division, Third Department. January 16, 1913.) Action by Charles F. Hunter against the City of Albany. No opinion. Motion granted, with costs, unless, within 40 days, appellant serves printed papers on appeal, and, if so served, motion denied, without costs.

HURWITZ, Respondent, v. BERNSTEIN, Appellant. (Supreme Court, Appellate Division, Second Department. January 28, 1913.) In the matter of proceedings supplementary to execution in an action by Jacob Hurwitz against Hyman Bernstein. No opinion. Motion denied, on condition that appellant perfect his appeal, place the cause on the next calendar, and be ready for argument when reached; otherwise, motion granted, with \$10 costs.

HYAMS v. MORISON et al. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Edwards Hyams against Margaret Morison and others. C. A. Baker, of New York City, for appellants. B. N. Cardozo, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

In re HYDE. (Supreme Court, Appellate Division, First Department. January 17, 1913.) In the matter of Charles H. Hyde. No opinion. Respondent disbarred. Order filed.

INGALLS, Respondent, v. ERIE R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Cora Ingalls against the Erie Railroad Company.

PER CURIAM. Judgment and order reversed, and new trial granted, with costs to appellant to abide event. Held that, while the defendant was under the same obligation to maintain the crossing for the use of the Ingalls farm as it was for the use of the Baker farm, yet the evidence fails to show that the defendant was guilty of negligence in the maintenance of the crossing which was the proximate cause of the accident.

FOOTE, J., concurs in result only, upon the ground that the occupants of the Ingalls farm had the use of the crossing either as licensees or as a way of necessity, and that in either

case the defendant owed them no duty to keep the crossing in repair. KRUSE, J., dissents.

JACOB BAYER LUMBER CO., Respondent, v. **MASSACHUSETTS BONDING & INS. CO.**, Appellant. (Supreme Court, Appellate Division, First Department, February 7, 1913.) Action by the Jacob Bayer Lumber Company against the Massachusetts Bonding & Insurance Company. H. L. Cheyney, of New York City, for appellant. B. D. Whedon, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

JACOBY, Respondent, v. **BROOKLYN, Q. C. & S. R. CO.** et al., Appellants. (Supreme Court, Appellate Division, Second Department, January 24, 1913.) Action by Jennie Jacoby against the Brooklyn, Queens County & Suburban Railroad Company and another. No opinion. Motion for leave to appeal to the Court of Appeals (from 153 App. Div. 352, 138 N. Y. Supp. 486) denied, without costs.

JAQUISH, Respondent, v. **KELLEY** et al., Appellants. (Supreme Court, Appellate Division, Third Department, January 16, 1913.) Action by George L. Jaquish against George W. Kelley and others. No opinion. Motion denied. See, also, 138 N. Y. Supp. 1122.

JENKINS v. **GRUEN** et al. (Supreme Court, Appellate Division, First Department, January 31, 1913.) Action by Mary Jenkins against Fanny Gruen and others. No opinion. Application granted. Order signed. See, also, 137 N. Y. Supp. 853.

JOHN D. ELWELL & CO., Appellants, v. **ACME PORTLAND CEMENT CO.**, Respondent. (Supreme Court, Appellate Division, First Department, January 31, 1913.) Action by John D. Elwell & Co. against the Acme Portland Cement Company. M. Conboy, of New York City, for appellants. H. M. Earle, of New York City, for respondent. No opinion. Order affirmed, with costs to respondent to abide event. Order filed. See, also, 138 N. Y. Supp. 1004.

JONES, Appellant, v. **DOW**, Respondent. (Supreme Court, Appellate Division, Second Department, January 24, 1913.) Action by Lorena Ridgely Jones against Carolyn A. Dow. No opinion. Motion for reargument (138 N. Y. Supp. 1123) denied with \$10 costs. See, also, 139 N. Y. Supp. 1128.

JONES, Appellant, v. **DOW**, Respondent. (Supreme Court, Appellate Division, Second Department, January 28, 1913.) Action by Lorena Ridgely Jones against Carolyn A. Dow. No opinion. Motion denied, with \$10 costs. See, also, 139 N. Y. Supp. 1128.

JUNGMAN v. **NAUMBERG**. (Supreme Court, Appellate Division, First Department, January 31, 1913.) Action by Charles Jungman against Bernard Naumberg. No opinion. Motion to dismiss appeal granted, with \$10 costs, unless appellant complies with terms stated in order. Order filed.

KATZ v. **J. A. BURNS CO.** (Supreme Court, Appellate Division, First Department, January 31, 1913.) Action by Phillip Katz against J. A. Burns Company. No opinion. Motion to dismiss appeal granted, with \$10 costs. Order filed. See, also, 144 App. Div. 928, 129 N. Y. Supp. 1130.

KELLAS, Respondent, v. **ST. ANDREW'S ROMAN CATHOLIC CHURCH OF NORWOOD** et al., Appellants. (Supreme Court, Appellate Division, Third Department, December 30, 1912.) Action by Leroy M. Kellas, as trustee in bankruptcy for Patrick J. Murtagh, against the St. Andrew's Roman Catholic Church of Norwood, N. Y., and another.

PER CURIAM. Order construing the order of reference reversed, without costs to either party, and judgment vacated, and matter remitted to the Special Term, to pass upon the report of the referee. Matter may be brought before the special term by motion for confirmation thereof.

HOUGHTON, J., dissents, on the ground that, the order of reference having been made upon stipulation of the parties without intervention of the court, in pursuance of section 1011 of the Code of Civil Procedure, it could have been only to hear and determine. **BETTS**, J., dissents, and votes for affirmance of the judgment, with costs, and that the order construing the order of reference be affirmed, without costs, and the appeal from the ex parte order be dismissed, without costs.

KELLER, Respondent, v. **NEW YORK WRECKING CO.**, Appellant. (Supreme Court, Appellate Division, First Department, January 31, 1913.) Action by William Keller, as administrator, etc., against the New York Wrecking Company. T. H. Lord, of New York City, for appellant. R. Link, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

KELLIHER, Respondent, v. **NEW YORK CENT. & H. R. R. CO.**, Appellant. (Supreme Court, Appellate Division, Fourth Department, November 27, 1912.) Action by Sarah Kelliher, as administratrix, etc., against the New York Central & Hudson River Railroad Company. No opinion. Motion for leave to appeal to Court of Appeals (from 138 N. Y. Supp. 894) granted, and questions for review certified.

KENT, Respondent, v. **KIERNAN**, Appellant. (Supreme Court, Appellate Division,

First Department. January 3, 1913.) Action by William J. Kent against Benjamin F. Kieran. J. H. McCrabon, of New York City, for appellant. M. T. Manton, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

KERSHAW, Respondent, v. STEUER, Appellant. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by George Kershaw, by guardian ad litem, against Charles D. Steuer. A. J. Westermayr, of New York City, for appellant. M. L. Heidenheimer, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed. See, also, 138 App. Div. 211, 123 N. Y. Supp. 77.

In re KEYSTONE STATE CONST. CO. (Supreme Court, Appellate Division, Third Department. January 16, 1913.) In the matter of the petition of the Keystone State Construction Company for a writ of certiorari against John Williams, as Commissioner of Labor of the State of New York, in which John Williams, as Commissioner of Labor, appeals. No opinion. Motion granted, except the word "unanimously" should be omitted from the decision. See, also, 152 App. Div. 575, 137 N. Y. Supp. 405.

KIDDER v. PORT HENRY IRON ORE CO. OF LAKE CHAMPLAIN et al. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by George S. Kidder against the Port Henry Iron Ore Company of Lake Champlain and another. No opinion. Motion granted, and proposed questions certified. See, also, 138 N. Y. Supp. 1124.

KIRKLAND, Appellant, v. HUGHES et al., Respondents. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by James Kirkland against James Hughes and others.

PER CURIAM. Order affirmed, with costs.

McLENNAN, P. J., dissents, and votes for modification of the order, by disallowing the item for extra labor and expense in moving the logs in the winter of 1907-08.

KIRSCHBAUM et al., Respondents, v. ESCHMANN, Appellant. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Action by Simon Kirschbaum and others, as executors, etc., against Frederick W. R. Eschmann. No opinion. Judgment and order affirmed, with costs. See, also, 142 App. Div. 906, 126 N. Y. Supp. 1134.

KLEIN v. HAMBURGER. (Supreme Court, Special Term, Kings County. November 28,

1911.) Action by one Klein against one Hamburger.

STAPLETON, J. Motion for an order requiring third party to pay to the sheriff money of judgment debtor denied.

KNAPP, Appellant, v. BARRETT, Respondent. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Alois Knapp against William M. Barrett, as president. T. G. Prioleau, of New York City, for appellant. E. C. Sherwood, of New York City, for respondent. No opinion. Order affirmed, with costs to respondent to abide event. Order filed.

KNAUSS, Respondent, v. WEBBER CONST. CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 28, 1913.) Action by Frederick Knauss against the Webber Construction Company. No opinion. Motion denied, on condition that appellant perfect its appeal, place the cause on the next calendar, and be ready for argument when reached; otherwise, motion granted, with \$10 costs.

In re KNEEN. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) In the matter of the application of William Alfred Kneen for admission to the bar. No opinion. Application granted, and order signed.

KORNBERG v. LASKI et al. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Sigmund Kornberg against Bogumil Laski and others. S. Meyers, of New York City, for plaintiff. E. P. Mowton, of New York City, for defendants.

PER CURIAM. Exceptions overruled, motion for new trial denied, and judgment directed dismissing complaint, with costs. Settle order on notice. See, also, 151 App. Div. 935, 135 N. Y. Supp. 1122.

LAUGHLIN, J., dissents, voting to sustain the exceptions and grant a new trial.

KRUEGER, Appellant, v. BROADWAY BREWING & MALTING CO. et al., Respondents. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by Felix Krueger against the Broadway Brewing & Malting Company and others.

PER CURIAM. Judgment affirmed, with costs.

McLENNAN, P. J., dissents.

KRUEGER, Appellant, v. EAST BUFFALO BREWING CO. et al., Respondent. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by Felix Krueger

against the East Buffalo Brewing Company and others.

PER CURIAM. Judgment affirmed, with costs.

McLENNAN, P. J., dissents.

LAMBERT et al., Appellants, v. JACKSON-STEINWAY CO., Respondent. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Dennis A. Lambert and another against the Jackson-Steinway Company. No opinion. Motion denied, without prejudice to renewal thereof, if due diligence be not shown henceforth.

LASKA, Respondent, v. HARRIS, Appellant. (Supreme Court, Appellate Division, First Department. January 3, 1913.) Action by Edward Laska against Charles K. Harris. A. H. Rosenfeld, of New York City, for appellant. A. A. Mayper, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

LAWLER, Respondent, v. PITKIN HOLESWORTH WORSTED CO., Appellant. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Mary E. Lawler against the Pitkin Holesworth Worsted Company. E. C. Sherwood, of New York City, for appellant. J. A. Dutton, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

In re LAWRENCE. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) In the matter of the judicial settlement of the account of Gilbert F. Lawrence, as executor, etc., of Thomas Lawrence, deceased. No opinion. Decree of the Surrogate's Court of Rockland County affirmed, with costs.

LEGARE, Respondent, v. BUFFALO & FT. ERIE FERRY & RY. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Lionel Legare against the Buffalo & Ft. Erie Ferry & Railway Company.

PER CURIAM. Judgment and order affirmed, with costs.

LAMBERT, J., not sitting.

LEGGETT, Respondent, v. VITAGRAPH CO. OF AMERICA, Appellant. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Action by Julius A. Leggett against the Vitagraph Company of America. No opinion. Judgment and order unanimously affirmed, with costs.

LEITER, Respondent, v. WAGER, Appellant. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Isaac H. Leiter against Daniel P. Wager. R. Wig-

gins, of Middletown, for appellant. G. A. Washington of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

LESKE v. WOLF. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Action by Emil Leske against Lawrence B. Wolf and others. No opinion. Motion to resettle order denied. See, also, 138 N. Y. Supp. 859.

In re LESTER. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) In the matter of the judicial settlement of the account of Willard Lester, as executor of and trustee under the last will and testament of A. Gerald Hull, deceased.

PER CURIAM. Since the commencement of this proceeding the appellant has become entitled to the corpus of the estate. The matter is remitted to the Surrogate's Court to state the final accounts of the executors and trustees, which he is directed to do with all possible speed. The determination of this appeal is held pending such determination, and until the same shall be certified to this court by said Surrogate's Court.

In re LETCHWORTH'S ESTATE. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) In the matter of the transfer tax upon the estate of William Pryor Letchworth, deceased. No opinion. Order affirmed, without costs of this appeal to either party.

LEVY, Appellant, v. GOMPRECHT, Respondent. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Aleck W. Levy against Benjamin Gomprecht. A. B. Hyman, of New York City, for appellant. S. A. Lowenstein, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed. See, also, 139 N. Y. Supp. 1130.

LEVY v. GOMPRECHT. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Aleck W. Levy against Benjamin Gomprecht. No opinion. Motion denied. Order filed. See, also, 139 N. Y. Supp. 1130.

LICARI v. SILVER et al. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Appeal from Special Term, New York County. Action by Salvatore Licari, an infant, against Thomas Silver and another. From an order granting defendant's motion for a bill of particulars, plaintiff appeals. Modified and affirmed. Rosario Maggio, of New York City, for appellant. Benjamin F. Feiner, of New York City, for respondents.

PER CURIAM. The order appealed from should be modified, by requiring the plaintiff to

give the particulars specified in the first and fifth subdivisions of the demand, and not requiring the plaintiff to furnish those specified in the second, third, and fourth subdivisions; and, as thus modified, the order is affirmed, without costs. Settle order on notice.

LICARI, Appellant, v. SILVER et al., Respondents. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Girolamo Licari against Thomas Silver and another. R. Maggio, of New York City, for appellant. B. F. Feiner, of New York City, for respondents. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed. See, also, 139 N. Y. Supp. 1130.

LOHMAN, Respondent, v. PADDOCK, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Harry C. Lohman against Judson H. Paddock. No opinion. Judgment and order unanimously affirmed, with costs.

LONDON, Respondent, v. CITY OF NEW YORK, Appellant. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Action by Hannah London against the City of New York.

PER CURIAM. Judgment and order reversed, and new trial granted, costs to abide the event, on the ground that there is not sufficient proof of any negligence on the part of the defendant.

WOODWARD and RICH, JJ., vote for affirmance.

LOOMIS et al., Appellants, v. NEW YORK CENT. & H. R. R. CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. January 15, 1913.) Action by Leslie G. Loomis and another against the New York Central & Hudson River Railroad Company. No opinion. Motion for reargument (of 138 N. Y. Supp. 1126) denied, with \$10 costs.

In re LORD. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) In the matter of John B. Lord, an attorney.

PER CURIAM. Motion for reargument denied. The court decided that the evidence submitted, together with the presumption of professional integrity arising from many years' practice at the bar, and with which the court could not be unacquainted, preponderatingly showed that the respondent was not guilty of the charge. See, also, 138 N. Y. Supp. 1126.

BURR, J., not voting.

LOWY et al. v. BRADLEY CONTRACTING CO. (Supreme Court, Appellate Term, First Department. February 7, 1913.) Appeal from Municipal Court, Borough of Manhattan, First District. Action by David Lowy and another

against the Bradley Contracting Company. Judgment for plaintiffs, and defendant appeals. Reversed. James A. Lynch, of New York City (Jacob Bernstein, of Mt. Vernon, N. Y., of counsel), for appellant. William Hauser, of New York City, for respondents.

PER CURIAM. The original contract by which the beams were sold to the plaintiffs was concededly rescinded. There is some evidence that thereafter some of the beams were sold to them on different terms. The testimony, however, on this point is very indefinite, and is insufficient to sustain a judgment predicated on title in the plaintiff of the particular beams which are involved in this litigation. Judgment is therefore reversed, and a new trial ordered, with costs to appellant to abide the event.

LUBASH, Respondent, v. CHARLES A. SIGMOND REALTY CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Aaron Lubash against Charles A. Sigmond Realty Company. No opinion. Appeal dismissed by default, with \$10 costs. See, also, 138 N. Y. Supp. 1127; 139 N. Y. Supp. 1131.

LUBASH, Respondent, v. CHARLES A. SIGMOND REALTY CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Action by Aaron Lubash against the Charles A. Sigmond Realty Company. No opinion. Motion granted, without costs. See, also, 139 N. Y. Supp. 1131.

LUBASH, Respondent, v. CHARLES A. SIGMOND REALTY CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 28, 1913.) Action by Aaron Lubash against the Charles A. Sigmond Realty Company.

PER CURIAM. Order modified, by fixing the costs payable as a condition for the service of the amended pleadings at the sum of \$30, and, as so modified, affirmed without costs. See, also, 139 N. Y. Supp. 1131.

JENKS, P. J., not voting.

LUBASH, Respondent, v. SIGMOND, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Aaron Lubash against Charles A. Sigmond. No opinion. Appeal dismissed by default, with \$10 costs. See, also, 138 N. Y. Supp. 1127; 139 N. Y. Supp. 1131, 1132.

LUBASH, Respondent, v. SIGMOND, Appellant. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Action by Aaron Lubash against Charles A. Sigmond. No opinion. Motion granted, without costs. See, also, 139 N. Y. Supp. 1131, 1132.

LUBASH, Respondent, v. SIGMOND, Appellant. (Supreme Court, Appellate Division, Second Department. January 28, 1913.) Action by Aaron Lubash against Charles A. Sigmond.

PER CURIAM. Order modified, by fixing the costs payable as a condition for the service of the amended pleadings at the sum of \$30, and, as so modified, affirmed, without costs. See, also, 139 N. Y. Supp. 1131.

JENKS, P. J., not voting.

LUTKINS, Respondent, v. LUTKINS, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Mary Lutkins against Theodore L. Lutkins, Jr. No opinion. Judgment modified, by reducing the payment of alimony to the sum of \$15 per week, and by reducing the penal amount of the bond to \$5,000, and, as so modified, affirmed, without costs. See, also, 152 App. Div. 931, 137 N. Y. Supp. 1127.

LYNCH, Appellant, v. NEW YORK, C. & ST. L. R. CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by James Lynch against the New York, Chicago & St. Louis Railroad Company. No opinion. Appeal dismissed, without costs, upon stipulation filed.

McCREARY, Appellant, v. TERRY & TENCH CO., Inc., Respondent. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Alfred A. McCreary against the Terry & Tench Company, Incorporated. H. G. Aron, of New York City, for appellant. C. C. Marsh, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

McDONALD, Appellant, v. McDONALD, Respondent. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by John J. McDonald against Thomas C. McDonald. A. Hutter, of New York City, for appellant. G. G. Battle, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

McELFATRICK v. McELFATRICK et al. (Supreme Court, Appellate Division, First Department. January 3, 1913.) Appeal from Judgment on Report of Referee. Action by William H. McElfattrick, as sole surviving partner, against Margarette E. McElfattrick and others. From a judgment for plaintiff, defendants appeal. Affirmed on stipulation. See, also, 134 App. Div. 965, 119 N. Y. Supp. 1133. Morgan J. O'Brien, for appellants. J. M. Dittenhofer, for respondent.

PER CURIAM. On the stipulation filed herewith, the judgment appealed from is reduced to the sum of \$771.79; and, as so reduced, the judgment is affirmed, without costs in this court.

McGEE, Respondent, v. FELTER, Appellant. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Action by Thomas A. McGee against George W. Feltez. No opinion. Judgment (75 Misc. Rep. 349, 133 N. Y. Supp. 267) of the County Court of Kings county affirmed, with costs.

McKIERNAN, Appellant, v. WHITE HOD ELEVATOR CO., Respondent. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Patrick McKiernan against the White Hod Elevator Company. F. J. Hogan, of New York City, for appellant. L. S. Coit, of New York City, for respondent.

PER CURIAM. Judgment affirmed, with costs, on the authority of McDonough v. Pelham Hod Elevator Co., 111 App. Div. 585, 93 N. Y. Supp. 90.

DOWLING, J., dissents. **INGRAHAM, P. J.,** dissents on the ground that the defendant, in installing the elevator as part of the machinery, furnished an unsafe and improper rope or cable with which to operate it, and that for that negligence the defendant was liable. Order filed.

McLEAN, Respondent, v. WURTZ et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Katherine G. McLean, as administratrix, etc., against George P. Wurtz and another. No opinion. Motion for reargument (of 138 N. Y. Supp. 1128) denied, with \$10 costs. Motion for leave to appeal to Court of Appeals denied.

MALDONADO & CO., Respondents, v. YGLESIAS, Appellant, et al. (Supreme Court, Appellate Division, First Department. January 3, 1913.) Action by Maldonado & Co. against Luis F. Yglesias, impleaded with others. M. G. Holstein, of New York City, for appellant. A. K. Stricker, of New York City, for respondents. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed. See, also, 139 N. Y. Supp. 102.

MANNING, Respondent, v. SEELIG, Appellant. (Supreme Court, Appellate Division, First Department. February 7, 1913.) Action by John J. Manning against Emil Seelig. L. Lowenstein, of New York City, for appellant. W. E. Benjamin, of New York City, for respondent. No opinion. Judgment and orders affirmed, with costs. Order filed. See, also, 138 N. Y. Supp. 1128.

MANOR REALTY CO., Appellant, v. EGBERT, Respondent. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Action by the Manor Realty Company against George W. Egbert. No opinion. Motion for reargument (of 138 N. Y. Supp. 502) denied, with \$10 costs.

MANWARING, Appellant, v. NEW YORK STATE RYS. et al., Respondents. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Milton G. Manwaring, an infant, etc., against the New York State Railways and another. No opinion. Order affirmed, with costs. Held, that the plaintiff failed to establish actionable negligence against the defendants, or either of them.

MARHOFFER, Respondent, v. SWEDISH AUGUSTANA HOME FOR THE AGED, Appellant, et al. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Frank Joseph Marhoffer against the Swedish Augustana Home for the Aged, impleaded with others. No opinion. Motion to resettle order denied. See, also, 138 N. Y. Supp. 1129.

MARTINOWITZ et al., Appellants, v. SCHAFFLER, Respondent, et al. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Herman Martinowitz and others against Louis Schaffler, impleaded with others. L. Freiman, of New York City, for appellants. I. S. Dorf, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

MASEL, Respondent, v. BROOKLYN HEIGHTS R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Joseph Masel against the Brooklyn Heights Railroad Company. No opinion. Motion to resettle order granted, without costs. See, also, 138 N. Y. Supp. 1129.

MASON-HENRY PRESS, Appellant, v. AETNA LIFE INS. CO., Respondent. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by the Mason-Henry Press against the Aetna Life Insurance Company. No opinion. Judgment affirmed, with costs. See, also, 146 App. Div. 181, 130 N. Y. Supp. 961.

MAYER et al., Appellants, v. MONZO, Respondent. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Marcus Mayer and others against Angelo R. Monzo. E. D. Brown, of New York City, for appellants. J. S. Sumner, of New York City, for respondent.

PER CURIAM. Order entered on December 5, 1912, affirmed, order entered on December 26, 1912, reversed, with \$10 costs and disbursements to appellants, and motion for retaxation of costs denied. Order filed. See, also, 151 App. Div. 866, 137 N. Y. Supp. 616.

MAYER et al., Respondents, v. RAUDENBUSH, Appellant. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Adolph B. Mayer and others against Wallace G. Raudenbush. T. F. Kuper, of New

York City, for appellant. W. S. Heilborn, of New York City, for respondents. No opinion. Judgment and order affirmed, with costs, on the authority of *Teel v. Yost*, 128 N. Y. 387, 28 N. E. 353, 13 L. R. A. 796. Order filed. See, also, 138 N. Y. Supp. 1129.

MAYOR, ETC., OF CITY OF NEW YORK, Respondents, v. BROADWAY & S. AVE. R. CO., Appellant. (Supreme Court, Appellate Division, First Department. January 24, 1913.) Action by the Mayor, Aldermen, etc., of the City of New York against the Broadway & Seventh Avenue Railroad Company. A. H. Masten, of New York City, for appellant. H. Crone, of New York City, for respondents. No opinion. Judgment affirmed, with costs, on 130 App. Div. 834, 115 N. Y. Supp. 872. Order filed.

MAYOR, ETC., OF CITY OF NEW YORK, Respondents, v. NINTH AVE. R. CO., Appellant. (Supreme Court, Appellate Division, First Department. January 24, 1913.) Action by the Mayor, Aldermen, etc., of the City of New York against the Ninth Avenue Railroad Company. A. H. Masten, of New York City, for appellant. H. Crone, of New York City, for respondents. No opinion. Judgment affirmed, with costs, on 130 App. Div. 839, 115 N. Y. Supp. 876. Order filed.

MELLEN, Respondent, v. ATHENS HOTEL CO., Appellant. (Supreme Court, Appellate Division, First Department. January 3, 1913.) Action by Nathan C. Mellen against the Athens Hotel Company. A. Thain, of New York City, for appellant. C. Mellen, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed. See, also, 138 N. Y. Supp. 451; 139 N. Y. Supp. 1133.

MELLEN v. ATHENS HOTEL CO. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Nathan C. Mellen against the Athens Hotel Company. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 139 N. Y. Supp. 1133.

METZGER, Respondent, v. KNOX et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 10, 1913.) Action by Charles E. Metzger against Edward M. Knox and others. No opinion. Motion denied, without costs. See, also, 139 N. Y. Supp. 1133, 1134.

METZGER, Respondent, v. KNOX et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 10, 1913.) Action by Charles E. Metzger against Edward M. Knox and others. No opinion. Order affirmed, with \$10 costs and disbursements, with leave to defendants to answer within 20 days on payment of costs of said action and of this appeal. Appeal to the Court of Appeals denied.

139 N. Y. Supp. 1134. See, also, 137 N. Y. Supp. 1129; 139 N. Y. Supp. 1133.

METZGER, Respondent, v. KNOX et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Charles E. Metzger against Edward M. Knox and others. No opinion. Motion for leave to appeal to the Court of Appeals (from 139 N. Y. Supp. 1133) denied.

In re MEYER. (Supreme Court, Appellate Division, First Department. January 17, 1913.) In the matter of Leopold A. Meyer. No opinion. Motion granted, unless appellant complies with terms stated in order. Order filed. See, also, 146 App. Div. 955, 131 N. Y. Supp. 1129; 139 N. Y. Supp. 1134.

In re MEYER. (Supreme Court, Appellate Division, First Department. January 17, 1913.) In the matter of Leopold A. Meyer. No opinion. Motion denied. Order filed. See, also, 139 N. Y. Supp. 1134.

MILLER, Respondent, v. SOLVAY PROCESS CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 15, 1913.) Action by Fred M. Miller against the Solvay Process Company. No opinion. Order affirmed, with \$10 costs and disbursements.

MILLER v. WINFIELD et al. (Supreme Court, Appellate Division, Second Department. January 28, 1913.) Action by William H. Miller against Elizabeth Winfield and Caroline Breitenbecker. No opinion. Judgment affirmed, with costs.

MININSOHN et al., Appellants, v. REGAL HOMES CO., Respondent. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) In the matter of the application for a discharge of a mechanic's lien filed by Leo Mininsohn and another against the Regal Homes Company.

PER CURIAM. Motion for stay granted, on condition that appellants perfect their appeal, place the cause on the calendar for January 27, 1913, and be ready for argument when reached; otherwise, motion denied, with \$10 costs.

MINRATH, Appellant, v. ADLER, Respondent (two cases). (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Ferdinand R. Minrath against Max Adler. C. L. Craig, for appellant. M. Brenner, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

MITCHEM et al., Respondents, v. PAULSON et al., Appellants, et al. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by John E. Mitchem and

others against Leonard Paulson and others, impleaded with others. C. A. Brodek, of New York City, for appellants. Moses Cohen, of New York City, for respondents.

PER CURIAM. Order affirmed, with \$10 costs and disbursements. Order filed.

INGRAHAM, P. J., dissents.

MOORE, Respondent, v. CENTRAL PARK, N. & E. R. R. CO., Appellant. (Supreme Court, Appellate Division, First Department. February 7, 1913.) Action by John G. Moore against the Central Park, North & East River Railroad Company. Chase Mellen, of New York City, for appellant. A. C. Sherman, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

MORAN, Respondent, v. DAKE DRUG CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Frank Moran against the Dake Drug Company. No opinion. Judgment (134 N. Y. Supp. 995) and order affirmed, with costs.

MORTON, Appellant, v. INTERBORO RAPID TRANSIT CO., Respondent. (Supreme Court, Appellate Division, First Department. January 3, 1913.) Action by Mary L. H. Morton against the Interboro Rapid Transit Company. C. D. Francis, of New York City, for appellant. B. H. Ames, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

MOWER v. ENGLIS. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Chas. D. Mower against Chas. M. Englis. No opinion. Application denied, with \$10 costs. Order signed. See, also, 137 N. Y. Supp. 845.

MULLER et al. v. CITY OF PHILADELPHIA et al. (Supreme Court, Appellate Division, First Department. January 10, 1913.) Appeal from Trial Term, New York County. Action by Charles F. Muller and others, as surviving executors, etc., against the City of Philadelphia and others. From the judgment, Louis Silverman and others appeal. Affirmed. See, also, 137 N. Y. Supp. 1131. Morgan J. O'Brien, for appellant Silverman. L. E. Warren, of New York City, for appellants Brodie and Lufia. J. Power Donellan, of New York City, for appellant Engel. J. Noble Hayes, Wolcott G. Lane, Charles H. Tuttle, and Joseph H. Kutner, all of New York City, for respondents.

PER CURIAM. Judgment affirmed, with costs.

LAUGHLIN, J. I dissent as to the purchase of jewelry from the defendant Silverman constituting a usurious transaction.

DOWLING, J. I dissent from the affirmation of the judgment as to Brodie, Engel, and

Luria, on the ground that the transactions with them did not constitute loans, but sales of an interest in the estate. I also dissent from the affirmance of so much of the judgment as adjudges the purchases of jewelry from the defendant Silverman to have been usurious transactions.

MURTHA, Respondent, v. CENTRAL PARK, N. & E. R. R. CO., Appellant. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Mary Murtha against the Central Park, North & East Railroad Company. C. H. Tuttle, of New York City, for appellant. F. J. Hogan, of New York City, for respondent.

PER CURIAM. Judgment and order affirmed, with costs. Order filed.

McLAUGHLIN and CLARKE, JJ., dissent.

MYERS, Appellant, v. CHANDLER, Respondent. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Florence M. Myers against Walter M. Chandler. J. A. Gray, of New York City, for appellant. F. C. Scofield, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

In re NEAL et al. In re CIVIL REMEDIES ASS'N. (Supreme Court, Appellate Division, First Department. July 11, 1912.) In the matter of Elbridge H. Neal and others. In the matter of the Civil Remedies Association. No opinion. See memorandum.

NEAL, Appellant, v. BALL et al., Respondents. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Sarah C. Neal against Ancell H. Ball and others. S. Fine, of New York City, for appellant. A. D. Kenyon, of New York City, for respondents. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

NEALON, Respondent, v. SOUTH BUFFALO RY. CO., Appellant, et al. (Supreme Court, Appellate Division, Fourth Department. January 15, 1913.) Action by John J. Nealon against the South Buffalo Railway Company, impleaded with others.

PER CURIAM. Order reversed, with \$10 costs and disbursements, and motion denied, without costs. Held that, upon the facts disclosed by the record, the plaintiff was not entitled to a bill of particulars.

ROBSON, J., dissents.

NEWCOMB, Appellant, v. LA ROE, Respondent. (Supreme Court, Appellate Division, First Department. February 7, 1913.) Action by Warren P. Newcomb, as executor, against Jeanne La Roe. B. Patterson, of New York City, for appellant. N. L. Robinson, of New

York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

NEW ENGLAND THEATERS CO., Respondent, v. WORKINGMEN'S CO-OP. PUB. CO., Appellant. (Supreme Court, Appellate Division, First Department. January 3, 1913.) Action by the New England Theaters Company against the Workingmen's Co-operative Publishing Company. S. J. Block, of New York City, for appellant. W. T. Kohn, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements, with leave to defendant to withdraw demurrer and to answer, on payment of costs in this court and in the court below. Order filed.

NEW YORK TIMES CO. v. LICHTENSTEIN. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by the New York Times Company against Julius Lichtenstein. No opinion. Application denied, with \$10 costs. Order signed.

NICHOLS, Respondent, v. HENDERSON, Appellant. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by John H. Nichols against Charles W. Henderson. No opinion. Judgment unanimously affirmed, with costs.

In re NORTH RIVER STEAMBOAT CO. (Supreme Court, Appellate Division, Second Department. January 10, 1913.) In the matter of the application of the North River Steamboat Company for a license to keep and maintain a ferry. From an order the North River Ferry Company appeals. (Appeal No. 1.) No opinion. Order affirmed, with \$10 costs and disbursements.

In re NORTH RIVER STEAMBOAT CO. (Supreme Court, Appellate Division, Second Department. January 10, 1913.) In the matter of the application of the North River Steamboat Company for a license to keep and maintain a ferry. From an order the North River Ferry Company appeals. (Appeal No. 2.) No opinion. Order affirmed, with \$10 costs and disbursements.

In re NORTH RIVER STEAMBOAT CO. (Supreme Court, Appellate Division, Second Department. January 10, 1913.) In the matter of the application of the North River Steamboat Company to extend its corporate existence. From an order the North River Ferry Company appeals. No opinion. Order affirmed, with \$10 costs and disbursements.

NORTH SHORE BUILDING LOAN & SAVINGS ASS'N v. REID et al. (Supreme Court, Appellate Division, Second Department.

January 10, 1913.) Action by the North Shore Building Loan & Savings Association against John J. Reid and Mary Reid. No opinion. Judgment affirmed, with costs.

NORTH SIDE BANK OF BROOKLYN v. BURGER et al. (Supreme Court, Appellate Division, Second Department. January 28, 1913.) Action by the North Side Bank of Brooklyn against Hattie E. Burger and others.

PER CURIAM. Motion granted, on condition that within five days appellant execute and file a bond, with sufficient surety, in the sum of \$1,000, to indemnify respondent against all loss and damage that may result from the granting of this stay, and also take such steps as may be necessary to protect the property from the foreclosure of the first mortgage pending the hearing and determination of the appeal.

OBERMAYER, Respondent, v. GEERING, Appellant. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Otto Obermayer against Adolph Geering. C. C. Miller, of New York City, for appellant. J. J. Schwartz, for respondent. No opinion. Judgment affirmed, with costs. Order filed. See, also, 146 App. Div. 927, 933, 131 N. Y. Supp. 1132.

ODELL, Respondent, v. GENESEE CONST. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Herbert Odell against the Genesee Construction Company. No opinion. Motion for leave to appeal to Court of Appeals (from 138 N. Y. Supp. 1132) denied, with \$10 costs.

O'NEILL v. BERNHEIMER & SCHWARTZ CO. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Nora O'Neill against the Bernheimer & Schwartz Company. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 138 N. Y. Supp. 1132.

O'NEILL, Respondent, v. RUPPERT, Appellant. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Action by Annie O'Neill against George E. Ruppert.

PER CURIAM. Judgment and order affirmed, with costs.

WOODWARD, J., dissents.

In re O'SULLIVAN. (Supreme Court, Appellate Division, First Department. January 10, 1913.) In the matter of Michael O'Sullivan. No opinion. Application denied. Settle order on notice. See, also, 144 App. Div. 936, 129 N. Y. Supp. 1138.

PASSARELLI, Respondent, v. THRAN, Appellant. (Supreme Court, Appellate Division,

Fourth Department. January 8, 1913.) Action by Antonio Passarelli against Adam Thran. No opinion. Judgment and order affirmed, with costs.

PASSARELLI, Respondent, v. THRAN, Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Maria Passarelli against Adam Thran. No opinion. Judgment and order affirmed, with costs.

PENNSYLVANIA R. CO. v. TITUS. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by the Pennsylvania Railroad Company against James L. Titus. No opinion. Application granted. Order signed. See, also, 78 Misc. Rep. 347, 138 N. Y. Supp. 325.

PEOPLE v. ANDERSON. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Proceeding by the People of the State of New York against Harry Anderson. No opinion. Motion granted. Order filed.

PEOPLE, Respondent, v. BATTLEORO, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1913.) Proceeding by the People of the State of New York against Genaro Battleoro. No opinion. Judgment of conviction of the Court of Special Sessions affirmed. See, also, 152 App. Div. 938, 137 N. Y. Supp. 1133.

PEOPLE, Respondent, v. BERNSTEIN, Appellant. (Supreme Court, Appellate Division, First Department. January 3, 1913.) Proceeding by the People of the State of New York against Solomon Bernstein. K. H. Rosenberg, of New York City, for appellant. Stanley L. Richter, of New York City, for respondent. No opinion. Judgment affirmed. Order filed. See, also, 137 N. Y. Supp. 1133.

PEOPLE v. BROOKLYN BANK IN CITY OF NEW YORK. (Supreme Court, Appellate Division, Third Department. January 8, 1913.) Proceeding by the People of the State of New York against the Brooklyn Bank in the City of New York. No opinion. Motion granted. See, also, 138 N. Y. Supp. 1134.

PEOPLE, Respondent, v. CALIBRETTI, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Proceeding by the People of the State of New York against Frank Calibretti. No opinion. Motion to dismiss appeal denied, on condition that appellant perfect his appeal, place the case on the next calendar, and be ready for argument when reached; otherwise, motion granted.

PEOPLE v. COYLE. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Proceeding by the People of the State of New York against Matthew Coyle. No opinion. Motion to dismiss appeal granted. Order filed.

PEOPLE, Respondent, v. CULMAN, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Proceeding by the People of the State of New York against Elsie Culman. No opinion. Motion to dismiss appeal granted.

PEOPLE v. DEBIASE. (Supreme Court, Appellate Division, First Department. December 13, 1912.) Proceeding by the People of the State of New York against Raphael Debiase. With this case have been consolidated in this court cases bearing titles as follows: *People v. Alice Johnson*; *People v. Bella La Friel*; *People v. George Malone*; *People v. Robert Ormsby*. No opinion. Motions to dismiss granted. Orders filed. See, also, 138 N. Y. Supp. 879.

PEOPLE, Respondent, v. DERESI, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Proceeding by the People of the State of New York against Gaetano Deresi. No opinion. Motion denied, on condition that appellant perfect his appeal, place the case on the next calendar, and be ready for argument when reached; otherwise, motion granted.

PEOPLE, Respondent, v. DI BARRI, Appellant. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Proceeding by the People of the State of New York against Angelo Di Barri. No opinion. Motion to dismiss appeal granted.

PEOPLE v. ENOCH. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Proceeding by the People of the State of New York against Max Enoch. No opinion. Motion to dismiss appeal granted. Order filed.

PEOPLE, Respondent, v. EVANS, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Proceeding by the People of the State of New York against John Evans. No opinion. Motion to dismiss appeal granted.

PEOPLE, Respondent, v. FORTUNA et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Proceeding by the People of the State of New York against Peter Fortuna, and others. No opinion. Judgment of conviction of the Court of Special Sessions affirmed by default.

PEOPLE v. FRIEDMAN. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Proceeding by the People of the State of New York against Philip Friedman. No opinion. Motion granted. Order filed. See, also, 138 App. Div. 29, 122 N. Y. Supp. 500.

PEOPLE v. HOFFMAN et al. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Proceeding by the People of the State of New York against Louis Hoffman and another. No opinion. Motion to dismiss appeal granted. Order filed.

PEOPLE v. HOROWITZ. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Proceeding by the People of the State of New York against Charles S. Horowitz. No opinion. Motion and time extended to March 14, 1913. Settle order on notice.

PEOPLE, Respondent, v. HUMPHERY, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Proceeding by the People of the State of New York against Robert Humphery, alias George Gorman. No opinion. Motion to dismiss appeal granted.

PEOPLE, Respondent, v. JUELL, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Proceeding by the People of the State of New York against Christian S. Juell. No opinion. Motion denied.

PEOPLE, Respondent, v. KIRK, Appellant. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Proceeding by the People of the State of New York against John Kirk. (Case No. 1.) No opinion. Motion to dismiss appeal granted.

PEOPLE, Respondent, v. KIRK, Appellant. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Proceeding by the People of the State of New York against John Kirk. (Case No. 2.) No opinion. Motion to dismiss appeal granted.

PEOPLE, Respondent, v. KOHN, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Proceeding by the People of the State of New York against Max Kohn. No opinion. Motion to dismiss appeal granted.

PEOPLE, Respondent, v. LEVY, Appellant. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Appeal from Court of Special Sessions of City of New York. Harry A. Levy was convicted of crime, and he appeals. Affirmed. Benjamin N. Cardozo, of

New York City, for appellant. Robert S. Johnstone, of New York City, for the People.

PER CURIAM. Judgment affirmed.

SCOTT, J., dissents.

LAUGHLIN, J. I dissent from the affirmation, and vote for reversal, and for the discharge of the defendant, on the authority of *Thompson v. New Academy Theater Co.* (decided March 13, 1912) 149 App. Div. 932, 134 N. Y. Supp. 1148, *People ex rel. Cisco v. School Board*, 161 N. Y. 598, 56 N. E. 81, 48 L. R. A. 113, and *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256.

PEOPLE, Respondent, v. LUND, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Proceeding by the People of the State of New York against Victor Lund. No opinion. Motion to dismiss appeal granted.

PEOPLE, Respondent, v. MACE, Appellant. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Proceeding by the People of the State of New York against Abram L. Mace. No opinion. Judgment of conviction affirmed.

PEOPLE, Respondent, v. MILLER, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Proceeding by the People of the State of New York against George Miller. (No. 1.) No opinion. Motion to dismiss appeal granted.

PEOPLE, Respondent, v. MILLER, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Proceeding by the People of the State of New York against George Miller. (No. 2.) No opinion. Motion to dismiss appeal granted.

PEOPLE, Respondent, v. MORAN, Appellant. (Supreme Court, Appellate Division, First Department. January 3, 1913.) Proceeding by the People of the State of New York against Charles F. Moran. C. F. Kingsley, of New York City, for appellant. R. S. Johnstone, of New York City, for the People. No opinion. Judgment affirmed. Order filed.

PEOPLE, Respondent, v. NAIMARK, Appellant. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Proceeding by the People of the State of New York against Max Naimark.

PER CURIAM. Motion for resettlement denied. The decision in this case was made in the exercise of the discretionary power conferred upon the court by section 527 of the Code of Criminal Procedure, which provides that a new trial may be granted when deemed to be required in the interests of justice. See, also, 139 N. Y. Supp. 418.

JENKS, P. J., not voting.

PEOPLE, Respondent, v. NAWROCKI, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Proceeding by the People of the State of New York against Adalbert Nawrocki. No opinion. Motion to dismiss appeal granted.

PEOPLE, Respondent, v. PARISI, Appellant, et al. (Supreme Court, Appellate Division, First Department, January 31, 1913.) Proceeding by the People of the State of New York against Frank Parisi, impleaded with others. L. O. Reilly, of Mount Olive, Ill., for appellant. G. Z. Medalie, of New York City, for the People. No opinion. Judgment affirmed. Order filed.

PEOPLE, Respondent, v. RIZZO, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Proceeding by the People of the State of New York against Donato Rizzo. No opinion. Judgment of conviction of the County Court of Kings County affirmed by default.

PEOPLE, Respondent, v. ROTHSTEIN, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Proceeding against the People of the State of New York against Aaron Rothstein. No opinion. Motion to dismiss appeal granted.

PEOPLE, Respondent, v. SCHMIDT, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1913.) Proceeding by the People of the State of New York against John Schmidt. No opinion. Judgment of conviction of the County Court of Kings County affirmed.

PEOPLE, Respondent, v. SMITH, Appellant. (Supreme Court, Appellate Division, First Department. February 7, 1913.) Proceeding by the People of the State of New York against Thomas F. Smith. W. Armstrong, of New York City, for appellant. L. Fabricant, of New York City, for respondent. No opinion. Judgment and order affirmed. Order filed.

PEOPLE v. STEINKREUTZER. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Proceeding by the People of the State of New York against Idisor Steinkreutzer. No opinion. Motion granted; time extended 30 days. Settle order on notice.

PEOPLE, Respondent, v. STORCH, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Proceeding by the People of the State of New York against Victor Storch. No opinion. Motion to dismiss appeal granted.

PEOPLE, Respondent, v. SWITSKY, Appellant. (Supreme Court, Appellate Division, Sec-

ond Department. January 17, 1913.) Proceeding by the People of the State of New York against Isidore Switsky. No opinion. Judgment of conviction of the County Court of Kings County affirmed by default.

PEOPLE, Respondent, v. THOMAS, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Proceeding by the People of the State of New York against William Thomas. No opinion. Motion to dismiss appeal granted.

PEOPLE, Respondent, v. TITELBAUM, Appellant. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Proceeding by the People of the State of New York against Philip Titelbaum. No opinion. Judgment of conviction and order affirmed.

PEOPLE, Respondent, v. TORNEY, Appellant. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Proceeding by the People of the State of New York against Alexander Torney. No opinion. Motion to dismiss appeal granted.

PEOPLE, Respondent, v. TRUST CO. OF AMERICA, Appellant. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Proceeding by the People of the State of New York against the Trust Company of America. No opinion. Interlocutory judgment affirmed, with costs, with usual leave to defendant to withdraw demurrer and answer, upon payment of costs in the court below and in this court. See, also, 145 App. Div. 900, 129 N. Y. Supp. 1140.

PEOPLE, Respondent, v. WARBLINSKY, Appellant. (Supreme Court, Appellate Division, Second Department. December 6, 1912.) Proceeding by the People of the State of New York against David Warblinsky.

PER CURIAM. The practice on this appeal is determined by the case of *People v. Vitusky* (decided in the First Department on July 11, 1912) 138 N. Y. Supp. 1013. The motion to dismiss the appeal is denied, on condition that the appellant perfect his appeal, place the case upon the next calendar, and be ready for argument when the case is moved or reached.

PEOPLE, Respondent, v. WILSON, Appellant. (Supreme Court, Appellate Division, First Department. January 3, 1913.) Proceeding by the People of the State of New York against William Wilson. M. Trice, of New York City, for appellant. G. Z. Medalie, of New York City, for the People. No opinion. Judgment affirmed. Order filed.

PEOPLE ex rel. McVEY v. O'LOUGHLIN, Register. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Pro-

ceeding by the People of the State of New York, on the relation of George H. McVey, against Edward T. O'Loughlin, Register of Kings County. No opinion. Final order affirmed, with costs.

PEOPLE ex rel. MALONE v. HIGGINS, Com'r. (Supreme Court, Appellate Division, First Department. January 3, 1913.) Proceeding by the People of the State of New York, on the relation of Martin J. Malone, against Thomas J. Higgins, as Commissioner, L. F. Fish, of New York City, for relator. H. Crone, of New York City, for respondent. No opinion. Writ dismissed, and proceedings affirmed, with \$50 costs and disbursements. Order filed.

PEOPLE ex rel. MEYERS v. FOX. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Proceeding by the People of the State of New York, on the relation of Philip Meyers, against Frank Fox. No opinion. Motion granted. Order filed.

PEOPLE ex rel. NORTH RIVER FERRY CO. v. ROCKLAND COUNTY COURT et al. (Supreme Court, Appellate Division, Second Department. January 10, 1913.) Proceeding by the People of the State of New York, on the relation of the North River Ferry Company, against the County Court of Rockland County and others. No opinion. Determination confirmed, and writ dismissed, with \$50 costs and disbursements.

PEOPLE ex rel. NUTTING, Appellant, v. MAXWELL et al., Respondents. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Proceeding by the People of the State of New York, on the relation of William W. Nutting, against William H. Maxwell and others. D. R. O'Brien, of New York City, for appellant. C. McIntyre, of New York City, for respondents. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

PEOPLE ex rel. SIMON et al., Respondents, v. BRADLEY et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Proceeding by the People of the State of New York, on the relation of William Simon and others, as and constituting the Terminal Station Commission of the city of Buffalo, against John H. Bradley and others, as Aldermen, and as constituting the Board of Aldermen of the City of Buffalo, and others. No opinion. Order affirmed, with costs, on the authority of *Hanrahan v. Terminal Station Commission of City of Buffalo*, 152 App. Div. 349, 136 N. Y. Supp. 1001.

PEOPLE ex rel. SIMON, Appellant, v. SIMON et al., Respondents. (Supreme Court,

Appellate Division, First Department. January 31, 1913.) Proceeding by the People of the State of New York, on the relation of Yancu Simon, against Floretta Simon and others. M. S. Yochelson, of New York City, for appellant. N. Frank, of New York City, for respondents. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

PEOPLE ex rel. SMITH v. WARDEN OF CITY PRISON et al. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Appeal from Special Term, New York County. Habeas corpus, on the relation of Laura Smith, against the Warden of the City Prison and others. From an order sustaining the writ and discharging the relator from custody, the Warden appeals. Reversed, writ dismissed, and relator remanded. Stanley L. Richter, of New York City, for appellant. Henry A. Friedman, of New York City, for respondent.

PER CURIAM. The evidence before the magistrate was sufficient to justify him in holding the relator, and for that reason the order appealed from is reversed, the writ dismissed, and the relator remanded.

PEOPLE ex rel. WHITE v. PURDY et al., Tax Com'rs. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Proceeding by the People of the State of New York, on the relation of Josiah J. White, against Lawson Purdy and others, as Commissioners of Taxes, etc. No opinion. Motion denied, without costs.

PERLMAN v. BROOKLYN HEIGHTS R. CO. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Morris Perlman against the Brooklyn Heights Railroad Company. No opinion. Application denied, with \$10 costs. Order signed. See, also, 78 Misc. Rep. 168, 137 N. Y. Supp. 917.

PERRINGTON, Appellant, v. LUDIN REALTY CO., Respondent. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Frank Perrington against the Ludin Realty Company. A. Lichtig, of New York City, for appellant. W. C. Low, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

PILCER v. HURTIG & SEAMON. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Harry G. W. Pilcer against Hurtig & Seamon. No opinion. Application denied, with \$10 costs. Order signed. See, also, 139 N. Y. Supp. 1140.

PILCER v. HURTIG & SEAMON. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Harry

G. W. Pilcer against Hurtig & Seamon. No opinion. Motion for stay denied, with \$10 costs. Order filed. See, also, 139 N. Y. Supp. 1140.

POKRESS et al., Appellants, v. MASSACHUSETTS BONDING & INS. CO., Respondent. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Herbert Pokress and others against the Massachusetts Bonding & Insurance Company. M. L. Heidenheimer, of New York City, for appellants. W. D. Williams, of New York City, for respondent. No opinion. Order reversed, with \$10 costs and disbursements, and motion granted to the extent indicated in the order. Order filed.

POLLITZ v. JEFFERY et al. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by James Pollitz against Edward T. Jeffery and others. No opinion. Motion denied, with \$10 costs. Order filed.

POLLITZ, Respondent, v. WABASH R. CO. et al., Appellants. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by James Pollitz against the Wabash Railroad Company and others. R. Taggart, Pierce & Greer, and G. W. Murray, all of New York City, for appellants. J. A. Hodge, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed. See, also, 139 N. Y. Supp. 1140.

POLLITZ v. WABASH R. CO. et al. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by James Pollitz against the Wabash Railroad Company and others. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 152 App. Div. 884, 136 N. Y. Supp. 1145, 139 N. Y. Supp. 1140.

POST et al. v. THOMAS. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Edwin M. Post and another against Edward R. Thomas. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 139 N. Y. Supp. 6.

PRESTON v. CUNEO et al. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Action by Henry L. Preston against Andrew Cuneo and others, in which Jacob Tuck, an attorney, appeals. No opinion. Motion granted, without costs. See, also, 140 App. Div. 144, 124 N. Y. Supp. 1031.

PRESTON v. TUCK. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) In the matter of Henry L. Preston

against Jacob Tuck, an attorney, etc. No opinion. Motion granted, without costs. See, also, 149 App. Div. 957, 133 N. Y. Supp. 1140.

PRIME, Appellant, v. PRIME, Respondent. (Supreme Court, Appellate Division, Third Department. January 8, 1913.) Action by Julia H. Prime against Spencer G. Prime, 2d. No opinion. Order amended, so that in the first, second, third, fourth, and fifth questions submitted to the jury the questions shall read "on or about the dates therein specified," and, as so amended, the order is affirmed, without costs. See, also, 150 App. Div. 897, 134 N. Y. Supp. 1144.

PRINCE, Respondent, v. CENTRAL NEW ENGLAND CO., Appellant. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by Cora A. Prince, as ancillary administratrix, etc., against the Central New England Company.

PER CURIAM. Judgment and order reversed, on the ground that the damages are excessive, and new trial granted, with costs to appellant to abide event, unless the plaintiff stipulates to reduce the verdict to \$15,000, in which case judgment is so modified, and, as modified, judgment and order unanimously affirmed, without costs. See, also, 147 App. Div. 486, 131 N. Y. Supp. 803.

PRIOR, Respondent, v. HUNKIN-CONKEY CONST. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by Charlotte Prior, as administratrix, etc., against the Hunkin-Conkey Construction Company.

PER CURIAM. Judgment and order affirmed, with costs.

McLENNAN, P. J., dissents.

PRUDENTIAL VAUDEVILLE EXCH., Respondent, v. CLEVELAND, Appellant (two cases). (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by the Prudential Vaudeville Exchange against William S. Cleveland. W. F. Ashley, of New York City, for appellant. H. A. Friedman, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

QUICK, Respondent, v. NIAGARA FALLS POWER CO., Appellant, et al. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by George A. Quick against the Niagara Falls Power Company, impleaded with others. No opinion. Judgment and order affirmed, with costs.

QUINN v. CATLIN. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by John Quinn against Donald C. Catlin. No opinion. Motion denied,

with \$10 costs. Order filed. See, also, 138 N. Y. Supp. 1139.

RACE, Respondent, v. SULLIVAN et al., Appellants. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by Eugene Race against Dennis Sullivan and another. No opinion. Judgment unanimously affirmed, without costs.

RACE, Respondent, v. WASHBURN et al., Appellants. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by Eugene Race against John Washburn and others. No opinion. Judgment unanimously affirmed, without costs.

RADLEY, Respondent, v. McKENZIE FURNACE CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Richard Radley against the McKenzie Furnace Company. No opinion. Judgment affirmed, with costs.

RANDALL v. HARRIGAN. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Robert J. Randall against William J. Harrigan. No opinion. Motion granted, with \$10 costs. Order filed.

In re RANDAZZO et al. (Supreme Court, Appellate Division, Fourth Department. January 15, 1913.) In the matter of the application of Frank Randazzo and another for the restoration of the child, Lillian Randazzo, now in the custody of the Children's Aid Society of Rochester, N. Y.

PER CURIAM. Order reversed, and motion denied, without costs. Held, that the temporary custody of the child should not have been awarded to the respondents pending the proceedings for the legal adoption of the child.

McLENNAN, P. J., and ROBSON, J., dissent.

In re RANSOM. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) In the matter of the judicial settlement of the accounts of Washington H. Ransom, as executor, etc., of Ruby F. Cooper, deceased.

PER CURIAM. Decree affirmed, with costs. ROBSON and FOOTE, JJ., dissent.

RATHBONE, Respondent, v. T. BRIGGS & CO., Appellant. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by James B. Rathbone against T. Briggs & Co. No opinion. Order affirmed, with \$10 costs and disbursements.

REARDON v. CITY OF NEW YORK. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Jo-

hanna Reardon against the City of New York. No opinion. Application denied, with \$10 costs. Order signed. See, also, 132 N. Y. Supp. 332.

REES, Respondent, v. AKRON GYPSUM CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Charles F. Rees against the Akron Gypsum Company. No opinion. Appeal dismissed, without costs, upon stipulation filed.

REGENSTEIN v. HOWARD et al. (Supreme Court, Appellate Division, Second Department. January 10, 1913.) Action by Minnie Regenstein against Annie Louise Howard and others. No opinion. Judgment affirmed, with costs.

REILLY v. SIMONSON. (Supreme Court, Appellate Division, First Department. January 3, 1913.) Appeal from Trial Term, New York County. Action by Sarah Teresa Reilly against Albert Simonson. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered. Theodore H. Lord, of New York City, for appellant. Nathan Marks, of Brooklyn, for respondent.

PER CURIAM. The judgment and order appealed from are reversed, and a new trial ordered, with costs to appellant to abide the event, on the ground that the evidence does not support the finding of the jury that the defendant was guilty of negligence.

SCOTT, J., dissents.

In re REQUA. (Supreme Court, Appellate Division, First Department. January 17, 1913.) In the matter of Mary A. Requa. No opinion. Motion denied, with \$10 costs. Settle order on notice. See, also, 138 N. Y. Supp. 1139.

REYNOLDS, Respondent, v. STEWART-KERBAUGH-SHANLEY CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Dwight E. Reynolds against the Stewart-Kerbaugh-Shanley Company. No opinion. Judgment and order affirmed, with costs.

RIANHARD, Respondent, v. M. BOWSKY FUR DRESSING & DYEING CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1913.) Action by Dane E. Rianhard against the M. Bowsky Fur Dressing & Dyeing Company. No opinion. Order affirmed, with \$10 costs and disbursements.

RICHE et al., Appellants, v. GREENWICH BANK OF CITY OF NEW YORK, Respondent. (Supreme Court, Appellate Division, Second Department. January 22, 1913.) Action by Crescenzo Richie and others against

the Greenwich Bank of the City of New York. No opinion. Motion for reargument (138 N. Y. Supp. 432) granted, and case set down for Tuesday, January 28, 1913.

RIDGEWOOD NAT. BANK v. STALLO et al. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by the Ridgewood National Bank against Edmund K. Stallo and others. Rockwood & Haldane, of New York City, for appellants. W. S. Gordon, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements, with leave to defendants to withdraw demurrers and to answer, on payment of costs in this court and in the court below. Order filed.

RILEY, Respondent, v. RANSOM et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Elizabeth B. Riley against Eleanor M. Ransom and others. No opinion. Motion granted, without costs. See, also, 152 App. Div. 939, 137 N. Y. Supp. 1140.

ROCK, Respondent, v. NEW YORK CENT. & H. R. R. CO. et al., Appellants. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by Andrew J. Rock against the New York Central & Hudson River Railroad Company and another.

PER CURIAM. Judgment and order affirmed, with costs.

KELLOGG, J., dissents.

In re ROLLINS et al. (Supreme Court, Appellate Division, First Department. January 31, 1913.) In the matter of charges against Phillip A. Rollins and others, attorneys at law. Proceedings in part dismissed, and in part remanded to the Grievance Committee of the Association of the Bar of the City of New York.

PER CURIAM. In this proceeding there was presented to the court the petition of one Joseph C. Robin, detailing certain facts in relation to a claim made by the firm of Gifford, Hobbs & Beard against a banking corporation known as the Northern Bank, then in charge of the Superintendent of Banks; the institution having failed. An examination of all of these papers fails to disclose any fact that would justify any proceedings against any of the respondents named, other than the firm of Gifford, Hobbs & Beard. As to the firm of Rollins & Rollins, we can see no fact alleged which would in the slightest degree reflect upon their professional character, and the proceedings, therefore, as against all of the respondents, except the firm of Gifford, Hobbs & Beard, are dismissed. As to the facts alleged in relation to the firm of Gifford, Hobbs & Beard, we think there is sufficient to justify a further investigation, and, without expressing an opinion that there are any facts stated

that would justify the presentation of charges against them, we think it proper that these papers should be remitted to the Grievance Committee of the Association of the Bar of the City of New York, with the request that they investigate the matters contained in the petition and in the answers of the several respondents, and report their conclusion to this court, and that, if in the opinion of the Association of the Bar facts are developed which would justify charges, they be requested to present them to the court in the form of such formal charges as they may consider proper.

ROTHMAN, Respondent, v. FRIEDMAN, Appellant. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Israel Rothman against Henry Friedman. A. L. Lazarus, of New York City, for appellant. A. Felt, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

ROUALET WINE CO., Respondent, v. HIPSH, Appellant. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by the Roualet Wine Company against Frederick Hipsh. No opinion. Order affirmed, with \$10 costs and disbursements.

ROWE, Respondent, v. HENDRICKS, Appellant. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by George E. Rowe against David B. Hendricks.

PER CURIAM. Judgment and order reversed, with costs, upon the ground that the plaintiff was guilty of contributory negligence, and complaint dismissed, with costs.

BETTS and LYON, JJ., dissent on the ground that there was a question of fact for the jury.

RUSSELL, Respondent, v. ERNEST-NOETH DAIRY LUNCH CO., Appellant, et al. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Robert Russell against the Ernest-Noeth Dairy Lunch Company, impleaded with others.

PER CURIAM. Judgment and order affirmed, with costs.

McLENNAN, P. J., dissents, upon the ground that the plaintiff, having settled with the owner of the building, cannot recover against the tenant, a joint tort-feasor.

ST. LAWRENCE COUNTY NAT. BANK OF CANTON, Appellant, v. WATKINS, Respondent, et al. (Supreme Court, Appellate Division, Third Department. January 8, 1913.) Action by the St. Lawrence County National Bank of Canton against Mary F. Watkins, im-

pleaded with Frank H. Watkins and Bertrand H. Snell.

PER CURIAM. Motion denied. See, also, 138 N. Y. Supp. 116.

KELLOGG, J., not sitting.

SALAMANCA VENEER PANEL CO., Respondent, v. LONG FURNITURE CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by the Salamanca Veneer Panel Company against the Long Furniture Company. No opinion. Judgment affirmed, with costs.

SALVAGE v. HARTLEY SILK MFG. CO. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Samuel A. Salvage against the Hartley Silk Manufacturing Company. No opinion. Application granted. Settle order on notice. See, also, 138 N. Y. Supp. 800.

SAVARESE, Respondent, v. GORDON, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Andrew Savarese against Mary Gordon. No opinion. Judgment and order unanimously affirmed, with costs.

SCHAPPER, Respondent, v. INGLEE, Appellant. (Supreme Court, Appellate Division, First Department. January 3, 1913.) Action by Charlotte Schapper against Lewis Inglee. F. W. Burr, of New York City, for appellant. M. Monfried, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

SCHNEIDER v. GOLDFINGER. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Jacob Schneider against Emil Goldfinger. No opinion. Motion granted, unless appellant complies with terms stated in order. Order filed. See, also, 139 N. Y. Supp. 1143.

SCHNEIDER et al. v. GOLDFINGER. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Jacob Schneider and others against Emil Goldfinger. No opinion. Motion granted, and time within which case must be on the calendar extended to February 18, 1913. Settle order on notice. See, also, 139 N. Y. Supp. 1143.

SCHWEID et al., Appellants, v. OOTHOUT, Respondent. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by Bernard A. Schweid and another against Christina Oothout. No opinion. Judgment and order affirmed, with costs. See, also, 146 App. Div. 903, 133 N. Y. Supp. 1143.

SCHWEID et al., Respondents, v. STORANDT, Appellant. (Supreme Court, Appellate Division, Fourth Department. January 15, 1913.) Action by Bernard A. Schweid and another against Carl W. Storandt. No opinion. Motion for reargument (of 138 N. Y. Supp. 1141) denied, with \$10 costs. Motion for leave to appeal to Court of Appeals denied.

SEALY v. FOOTE. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Thomas Sealy against Clarence Foote. No opinion. Motion granted, unless appellant complies with terms stated in order. Order filed. See, also, 151 App. Div. 935, 135 N. Y. Supp. 1142.

SEAMAN, Respondent, v. SMITH et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Richard F. B. Seaman against Fitzhugh Smith and others.

PER CURIAM. Motion denied, on condition that the printed papers be served and filed on or before January 20, 1913, and that the appellant place the cause on the calendar for the 27th of January, 1913, and be ready for argument when reached; otherwise, motion granted with \$10 costs. See, also, 137 App. Div. 895, 121 N. Y. Supp. 1147.

SEIBERT v. ERIE R. CO. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by Victor Seibert against the Erie Railroad Company.

PER CURIAM. Plaintiff's exceptions overruled, motion for new trial denied, with costs, and judgment directed for the defendant upon the nonsuit, with costs.

KRUSE, J., dissents, upon the ground that if there was a sudden, violent collision, caused by the engine coming against the car, and the men in charge of the engine knew that the car was being loaded, as can be found from the evidence, a prima facie case was made out, although the loaders knew that an engine was liable to come for the car.

SEVERSON, Com'r, etc., v. MACOMBER. (Supreme Court, Appellate Division, Third Department. January 8, 1913.) Action by John S. Severson, as Commissioner of Charities of the City of Binghamton, against Henry M. Macomber. No opinion. Motion granted. See, also, 138 N. Y. Supp. 250.

SHANAHAN, Respondent, v. FELTMAN, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by John J. Shanahan against Charles L. Feltman. No opinion. Appeal dismissed, without costs.

SHARRON, Appellant, v. McCALL CO., Respondent. (Supreme Court, Appellate Division,

Third Department. December 30, 1912.) Action by Albert Sharron against the McCall Company. No opinion. Order affirmed, with \$10 costs and disbursements.

SHAW v. SHAW et al. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Gertrude L. Shaw against William Barrett Shaw and another.

PER CURIAM. Motion for leave to appeal to the Court of Appeals denied. As already indicated, the remedy of the correspondent, in the first instance, is to move to open the interlocutory judgment, and the final judgment, if one has been entered. See, also, 138 N. Y. Supp. 999, 1142.

SHEEHAN, Respondent, v. SOMERVILLE, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by James A. Sheehan against Edward L. Somerville. No opinion. Judgment affirmed by default, with costs.

SIDWAY, Respondent, v. SIDWAY, Appellant. (Supreme Court, Appellate Division, Second Department. January 28, 1913.) Action by Mary S. Sidway against Harold S. Sidway. No opinion. Reargument (of 152 App. Div. 932, 137 N. Y. Supp. 1143) ordered, and case set down for Monday, March 10, 1913.

SIGNER, Appellant, v. SIGNER, Respondent. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by Sarah Signer against Frederick G. Signer.

PER CURIAM. Order affirmed, without costs, with leave to plaintiff to renew motion, after making demand of payment and refusal of defendant to pay.

KELLOGG, J., dissents.

SILBERMAN, Appellant, v. SCHER, Respondent. (Appeal No. 1) (Supreme Court, Appellate Division, Second Department. December 6, 1912.) Action by Ida Silberman against Louis Scher.

PER CURIAM. Order reversed, with \$10 costs and disbursements, and motion for stay pending appeal granted, upon plaintiff's furnishing security, duly approved by a justice of the Supreme Court, for the payment of the fund on deposit to the defendant on affirmance. See *Silberman v. Scher*, 138 N. Y. Supp. 1002, decided herewith. See, also, 139 N. Y. Supp. 1144.

SILBERMAN, Appellant, v. SCHER, Respondent. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Ida Silberman against Louis Scher. No opinion. Motions denied, with \$10 costs in each motion. See, also, 139 N. Y. Supp. 1144.

SIMMONS, Respondent, v. EPSTEIN et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 10, 1913.) Action by Mary J. Simmons against Mendel Epstein and another. No opinion. Judgment and order unanimously affirmed, with costs.

In re SIMPKINS. (Supreme Court, Appellate Division, First Department. January 24, 1913.) In the matter of Charles J. Simpkins. No opinion. Reference ordered to official referee. Settle order on notice.

SMITH, Respondent, v. EXCELSIOR BREWING CO., Appellant. (Supreme Court, Appellate Division, Second Department. December 6, 1912.) Action by Charles Smith against the Excelsior Brewing Company. No opinion. Motion to dismiss appeal denied, without costs. See, also, 138 N. Y. Supp. 1143.

SMITH, Respondent, v. VALENTINE, Appellant. (Supreme Court, Appellate Division, Second Department. January 28, 1913.) Action by John H. Smith against Benjamin E. Valentine. No opinion. Order affirmed, with \$10 costs and disbursements.

SOLFANELLI, Appellant, v. AUSTIN et al., Respondents. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Action by Salvatore Solfanelli against Augusta C. Austin and others. No opinion. Motion to dismiss appeals granted, with \$10 costs, because of the failure of the appellants to show merit, as required by the special rule.

SPANNHAKE v. MOUNTAIN CONST. CO. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Otto L. Spannhake against the Mountain Construction Company. No opinion. Application granted. Order signed. See, also, 137 N. Y. Supp. 900.

SPENCER, Appellant, v. CHAMBERLAIN, Respondent. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by Don M. Spencer against Worth Chamberlain, as executor of the last will of Kate B. Field, deceased. No opinion. Judgment modified, by deducting therefrom the sum of \$12.25, and, as modified, affirmed, without costs of this appeal.

STAGE SOCIETY OF NEW YORK, Appellant, v. WALDO, Com'r, Respondent. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by the Stage Society of New York against Rhinelander Waldo, as Commissioner, etc. H. G. Gray, of New York City, for appellant. H. Crone, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

STALKER, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by Alida C. Stalker, as administratrix, etc., of Stephen Stalker, deceased, against the New York Central & Hudson River Railroad Company, as lessee of the Boston & Albany Railroad.

PER CURIAM. Judgment and order affirmed, with costs.

KELLOGG and HOUGHTON, JJ., dissent, on the ground that the proof shows that the decedent exercised no care and was guilty of contributory negligence.

STANDARD NURSERY CO., Appellant, v. LOWERY, Respondent. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by the Standard Nursery Company against Edwin O. Lowery. No opinion. Judgment affirmed, with costs.

STARBUCK, Respondent, v. ERIE R. CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Ida A. Starbuck, as administratrix, etc., of Henry Starbuck, deceased, against the Erie Railroad Company. No opinion. Order affirmed, with \$10 costs and disbursements.

STEHLI, Appellant, v. MCGREGOR, Respondent. (Supreme Court, Appellate Division, First Department. January 24, 1913.) Action by John A. Stehli against John McGregor. B. Gordon, of New York City, for appellant. N. W. Hacker, of New York City, for respondent. No opinion. Order affirmed, with costs. Order filed.

STEINMAN et al., Respondents, v. CONLON, Appellant. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Benjamin Steinman and another against Eva K. Conlon. B. Rembaugh, of New York City, for appellant. D. Steckler, of New York City, for respondents. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed. See, also, 138 N. Y. Supp. 1144; 139 N. Y. Supp. 1145.

STEINMAN et al. v. CONLON. (Supreme Court, Appellate Division, First Department. February 7, 1913.) Action by Benjamin Steinman and another against Eva K. Conlon, in which Edward B. Hosier appeared as a witness. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 139 N. Y. Supp. 1145.

In re STENTON. (Supreme Court, Appellate Division, First Department. January 31, 1913.) In the matter of Louisa M. Stenton, deceased. No opinion. Motions to dismiss appeals granted, with \$10 costs, unless appellant complies with terms stated in orders. Orders filed. See, also, 148 App. Div. 913, 132 N. Y. Supp. 1147.

STERN et al., Respondents, v. CARL LAEMMLE MUSIC CO., Appellant. (Supreme Court, Appellate Division, First Department. February 7, 1913.) Action by Joseph W. Stern and another against the Carl Laemmle Music Company. W. G. Morse, of New York City, for appellant. T. B. Richter, of New York City, for respondents.

PER CURIAM. Judgment (74 Misc. Rep. 262, 133 N. Y. Supp. 1082) affirmed, with costs. Order filed.

INGRAHAM, P. J., dissents.

STEWART, Respondent, v. F. W. WOOLWORTH CO. et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Susie T. Stewart against the F. W. Woolworth Company and another.

PER CURIAM. While it will be competent for the plaintiff to prove the fact stated in the seventh subdivision of the complaint, upon the trial, it is improper to plead the evidence. The allegation is unnecessary and redundant, and the order must be reversed, with \$10 costs and disbursements, and the motion granted, with costs.

STONE, Respondent, v. LE SEUR et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. January 15, 1913.) Action by Thomas R. Stone, as receiver, etc., against John W. Le Seur and others. No opinion. Order affirmed, with \$10 costs and disbursements.

SUBURBAN LAND IMPROVEMENT CO., Respondent, v. BANKERS' SURETY CO., Appellant, et al. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by the Suburban Land Improvement Company against the Bankers' Surety Company, impleaded with others. E. J. Dowling, of New York City, for appellant. G. S. Daniels, of New York City, for respondent. No opinion. Judgment affirmed, with costs. Order filed.

SURPLUS ASSETS CO., Respondent, v. LANE, Appellant. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by the Surplus Assets Company against Frank A. Lane. B. R. Duncan, of Brooklyn, for appellant. F. E. Neagle, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

SWAN, Respondent, v. WOODCOCK et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by William H. L. Swan against Milo B. Woodcock and another.

PER CURIAM. Judgment and order affirmed, with costs. See, also, 149 App. Div. 937, 134 N. Y. Supp. 1147.

LAMBERT, J., not sitting.

SYLVESTER, Respondent, v. MULLEN et al., Appellants. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Action by John A. Sylvester against Henry J. Mullen and another.

PER CURIAM. Order unanimously affirmed, with costs. As to the refusal of the learned trial justice to impose costs as a condition of granting a new trial, see *Post v. Kerwin*, 150 App. Div. 321, 134 N. Y. Supp. 714.

TAGGARTS PAPER CO., Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by the Taggarts Paper Company against the New York Central & Hudson River Railroad Company. No opinion. Judgment affirmed, with costs.

TAGLIAVIA, Appellant, v. MEIKLEHAM et al., Respondents. (Supreme Court, Appellate Division, First Department. January 24, 1913.) Action by Frederick T. Tagliavia against T. M. Randolph Meikleham and another. J. B. Shope, of New York City, for appellant. G. Whittlesey, of New York City, for respondents. No opinion. Judgment and order affirmed, with costs. Order filed. See, also, 138 N. Y. Supp. 1145.

TELLER, Appellant, v. KUNZ et al., Respondents. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by George R. Teller against William Kunz and others. No opinion. Judgment affirmed, with costs.

TERHUNE, Respondent, v. TERHUNE, Appellant. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Anna L. Terhune against Clarence H. Terhune. Ehrich & Wheeler, of New York City, for appellant. D. C. Hirsch, of New York City, for respondent. No opinion. Judgment affirmed with costs. Order filed.

TERRAGNI et al., Respondents, v. ILLINOIS SURETY CO., Appellant. (Supreme Court, Appellate Division, First Department. February 7, 1913.) Action by Giovanni Terragni and another against the Illinois Surety Company. N. L. Keach, of New York City, for appellant. M. Schneiderman, of New York City, for respondents. No opinion. Judgment affirmed, with costs. Order filed.

TERWILLIGER, Respondent, v. BROWNING, KING & CO., Appellant. (Supreme Court, Appellate Division, Third Department. January 16, 1913.) Action by Frank W. Terwilliger against Browning, King & Co., a corporation. No opinion. Motion for leave to appeal to Court of Appeals (from 152 App. Div. 552, 137 N. Y. Supp. 572) granted, and question certified as follows: Does the complaint

state facts sufficient to constitute a cause of action?

In re THIRTY-EIGHTH ST. IN CITY OF NEW YORK. In re PORTER et al. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) In the matter of the application of the City of New York, etc., relative to acquiring title, etc., for ferry purposes. Thirty-Eighth Street, etc. The City of New York appeals, and David Porter and Thomas P. Graham are respondents. No opinion. Order modified, by fixing the taxation of the fees of the claimants, Porter and Graham, at the sum of \$4,000 for each, and, as thus modified, order affirmed, without costs of this appeal. See, also, 139 N. Y. Supp. 1147.

In re THIRTY-EIGHTH ST. IN CITY OF NEW YORK. In re PORTER et al. (Supreme Court, Appellate Division, Second Department. January 28, 1913.) In the matter of the application of the City of New York relative to acquiring title, etc. Thirty-Eighth Street, etc. The City of New York appeals, and David Porter and Thomas P. Graham are respondents. No opinion. Motion denied, without costs. See, also, 139 N. Y. Supp. 1147.

In re THIRTY-EIGHTH ST. IN CITY OF NEW YORK. In re STONE. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) In the matter of the application of the City of New York, etc., relative to acquiring title, etc. The City of New York appeals, and William Stone is respondent. No opinion. Order modified, by fixing the taxation of the fees of the claimant, Stone, at the sum of \$4,000, and, as thus modified, order affirmed, without costs of this appeal. See, also, 139 N. Y. Supp. 1147.

In re THIRTY-EIGHTH ST. IN CITY OF NEW YORK. In re STONE. (Supreme Court, Appellate Division, Second Department. January 28, 1913.) In the matter of the application of the City of New York relative to acquiring title, etc., for ferry purposes. Thirty-Eighth Street, etc. The City of New York appeals, and William Stone is respondent. No opinion. Motion denied, without costs. See, also, 139 N. Y. Supp. 1147.

35% AUTOMOBILE SUPPLY CO., Respondent, v. RUBLY, Appellant. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by the 35% Automobile Supply Company against William Rubly. H. Jones, of New York City, for appellant. H. B. Tibbetts, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

THOMY et al., Appellants, v. BELCHER et al., Respondents. (Supreme Court, Appellate

Division, Fourth Department. January 8, 1913.) Action by Jacob Thomy and another against Alvah E. Belcher and others. No opinion. Judgment affirmed, with costs.

THROCKMORTON v. HOWELL. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by C. Wickliffe Throckmorton against Wm. S. Howell. No opinion. Motion granted, with \$10 costs. Order filed. See, also, 139 N. Y. Supp. 1147.

THROCKMORTON v. HOWELL. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by C. Wickliffe Throckmorton against Wm. S. Howell. No opinion. Motion denied, without costs. Settle order on notice. See, also, 139 N. Y. Supp. 1147.

TIOGA MILL & ELEVATOR CO., Respondent, v. O. G. SPANN GRAIN CO., Appellant. (Supreme Court, Appellate Division, Third Department. January 8, 1913.) Action by the Tioga Mill & Elevator Company against the O. G. Spann Grain Company. No opinion. Order affirmed, with \$10 costs and disbursements.

TISDALE LUMBER CO., Respondent, v. READ REALTY CO., Appellant, et al. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by the Tisdale Lumber Company against the Read Realty Company, Gustave A. Cooper being also a respondent. No opinion. Motion denied, without costs. See, also, 138 N. Y. Supp. 829.

In re TOBEY'S ESTATE. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) In the matter of the estate of Eunice Jane Tobey, deceased. No opinion. Decree affirmed, with costs.

TOMS, Respondent, v. TOWN OF NEW-FANE, Appellant. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by Imo W. Toms against the Town of Newfane.

PER CURIAM. Judgment and order reversed, and new trial granted, with costs to appellant to abide event. Held, that the evidence fails to establish actionable negligence against the defendant.

KRUSE, J., dissents.

TOWNSEND, Respondent, v. TOWNSEND, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Florence E. Townsend against George S. Townsend. No opinion. Judgment affirmed by default, with costs. See, also, 138 N. Y. Supp. 1146.

TROIANO et al., Respondents, v. EGAN et al., Appellants. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Andrew Troiano and others against Charles E. Egan and others. J. E. Doherty, of Brooklyn, for appellants. J. G. Deane, of New York City, for respondents. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

TROTTER, Respondent, v. DICK et al., Appellants. (Supreme Court, Appellate Division, First Department. January 3, 1913.) Action by Walter F. Trotter, as receiver, against William A. Dick and others. R. P. Buell, of New York City, for appellants. H. A. Bayne, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements, with leave to defendants to withdraw demurrer and to answer, on payment of costs. Order filed. See, also, 139 N. Y. Supp. 1148.

TROTTER v. DICK et al. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Walter F. Trotter, as receiver, etc., against William A. Dick and others. No opinion. Motions granted. Questions certified. Order filed. See, also, 139 N. Y. Supp. 1148.

TROTTER v. IRON RY. CO. et al. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Walter F. Trotter, as receiver, etc., against the Iron Railway Company, impleaded with others. No opinion. Motion granted. Questions certified. Order filed.

TROTTER v. LISMAN et al. (Supreme Court, Appellate Division, First Department. January 3, 1913.) Appeal from Special Term, New York County. Action by Walter F. Trotter, as receiver, against Frederick J. Lisman and others. From a judgment sustaining the demurrer interposed by the Iron Railway Company, and dismissing the complaint, plaintiff appeals. Reversed, and demurrer overruled. See, also, 131 App. Div. 932, 116 N. Y. Supp. 1149. Hugh A. Bayne, of New York City, for appellant. George Welwood Murray, of New York City, for respondent.

PER CURIAM. Judgment appealed from must be reversed, with costs, and the demurrer overruled, with costs, with leave to the defendant to withdraw the demurrer and to answer, on payment of costs in this court and in the court below, on the ground that the demurring defendant is a proper, although perhaps not a necessary, party to the action.

TROWBRIDGE, Appellant, v. TOWNSEND, Respondent. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Katharine B. Trowbridge against James M. Townsend, individually and as execu-

tor, etc. W. T. Jerome, of New York City, for appellant. C. V. Anable, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

TULL, Respondent, v. BARRETT, Appellant. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Edward E. Tull against Marian A. Barrett. R. P. Buell, of New York City, for appellant. C. O. Maas, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements, with leave to defendant to withdraw demurrer, upon payment of costs in this court and in the court below. Order filed.

UNGER et al., Respondents, v. MILLAR et al., Appellants. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by George E. Unger and others against John C. Millar, individually, etc., and another. No opinion. Motion for leave to appeal to Court of Appeals (from 138 N. Y. Supp. 1146) denied, with \$10 costs.

URLACHER, Respondent, v. NEW YORK TELEPHONE CO., Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Charles Urlacher against the New York Telephone Company. No opinion. Motions denied, without costs.

UTESS, Respondent, v. ERIE R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Max F. Utes against the Erie Railroad Company.

PER CURIAM. Judgment and order affirmed, with costs. See, also, 140 App. Div. 922, 125 N. Y. Supp. 1148.

McLENNAN, P. J., and LAMBERT, J., dissent, upon the authority of decision in same case on former appeal, reported at 204 N. Y. 324, 97 N. E. 722.

VANDIVER, Appellant, v. WILLIAMS et al., Respondent. (Supreme Court, Appellate Division, First Department. January 24, 1913.) Action by Almuth C. Vandiver against John Williams and another. C. S. Mackenzie, of New York City, for appellant. W. H. Baker, of New York City, for respondent. No opinion. Judgment and order affirmed, with costs. Order filed.

VAN VOORHIS, Respondent, v. MARTIN, Appellant. (Supreme Court, Appellate Division, Second Department. January 10, 1913.) Action by Annie C. Van Voorhis against James E. Martin. No opinion. Judgment and order unanimously affirmed, with costs.

VOJTOISOVICH, Respondent, v. SOLVAY PROCESS CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. Jan-

uary 8, 1913.) Action by Joseph Vojtoisovich, an infant, etc., against the Solvay Process Company. No opinion. Judgment and order affirmed, with costs.

In re VOXMAN. (Supreme Court, Appellate Division, First Department. January 24, 1913.) In the matter of William Voxman. No opinion. Application granted. Settle order on notice. See, also, 148 App. Div. 286, 132 N. Y. Supp. 217.

In re WALSH. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) In the matter of Joseph A. Walsh, an attorney. No opinion. Motion granted, and respondent suspended from practice for a period of three years from the date of the entry of the order herein.

WALSH, Respondent, v. SHEEHY, Appellant. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Action by John A. Walsh against Frank Sheehy.

PER CURIAM. Judgment and order reversed, and new trial granted, costs to abide the event, on the ground that the verdict of the jury as to alienation of the affections of plaintiff's wife by defendant was not sufficiently justified by the evidence.

WARD, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 22, 1913.) Action by William Ward against the New York Central & Hudson River Railroad Company.

PER CURIAM. Judgment and order reversed, and new trial granted, with costs to appellant to abide event, upon the ground that the verdict of the jury on the question of defendant's negligence is contrary to and against the weight of the evidence.

ROBSON, J., dissents.

WASHBURN et al., Respondents, v. SALMON, Appellant. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Action by Albert H. Washburn and another against William Salmon. No opinion. Motion denied, with \$10 costs. See, also, 138 N. Y. Supp. 1148.

WATSON v. BEAVER. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by John H. Watson against William Beaver. No opinion. Motion granted, unless appellant complies with terms stated in order. Order filed. See, also, 152 App. Div. 947, 137 N. Y. Supp. 1148.

WEINSTEIN v. CITY OF NEW YORK. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Na-

than Weinstein against the City of New York. No opinion. Application granted. Order signed.

WEINUS v. LIGHT et al. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Morris Weinus against Benjamin Light and others. No opinion. Application denied, with \$10 costs. Order signed. See, also, 127 N. Y. Supp. 465.

WELLS, Appellant, v. SCOFIELD, Respondent. (Supreme Court, Appellate Division, Third Department. January 16, 1913.) Action by Aaron Wells against Carrie L. Scofield, as administratrix, etc., of Frederick R. Scofield, deceased. No opinion. Motion granted, with \$10 costs, unless the appellant serves his case and brings the same on for argument at the March term, in which case motion denied, without costs. See, also, 138 N. Y. Supp. 1148.

WESTER et al., Respondents, v. CASEIN CO. OF AMERICA, Appellant. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Juan E. Wester and others against the Casein Company of America. C. J. Hardy, of New York City, for appellant. P. B. Olney, of New York City, for respondents. No opinion. Judgment and order affirmed, with costs. Order filed. See, also, 140 App. Div. 442, 125 N. Y. Supp. 335.

In re WHITE. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) In the matter of William H. White, an attorney. No opinion. Matter referred to Hon. William D. Dickey, official referee, for hearing and report, with his opinion.

WHITE et al. v. CITY OF NEW YORK et al. (Supreme Court, Appellate Division, Second Department. January 24, 1913.) Action by Maud S. White and others against the city of New York and Bryant Seaman. No opinion. Judgment affirmed, with costs.

WHITE, Respondent, v. POWLEY et al., Appellants. (Supreme Court, Appellate Division, Third Department. December 30, 1912.) Action by Daniel White against Joseph L. Powley, and others. No opinion. Judgment and order unanimously affirmed, with costs.

WHITE v. SCHWEITZER et al. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) Appeal from Trial Term, Nassau County. Action by William E. White against Nathan Schweitzer and another. From a judgment for defendants, plaintiff appeals. Reversed, and new trial granted. See, also, 149 App. Div. 954, 133 N. Y. Supp. 1149. Hartwell Cabell, of New York City, for appel-

lant. Julian Arthur Leve, of New York City, for respondents.

JENKS, P. J. Two opinions were written on the former appeal, by Thomas, J., and by Burr, J., respectively. 147 App. Div. 544, 554, 132 N. Y. Supp. 644, 650. Thomas, J., confined discussion to the question of delivery. All concurred, save Hirschberg, J. Burr, J., thought that, aside from the question of delivery, there were two other questions in the case: First, whether there was any evidence of acceptance on the part of the defendants; and, second, whether the verdict was against the weight of evidence. After extended discussion, Burr, J., said that "upon this evidence the court should not have submitted to the jury the question of an acceptance implied from circumstances," and held that exceptions to the charge were well taken. As appears from the opinion of Burr, J., the court did not pass upon the weight of the evidence as to whether, under the contract, the turkeys were to be scalded or dry-picked. All concurred with Burr, J., save Hirschberg, J. Thus the case upon the first appeal presented the issue of fact whether the turkeys were to be scalded or dry-picked. The case now presented, not only contains the original evidence, but also additional evidence offered by the plaintiff to the effect that the turkeys called for by the contract were to be scalded. Without passing upon the probative force of the evidence of either party as to the kind of turkeys, we hold that this issue should have been submitted in the first instance to the triers of fact. Therefore the exception to the dismissal of the plaintiff was well taken, and there must be a new trial granted, costs to abide the event. All concur.

WHITE v. WESTERN UNION TELEGRAPH CO. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by William N. White against the Western Union Telegraph Company. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 138 N. Y. Supp. 598.

In re WILLCOX. (Supreme Court, Appellate Division, First Department. January 17, 1913.) In the matter of William R. Willcox. No opinion. Motion denied, with \$10 costs. Order filed. See, also, 138 N. Y. Supp. 1149.

WILLIAMS v. BILLINGTON et al. (Supreme Court, Appellate Division, First Department. January 31, 1913.) Action by Justus N. Williams against Reno R. Billington and others. No opinion. Motion denied, without costs, with leave to renew after determination of appeal to Court of Appeals. Settle order on notice. Memorandum per curiam. See, also, 135 N. Y. Supp. 32.

WILLIAMS, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Henry Williams

against the New York Central & Hudson River Railroad Company.

PER CURIAM. Order reversed, and new trial granted, with costs to appellant to abide event. Held, that the verdict of the jury upon the question of plaintiff's freedom from contributory negligence is contrary to and against the weight of evidence.

KRUSE, J., dissents.

WILLSON, Appellant, v. FISHER, Respondent. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by Frederick M. Willson against George T. Fisher. No opinion. Judgment (75 Misc. Rep. 382, 135 N. Y. Supp. 532) affirmed, with costs.

WISE, Respondent, v. LAW REPORTING CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by James B. Wise against the Law Reporting Company.

PER CURIAM. Motion for reargument of appeal (138 N. Y. Supp. 1150) from order denying motion for change of venue denied, without costs. Motion for modification of order affirming said order denied, upon the ground that the application for leave to renew the motion for change of venue should be made at the Special Term. Motion for reargument of appeal from judgment denied, without costs.

WISE, Respondent, v. NORTHERN SPECIALTY CO., Appellant. (Supreme Court, Appellate Division, Fourth Department. January 8, 1913.) Action by James B. Wise against the Northern Specialty Company. No opinion. Judgment affirmed, with costs.

WITKOV v. HARMON. (Supreme Court, Appellate Division, First Department. January 17, 1913.) Action by Frederick A. Witkov against Clifford B. Harmon. No opinion. Application denied, with \$10 costs. Order signed.

In re WOOD. (Supreme Court, Appellate Division, Second Department. January 17, 1913.) In the matter of the judicial settlement of the account of George Wood, as committee of the estate of Levi Melhado, an incompetent person.

PER CURIAM. Decree and order, in so far as appealed from, modified by reducing the amount of the additional allowance to the committee from \$1,000 to \$250, and, as thus modified, affirmed, without costs.

HIRSCHBERG, J., votes to affirm.

W. P. CALLAHAN CO., Respondent, v. HILLS et al., Appellants. (Supreme Court, Appellate Division, First Department. Janu-

ary 31, 1913.) Action by the W. P. Callahan Company against William Hills and others. M. Conboy, of New York City, for appellants. E. J. Nathan, of New York City, for respondent.

PER CURIAM. Judgment and order affirmed with costs. Order filed.

LAUGHLIN, J., dissents, and voting for reversal and dismissal of complaint as to defendant William Hills.

ZABLATZKY, Appellant, v. UNITED STATES CASUALTY CO., Respondent. (Supreme Court, Appellate Division, First Department. January 8, 1913.) Action by Mary Zablatzky against the United States Casualty Company. G. V. Grainger, of New York City, for appellant. C. S. Petrasch, of New York City, for respondent. No opinion. Order affirmed, with \$10 costs and disbursements. Order filed.

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(A) Issues and Questions in Lower Court.

§ 171 (N.Y.Sup.) A case must be determined in the appellate court upon the same theory on which it was presented below.—Singer v. National Fire Ins. Co. of Hartford, Conn., 139 N. Y. S. 375.

§ 179 (N.Y.Sup.) Where a party did not request an instruction directing the jury to disregard certain testimony, the improper refusal of the court to strike it is not reversible error.—Malcomson v. Monaton Realty Investing Corporation, 139 N. Y. S. 405.

(B) Objections and Motions, and Rulings Thereon.

§ 204 (N.Y.Sup.) A party may not complain of evidence received without objection.—Geiger v. Rapaport, 139 N. Y. S. 55.

§ 215 (N.Y.Sup.) In an action for ejection of a passenger for refusal to pay a second fare, the acquiescence by defendant in an instruction authorizing exemplary damages if the defendant authorized the ejection with malice was a concession that there was evidence from which the jury might find the facts suggested.—Daymon v. Westchester St. R. Co., 139 N. Y. S. 751.

§ 221 (N.Y.Sup.) Where incidental expenses in anticipation of performance of contract were recovered as damages, and no question was raised that the benefit to plaintiff from such expenses should have been deducted, the deduction will not be made on appeal.—Borough Development Co. v. Harmon, 139 N. Y. S. 362.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(D) Writ of Error, Citation, or Notice.

§ 419 (N.Y.Sup.) There is no right of appeal from a paper, and an appeal purporting to be from a paper will be dismissed.—Kramer v. Barth, 139 N. Y. S. 341.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(D) Contents, Making, and Settlement of Case or Statement of Facts.

§ 564 (N.Y.Sup.) A third extension of time to serve a case on appeal was properly refused, where the application contained no showing of merit in the proposed appeal, except the allegation of belief that the appellate court would reverse a judgment and grant a new trial.—Schueler v. Dooley, 139 N. Y. S. 743.

§ 564 (N.Y.Sup.) Where appellant's attorney failed to comply with the court rules requiring him to print and serve the case and papers on appeal, and made a willfully false and misleading affidavit to excuse such default, appellant's motion to extend the time to have the case placed on the calendar for argument will be denied.—Callan v. Callan, 139 N. Y. S. 898.

§ 569 (N.Y.Sup.) The case on appeal should show the facts as they really happened on the trial, and where there are errors or omissions in the stenographer's minutes should not follow the minutes.—People v. Buccufurri, 139 N. Y. S. 305.

The responsibility of settling a case on appeal is on the trial judge, and his notes and recollection of what occurred must prevail, and while he may be aided by the stenographer's minutes he should not rely upon them alone.—Id.

§ 570 (N.Y.Sup.) While the Appellate Division cannot dictate as to how the trial judge should settle a case, where he has based the settlement entirely upon the stenographer's minutes, and not on his personal recollection, refreshed or aided by other means, it will order a resettlement.—People v. Buccufurri, 139 N. Y. S. 305.

XVI. REVIEW.

(A) Scope and Extent in General.

§ 854 (N.Y.Sup.) Reasons, other than those stated by the trial court in the opinion on decision of a motion, existing for affirmance of the order thereon, its affirmance is not necessarily an adoption of such reasons.—Casey v. Auburn Telephone Co., 139 N. Y. S. 579.

§ 867 (N.Y.Sup.) Where a verdict was set aside by the Municipal Court as contrary to law, and its order was affirmed by the Appellate Term, the facts found are taken as established.—Barnard Realty Co. v. Bonwit, 139 N. Y. S. 1050.

(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions.

§ 875 (N.Y.Sup.) An order directing defendant's punishment for contempt on failure to pay the costs of a reference held not reviewable on appeal from a subsequent order denying a motion to set aside the judgment.—Davidson v. Unger, 139 N. Y. S. 157.

(E) Presumptions.

§ 927 (N.Y.Sup.) On appeal from a judgment of nonsuit, plaintiff is entitled to the benefit of all reasonable inferences from the evidence.—Judd v. Lake Shore & M. S. Ry. Co., 139 N. Y. S. 542.

(G) Questions of Fact, Verdicts, and Findings.

§ 1002 (N.Y.Sup.) A verdict on conflicting evidence will not be disturbed.—Jacobson v. Ebling Brewing Co., 139 N. Y. S. 319.

§ 1003 (N.Y.Sup.) Where the verdict is against the weight of evidence on questions of negligence and contributory negligence, a judgment for plaintiff will be reversed.—Wilund v. New York Cent. & H. R. R. Co., 139 N. Y. S. 1071.

(H) Harmless Error.

§ 1033 (N.Y.Sup.) The refusal to charge that no inference could be drawn by the jury against a party because of his failure to call a witness present in court during the trial was not erroneous, where the court gave instructions more favorable to the party than he was entitled to.—Geiger v. Rapaport, 139 N. Y. S. 55.

§ 1041 (N.Y.Sup.) Complaint *held* sufficient to warrant a recovery either upon a contract or upon a quantum meruit, so that the allowing of an amendment on the trial stating the value of services rendered, if error, was harmless.—*Morse v. Canaswacta Knitting Co.*, 139 N. Y. S. 634.

§ 1041 (N.Y.Sup.) Allowance of an amendment to complaint by additional allegations as to the extent of plaintiff's personal injuries, where it did not appear that any new answer would be required, on payment of the costs of the motion only, *held* not prejudicial to defendant.—*Kyle v. City of New York*, 139 N. Y. S. 1080.

§ 1048 (N.Y.Sup.) The error in excluding an answer of a witness, on objection to the question made subsequent to the answer, while the remedy was by motion to strike out the answer, was harmless, where the witness was subsequently permitted to testify to the same fact, and the inquiry was not continued.—*Kennedy v. John N. Robins Co.*, 139 N. Y. S. 745.

§ 1050 (N.Y.Sup.) A party cannot complain of the reception of evidence over his objection, where similar evidence is later admitted without objection.—*Malcomson v. Monaton Realty Investing Corporation*, 139 N. Y. S. 405.

§ 1050 (N.Y.Sup.) Error in admitting evidence that a sale of rice was by sample, and that the rice shipped did not correspond to the sample, which was the basis of the court's action in directing a verdict for defendants in an action for the purchase price, was prejudicial to plaintiff.—*Standard Milling Co. v. De Pass*, 139 N. Y. S. 611.

§ 1050 (N.Y.Sur.) Where the attorney who drew testator's will was also attorney of record in a suit, the judgment of which showed that persons other than the sole beneficiary had claims upon the testator, knowledge of those facts would be imputed to the attorney, and the improper allowance of questions as to whether he knew those facts was harmless.—*In re Van Ness' Will*, 139 N. Y. S. 485.

§ 1051 (N.Y.Sup.) Where fraud was charged, in that the applicant and the person examined were not the same, and the supposed applicant was examined by the company, proof by it as to prior medical attendance and illness, contrary to plaintiff's evidence, would not render harmless the erroneous admission of evidence by insured's physician of prior medical treatment, based on insured's statements to the physician.—*Denaro v. Prudential Ins. Co. of America*, 139 N. Y. S. 758.

§ 1052 (N.Y.Sup.) Where, in an action to recover money represented by certificates of deposit claimed to belong to plaintiff's intestate, defendant did not make out a prima facie case of ownership of the certificates or their proceeds, any error in admitting evidence would not require reversal of a judgment for plaintiff.—*Sands v. Saltzman*, 139 N. Y. S. 862.

§ 1057 (N.Y.Sup.) Exclusion of oral representations prior to written contract *held* harmless error where they were shown by other testimony, and the evidence showed that the contract had been performed in accordance with such representations.—*Borough Development Co. v. Harmon*, 139 N. Y. S. 362.

§ 1060 (N.Y.Sup.) In an action for malicious prosecution and false arrest after plaintiff

amended the complaint at the close of his case to allege that the offense charged by defendant was a violation of the hotel law, instead of larceny, arguments by plaintiff's counsel that defendant's charge on which the arrest was based was larceny, which meant, in plain English, that defendant was a thief, *held* prejudicial to defendant.—*Norton v. Wilson*, 139 N. Y. S. 1047.

(K) Subsequent Appeals.

§ 1099 (N.Y.Sup.) The issue of negligence by a freight handler's foreman in requiring the work to be done before a skid was fastened was not adjudicated on former appeal, though counsel then urged liability on that ground, where the only issue submitted at the trial was that of negligence in failing to secure the skid as an appliance under the Employer's Liability Act, so that the question could be considered on subsequent appeal.—*Nappa v. Erie R. Co.*, 139 N. Y. S. 547.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(D) Reversal.

§ 1169 (N.Y.Sup.) Where the complaint should have been dismissed at the close of plaintiff's case, or a verdict directed for defendant at the close of the whole case, a judgment for plaintiff and an order denying a new trial must be reversed, and a new trial ordered.—*Mendelson v. Irving*, 139 N. Y. S. 1065.

§ 1170 (N.Y.Sup.) In view of the express provisions of Code Civ. Proc. § 1317, as amended by Laws 1912, c. 380, inconsistency in the conclusions of law of the trial court, not affecting substantial rights, does not require a reversal.—*Cromwell v. Nichols*, 139 N. Y. S. 1051.

§ 1171 (N.Y.Sup.) On appeal from a judgment for profits on a contract, where it appeared that plaintiff's profits were necessarily reduced because of the subcontractor's poor work, a judgment which did not make that reduction must be reversed, and the cause remanded, where the amount of the loss does not appear upon the record.—*Cole v. Lutz & Sheinkman*, 139 N. Y. S. 323.

§ 1175 (N.Y.Sup.) Where, on plaintiff's appeal, it appears that he is entitled to recover, and the findings of fact show, without dispute, the amount, the judgment will be reversed and final judgment rendered without new trial under authority of Code Civ. Proc. § 1317, as amended by Laws 1912, c. 380, authorizing rendition of judgment without a new trial when a new trial is unnecessary.—*Crowe v. Liquid Carbonic Co.*, 139 N. Y. S. 587.

§ 1177 (N.Y.Sup.) In a subcontractor's action to foreclose a mechanic's lien, upon reversal of a personal judgment against the owner, where facts may be shown upon another trial making him personally liable, a new trial will be granted, instead of dismissing the complaint.—*Tradesman's Nat. Bank of Conshohocken v. Boldt*, 139 N. Y. S. 531.

§ 1180 (N.Y.Sup.) Where an order denying a motion to examine defendant before trial is reversed, an order denying a stay of proceedings until such examination is taken will also be reversed.—*Ewen v. Hoefer*, 139 N. Y. S. 1055.

(F) Mandate and Proceedings in Lower Court.

§ 1195 (N.Y.Sup.) A prior determination of the Court of Appeals on reversing a judgment is the law of the case on retrial, unless it appears that the evidence introduced on retrial shows that the premise on which the conclusion of the Court of Appeals was founded is untrue.—Title Guarantee & Trust Co. v. Haven, 139 N. Y. S. 207.

APPEARANCE.

See Courts, § 189; Judgment, § 677.

§ 26 (N.Y.Sup.) Where defendant moved to open his default and to permit him to answer, upon proof that there had been no service of the summons, the court erred in dismissing the complaint; defendant having waived the jurisdictional defect and submitted himself to the court's jurisdiction.—B. Crystal & Son v. Ohmer, 139 N. Y. S. 841.

APPLIANCES.

See Master and Servant, §§ 107, 121, 125, 126.

APPOINTMENT.

See Executors and Administrators, § 24; Guardian and Ward, §§ 8, 10.

ARBITRATION AND AWARD.

See Reference.

ARGUMENT OF COUNSEL.

See Appeal, § 1060; Trial, § 127.

ARMY AND NAVY.

See Paupers.

ARREST.

See Appeal, § 1060; Criminal Law, § 217; False Imprisonment.

II. ON CRIMINAL CHARGES.

§ 64 (N.Y.Sup.) An arrest without a warrant by a private person for misdemeanor is lawful only where a misdemeanor was actually committed in his presence.—Reisler v. Interborough Rapid Transit Co., 139 N. Y. S. 335.

ARREST OF JUDGMENT.

See Criminal Law, § 968.

ARSON.

See Criminal Law, § 406; Witnesses, § 367.

§ 28 (N.Y.Sup.) In a prosecution for arson, it was not error to introduce in evidence books and papers showing business relations between the defendant and the record owner of the premises burned.—People v. Schneider, 139 N. Y. S. 104.

ASSAULT AND BATTERY.

See New Trial, § 74; Witnesses, § 140.

II. CRIMINAL RESPONSIBILITY.**(B) Prosecution and Punishment.**

§ 82 (N.Y.Sup.) The failure of accused, testifying in his own behalf on his trial for assault by cutting complainant with a razor, to deny that he had a razor at the time, or that he cut complainant, raised of itself a strong presumption of guilt.—People v. Longebodi, 139 N. Y. S. 721.

§ 91 (N.Y.Sup.) Evidence held to support a conviction of assault in the second degree.—People v. Longebodi, 139 N. Y. S. 721.

ASSESSMENT.

See Taxation, § 496.

ASSETS.

See Executors and Administrators, § 51.

ASSIGNMENTS.

See Bills and Notes, § 316; Insurance, §§ 579, 648; Landlord and Tenant, § 44; Wills, § 72.

I. REQUISITES AND VALIDITY.**(A) Property, Estates, and Rights Assignable.**

§ 14 (N.Y.Sup.) The right of a receiver to his fees is inchoate, and upon the grounds of public policy unassignable until liquidated.—Colonial Bank v. Sutton, 139 N. Y. S. 1002.

IV. ACTIONS.

§ 131 (N.Y.Sup.) In an action for receiver's fees by an assignee thereof, the issue of the validity of the assignment is raised by a denial of the allegation of due assignment; the defense that unearned receiver's fees are not assignable not being personal to the receiver.—Colonial Bank v. Sutton, 139 N. Y. S. 1002.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy.

ASSUMPSIT, ACTION OF.

See Work and Labor.

ASSUMPTION.

Of risk, see Master and Servant, §§ 217, 220, 265, 288.

ATTACHMENT.

See Bankruptcy, §§ 156, 195; Execution.

III. PROCEEDINGS TO PROCURE.**(B) Affidavits.**

§ 102 (N.Y.CityCt.) Conclusion of an attachment affidavit that plaintiff was damaged in a specified sum by breach of contract, the damages being unliquidated, held insufficient show-

ing of damages to sustain the attachment.—*C. Tennant Sons & Co. v. New Jersey Oil & Meal Co.*, 139 N. Y. S. 1023.

ATTENDANCE.

See Witnesses, § 27.

ATTORNEY AND CLIENT.

See Appeal, § 1050; Courts, § 189; Evidence, § 590; Joint Ventures; Judgment, § 143; Libel and Slander, §§ 7, 121; Pleading, § 258; Trial, § 127; Usury; Wills, §§ 164, 166.

I. THE OFFICE OF ATTORNEY.

(C) Suspension and Disbarment.

§ 40 (N.Y.Sup.) An attorney will be disbarred for concealing the fact that he had been convicted of a felony prior to his admission.—*In re Kristeller*, 139 N. Y. S. 64.

§ 54 (N.Y.Sup.) Where the charges of a petitioner on motion to discipline an attorney are indefinite and unsustained by the slightest evidence, excepting some general statements as to matters upon which petitioner could have no personal knowledge, the proceedings will be dismissed.—*In re Moffett*, 139 N. Y. S. 545.

§ 61 (N.Y.Sup.) Where the referee, on petition by an attorney for a rehearing of the application to disbar him and for his reinstatement, found that the attorney was not guilty of the charges on which he was disbarred, and the representative of the Bar Association appearing before the referee approved his report, the court will reinstate the attorney.—*In re Oppenheim*, 139 N. Y. S. 1053.

II. RETAINER AND AUTHORITY.

§ 86 (N.Y.Sup.) The attorney for plaintiff in divorce had authority to stipulate that an adjournment of the hearing of a motion to vacate a judgment for plaintiff should not prejudice defendant's rights, although plaintiff died before the motion was heard.—*Hunt v. Hunt*, 139 N. Y. S. 413.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

§ 136 (N.Y.Sup.) A contract for legal services by a mercantile agency constituting a firm not composed of members of the bar, or by an individual not a member of the bar as assignee of the business, is illegal, without reference to Laws 1909, c. 483, as amended by Laws 1911, c. 317, prohibiting corporations and associations from practicing law.—*Buxton v. Lietz*, 139 N. Y. S. 46.

§ 150 (N.Y.Sup.) The estate of a deceased attorney held entitled to the agreed contingent fee on a settlement made after his death, where his services were the proximate cause of the settlement.—*Sargent v. McLeod*, 139 N. Y. S. 666.

(B) Lien.

§ 182 (N.Y.Sup.) Under Judiciary Law, § 475, an attorney cannot enforce a lien against real estate which has been the subject-matter in a certiorari proceeding to review the assess-

ment of the real estate for taxation.—*In re Ely*, 139 N. Y. S. 729.

§ 189 (N.Y.Sup.) Attorney's right to compensation upon a settlement by his client held limited by the agreement of retainer, and a recovery on quantum meruit for more than the stipulated amount could not be had.—*In re Winkler*, 139 N. Y. S. 755.

Where action for conversion of chattels was settled without knowledge of plaintiff's attorney by plaintiff paying defendant's innkeeper's lien and accepting a return of the property, the attorney's lien was not enforceable against defendant without proof of plaintiff's right to recover and collusion by the parties to deprive him of his fees.—*Id.*

In an action for conversion of chattels, defendant held charged with notice of plaintiff's attorney's lien on the cause of action, but not with notice of the attorney's right to specific chattels under an agreement with his client.—*Id.*

AUTHORITY.

See Attorney and Client, § 86; Principal and Agent, §§ 100-164.

AUTOMOBILES.

See Damages, § 39; Highways, § 186; Municipal Corporations, § 706; New Trial, § 35.

BAGGAGE.

See Carriers, §§ 387, 391.

BAILMENT.

See Banks and Banking, §§ 126, 148; Carriers, § 57; Innkeepers; Insurance, §§ 164, 579, 624, 648, 665; Pledges.

BANKRUPTCY.

See Banks and Banking, § 317; Estoppel; Undertakings.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

§ 150 (N.Y.Sup.) Although the title to land passes to the trustee in bankruptcy by the proceedings in bankruptcy, if he so elects, he is not required to accept it, if in his opinion it is worthless or will be unprofitable.—*McCarty v. Light*, 139 N. Y. S. 853.

§ 156 (N.Y.CityCt.) A defendant's trustee in bankruptcy is entitled to move in the state court for vacation of an attachment on a bankrupt's property.—*C. Tennant Sons & Co. v. New Jersey Oil & Meal Co.*, 139 N. Y. S. 1023.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

§ 195 (N.Y.CityCt.) Where an attachment was discharged on the giving of a surety undertaking for which defendant had deposited indemnifying securities, and defendant became a bankrupt within four months, the attachment will be vacated on motion by the bankrupt's

trustee.—*C. Tennant Sons & Co. v. New Jersey Oil & Meal Co.*, 139 N. Y. S. 1023.

§ 196 (N.Y.Sup.) Where a judgment is rendered within four months of an adjudication of bankruptcy, it becomes a lien on real estate which the trustee does not elect to take, in spite of Bankruptcy Act July 1, 1898, § 67f, although not effective as against the trustee, or persons claiming under him, or the insolvent personally.—*McCarty v. Light*, 139 N. Y. S. 853.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

§ 433 (N.Y.Sup.) Where a judgment creditor proved his claim against the estate of a bankrupt, but got nothing thereon, and there was nothing to show that he had surrendered or waived the lien of his judgment on land not sold by the trustee, such lien was not affected by the discharge in bankruptcy of the judgment debtor, under Bankruptcy Act July 1, 1898, § 57g, as amended by Act Feb. 5, 1903, § 12.—*McCarty v. Light*, 139 N. Y. S. 853.

BANKS AND BANKING.

See Carriers, § 57; Courts, § 188; Evidence, §§ 121, 236, 265, 332; Gifts, §§ 30, 82; Guaranty, § 74; Principal and Surety, § 147; Receivers; Subrogation; Trusts, § 59; Wills, §§ 487, 488; Witnesses, §§ 150, 159.

III. FUNCTIONS AND DEALINGS.

(B) Representation of Bank by Officers and Agents.

§ 116 (N.Y.Sup.) Notice of the dissolution of a firm, received by the officers and directors of a bank receiving its note, would constitute notice to the bank.—*Union Nat. Bank of Franklinville v. Dean*, 139 N. Y. S. 835.

(C) Deposits.

§ 126 (N.Y.Sup.) In an action on a draft drawn upon defendant bank, and on receipt of which it notified plaintiff that it had received the draft for its credit held that, in the absence of proof that plaintiff sustained damage by reason of not making an effort to collect because of such notice, or that if it had done so it could have collected the debt or some part of it, plaintiff could not recover.—*Walnut Hill Bank v. National Reserve Bank of City of New York*, 139 N. Y. S. 117.

§ 148 (N.Y.Sup.) Where plaintiff, discounting a note made by S. to M. and B., indorsed in blank in their names, and presented by V., gave V. a check payable to M. and B., and the bank paid it on its indorsement in the name of M. and B., forged by S., as had been the indorsement of the note, it could not charge the payment to plaintiff, even if he was negligent in delivering the check to V.—*Kobre v. Corn Exchange Bank*, 139 N. Y. S. 890.

VI. LOAN, TRUST, AND INVESTMENT COMPANIES.

§ 317 (N.Y.Sup.) On dissolution of a trust company designated as a depository under Bankruptcy Act July 1, 1898, § 61, and by the

state comptroller under Code Civ. Proc. § 746, money deposited by a trustee or receiver in bankruptcy is, under Banking Law, §§ 189, 190, entitled to preference, as a deposit of "money paid into court," or "brought into court."—*Morris v. Carnegie Trust Co.*, 139 N. Y. S. 969.

BAR.

See Abatement and Revival, § 8; Judgment, §§ 596-952; Limitation of Actions.

BATTERY.

See Assault and Battery.

BENEFICIAL ASSOCIATIONS.

See Insurance, §§ 723-777; Perpetuities, § 6.

BEQUESTS.

See Wills.

BEST AND SECONDARY EVIDENCE.

See Evidence, §§ 181, 182.

BIAS.

See Witnesses, § 367.

BIDS.

See Municipal Corporations, § 354.

BIGAMY.

See Evidence, § 80.

BILL OF LADING.

See Carriers, § 57.

BILL OF PARTICULARS.

See Pleading, §§ 317-323.

BILLS AND NOTES.

See Abatement and Revival, § 8; Action, § 25; Banks and Banking, §§ 116, 126, 148; Evidence, §§ 400, 402; Good Will; Guaranty, §§ 53, 74; Judgment, § 951; Libel and Slander, § 9; Partnership, §§ 292, 296; Pleading, §§ 120, 317; Pledges; Replevin, § 4; Sales, § 430; Subrogation; Trial, § 3; Trusts, § 358; Usury.

I. REQUISITES AND VALIDITY.

(B) Form and Contents of Promissory Notes and Duebills.

§ 47 (N.Y.Sup.) A note being given on condition that the maker should not be called on to pay it, if, when it was due, the indebtedness of the payee to another, payment of which the maker had guaranteed, existed to the amount of the note; and, the indebtedness having so existed at such time, the note never had a valid inception.—*Copans v. Dougan*, 139 N. Y. S. 427.

(D) Acceptance.

§ 70 (N.Y.Sup.) The mere retention of an order to pay money is not an acceptance, unless it be under circumstances from which a promise to pay may be presumed.—*Foley v. New York Savings Bank*, 139 N. Y. S. 915.

§ 75 (N.Y.Sup.) An accommodation acceptor of a bill, as between himself and the drawer, in equity occupies the position of a surety.—*Sexton v. Fensterer*, 139 N. Y. S. 811.

(E) Consideration.

§ 92 (N.Y.Sup.) D.'s contract of purchase from C. providing that he should give a bond for \$1,000 to C.'s wife payable in future installments, and she refusing to sign a deed unless she received \$200 down, and C. having paid it on D.'s refusal to do so, D.'s note for \$200 then given C., on suggestion of another, was without consideration.—*Copans v. Dougan*, 139 N. Y. S. 427.

§ 96 (N.Y.Sup.) An accommodation note, transferred to a third person, either in payment of or as collateral security for a pre-existing debt, is supported by a sufficient consideration.—*Martin L. Hall Co. v. Todd*, 139 N. Y. S. 111.

II. CONSTRUCTION AND OPERATION.

§ 121 (N.Y.Sup.) Where a drawer of foreign drafts was to put New York bankers in funds 15 days before each draft was due, and they requested a foreign correspondent to pay the drafts and guaranteed it against loss therefrom, the correspondent, after acceptance of drafts, was the principal debtor as between itself and the holder, but as between itself and the drawer the drawer was the principal debtor.—*Sexton v. Fensterer*, 139 N. Y. S. 811.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.**(C) Assignment or Sale.**

§ 316 (N.Y.Sup.) It is no defense to a note, as against an assignee, that he paid no consideration therefor.—*Canning v. Lane*, 139 N. Y. S. 884.

(D) Bona Fide Purchasers.

§ 371 (N.Y.Sup.) One who receives an accommodation note, in payment of or as collateral security for a pre-existing debt, is a holder for value, though he knows that the maker is an accommodation party.—*Martin L. Hall Co. v. Todd*, 139 N. Y. S. 111.

VIII. ACTIONS.

§ 489 (N.Y.Sup.) Where, in an action on a note, the answer relied on an affirmative defense, the mere production of the note on the trial established a prima facie case for plaintiff.—*Oppenheimer v. Trebla Realty Co.*, 139 N. Y. S. 894.

§ 493 (N.Y.Sup.) Where there is no evidence that a note was without consideration, and it shows on its face that it was given for value, a recovery should be allowed.—*Canning v. Lane*, 139 N. Y. S. 884.

§ 497 (N.Y.Sup.) A purchaser for value of notes given for the price of goods, with knowledge of the terms of sale and of the seller's

representations, must, to recover from the buyer, show that he acted in good faith and had no knowledge of the seller's fraud.—*Rafsky v. Frederick A. Smith Co.*, 139 N. Y. S. 1088.

BOARDS.

See Counties, §§ 132, 134; Work and Labor, §§ 7, 28.

BONA FIDE PURCHASERS.

See Bills and Notes, § 371; Vendor and Purchaser, §§ 230-242.

BONDS.

See Corporations, § 320; Costs, § 169; Executors and Administrators, § 509; Interest, § 37; Mechanics' Liens, § 115; Mortgages, § 25; Principal and Surety; Reference, § 99; Replevin, § 124; Taxation, § 200; Undertakings.

BOOKS.

See Evidence, §§ 181, 182.

BOUNDARIES.**I. DESCRIPTION.**

§ 20 (N.Y.Sup.) Descriptions in a mortgage of city lots beginning at the intersection of the exterior lines of two streets reserve the fee in the highway to the mortgagor.—*De Baun v. Pardee*, 139 N. Y. S. 1077.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

§ 48 (N.Y.Sup.) Plaintiff held estopped by acquiescence to claim that a boundary fence which had existed since 1883 or 1885 was not the actual boundary line.—*French v. Wray*, 139 N. Y. S. 339.

BREACH.

See Covenants; Sales; Vendor and Purchaser, §§ 130-175.

BRIBERY.

See Criminal Law, § 1073.

BRIDGES.

See Canals.

BROKERS.

See Evidence, § 400; Insurance, §§ 96, 102, 103; Limitation of Actions, § 46; Principal and Agent; Release, § 12.

II. EMPLOYMENT AND AUTHORITY.

§ 8 (N.Y.Sup.) Evidence in an action for a broker's commission on a sale of real estate held insufficient to authorize a finding of employment of plaintiff.—*Sanders v. Schultheis*, 139 N. Y. S. 866.

§ 9 (N.Y.Sup.) Where an agent for subscribers to a stock pool account has authority to manage the account and close it out when he sees fit, his agency is terminated when he causes a transfer of the account to another account of

which he also has control.—*Post v. Thomas*, 139 N. Y. S. 6.

A transfer of a stock pool account *held* a closing out of the pool account as to one of the parties interested therein.—*Id.*

III. DUTIES AND LIABILITIES TO PRINCIPAL.

§ 24 (N. Y. Sup.) A stockbroker's action against a customer, to recover the balance due on margin transactions after having sold the customer out, could not be maintained, where the customer was given no notice of the time of sale.—*Fairchild v. Flomerfelt*, 139 N. Y. S. 44.

IV. COMPENSATION AND LIEN.

§ 74 (N.Y.Sup.) A brokerage firm, carrying a stock pool account for two persons and executing a release of one, on the theory that the other was liable for his interest, though he had been actually discharged, *held* entitled to sue the former on the account; the release being without consideration.—*Post v. Thomas*, 139 N. Y. S. 6.

V. ACTIONS FOR COMPENSATION.

§ 88 (N.Y.Sup.) In an action for a real estate broker's commission for procuring a purchaser, a question of defendant's good faith in canceling the broker's authority to sell just before the sale was effected through another broker to a purchaser produced by plaintiff *held*, under the evidence for the jury.—*L'Ecluse v. Field*, 139 N. Y. S. 383.

BUILDING CONTRACTS.

See Contracts, § 198.

BURDEN OF PROOF.

See Evidence, § 90.

BURGLARY.

See Insurance, § 665.

BURIAL GROUNDS.

See Cemeteries.

BY-LAWS.

See Corporations, § 308.

CABLES.

See Telegraphs and Telephones.

CALENDARS.

See Trial, § 14.

CANALS.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 17 (N.Y.Sup.) The canal board having taken no steps to erect a new bridge or appropriate complainants' toll bridge over the Mohawk river under Barge Canal Act, § 3, complainants,

owning and operating the bridge, were entitled to an injunction restraining the board and its employes from interfering therewith.—*Half-moon Bridge Co. v. Canal Board*, 139 N. Y. S. 156.

CANCELLATION OF INSTRUMENTS.

See Deeds, § 70; Insurance, § 730; Judgment, § 199; Limitation of Actions, § 100; Quiet-ing Title.

CAPTION.

See Judgment, § 326.

CARRIERS.

See Appeal, § 215.

II. CARRIAGE OF GOODS.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

§ 57 (N.Y.Sup.) Where an owner takes a bill of lading, "order (consignee) notify" C., and attaches a draft thereto, and delivers it to a bank for value, the title to the goods passes to the bank, and the carrier is liable to the bank for conversion if it delivers such shipment without surrender of the bill of lading.—*Canandaigua Nat. Bank v. Cleveland, C. & St. L. Ry. Co.*, 139 N. Y. S. 561.

IV. CARRIAGE OF PASSENGERS.

(D) Personal Injuries.

§ 280 (N.Y.Sup.) Owner or occupier of a store building, maintaining a passenger elevator therein, *held* not an insurer of the safety thereof, but only bound to use reasonable care as to the appliances provided and in the maintenance and operation thereof.—*Rumetsch v. John Wanamaker*, New York, 139 N. Y. S. 385; *Mack v. Wanamaker*, *Id.* 391; *Dutcher v. Same*, *Id.* 392.

§ 280 (N.Y.Sup.) In submitting the question of a subway company's negligence in failing to protect passengers on its platform from the results of crowding, the standard of care taken should be that of one skillful in carrying on the business; the highest degree of practicable care not being required.—*Bacon v. Hudson & M. R. Co.*, 139 N. Y. S. 740.

§ 286 (N.Y.Sup.) A subway company's employes should give attention to prevent passengers congregating on a subway platform from congesting or crowding, so as to endanger the safety of passengers.—*Bacon v. Hudson & M. R. Co.*, 139 N. Y. S. 740.

§ 287 (N.Y.Sup.) An electric railroad company *held* bound to anticipate crowding in attempting to board its cars, and to use reasonable care to protect passengers from injury therefrom.—*Reschke v. Syracuse, L. S. & N. R. Co.*, 139 N. Y. S. 555.

§ 293 (N.Y.Sup.) In an action for injuries to a patron of a department store by the breaking of a steel band supporting an elevator, defendant *held* not negligent in failing to ascertain and repair the defect prior to the injury.—*Rumetsch v. John Wanamaker*, New York, 139

N. Y. S. 385; *Mack v. Wanamaker*, Id. 391; *Dutcher v. Same*, Id. 392.

§ 317 (N.Y.Sup.) Admission of evidence to show precautions taken at other stations and upon other roads to prevent passengers being forced against and between moving cars *held* proper.—*Reschke v. Syracuse, L. S. & N. R. Co.*, 139 N. Y. S. 555.

§ 318 (N.Y.Sup.) In a subway passenger's action for injuries by being pushed from the platform onto the track by other passengers, evidence *held* not to sustain a finding that defendant's employes were negligent in not exercising due care to control and restrain the passengers on the platform.—*Bacon v. Hudson & M. R. Co.*, 139 N. Y. S. 740.

Evidence, in a subway passenger's action for injuries by being crowded off the platform onto the track, *held* not to show negligence in failing to prevent the entrance of more passengers, because of the crowded condition of the platform.—Id.

§ 320 (N.Y.Sup.) Evidence *held* to present question for jury whether plaintiff was forced between motor car and a trailer, and injured, by the pressure of the crowd, as claimed by him.—*Reschke v. Syracuse, L. S. & N. R. Co.*, 139 N. Y. S. 555.

Question whether railroad company should have furnished more men than it did to assist in controlling a crowd at station *held* to be for the jury.—Id.

Question whether railroad company should have erected barriers at a station to control crowds *held* properly submitted to the jury.—Id.

(F) Ejection of Passengers and Intruders.

§ 382 (N.Y.Sup.) The fact that a carrier acts on the advice of counsel in claiming a second fare and ejecting a passenger for refusal to pay goes only to the mitigation of damages, and not to the right to recover exemplary damages.—*Daymon v. Westchester St. R. Co.*, 139 N. Y. S. 751.

That a conductor, in ejecting a passenger who has paid all that the law requires him to pay, acted in good faith and in the honest belief that the passenger was not entitled to further transportation without additional fare, does not affect the passenger's right to compensatory damages.—Id.

The right of a passenger wrongfully ejected to compensatory damages includes compensation for loss of time and the amount the passenger was obliged to pay for passage on another car, and also suitable recompense for injury to his feelings.—Id.

(G) Passengers' Effects.

§ 387 (N.Y.Sup.) A carrier must transport a reasonable amount of hand baggage, such as is commonly taken by travelers for their personal use; the quantity and value depending on the passenger's station in life and the purpose of the journey.—*Sherman v. Pullman Co.*, 139 N. Y. S. 51.

§ 391 (N.Y.Sup.) A diamond necklace, carried by a female passenger, is baggage, though not used on the journey.—*Sherman v. Pullman Co.*, 139 N. Y. S. 51.

(H) Palace Cars and Sleeping Cars.

§ 413 (N.Y.Sup.) If a porter neglected to watch a bag which he received from a passenger on her retiring, and permitted its contents to be stolen, or himself stole it, the sleeping car company would be liable therefor.—*Sherman v. Pullman Co.*, 139 N. Y. S. 51.

§ 417 (N.Y.Sup.) Evidence in a Pullman car passenger's action for loss of baggage *held* to sustain a judgment for plaintiff.—*Sherman v. Pullman Co.*, 139 N. Y. S. 51.

The failure of the porter of a Pullman car to return to a passenger articles delivered to him on retiring was *prima facie* evidence of negligence.—Id.

CARRYING WEAPONS.

See Weapons.

CAUSA MORTIS.

See Gifts, § 82.

CAUSE OF ACTION.

See Action.

CEMETERIES.

§ 5 (N.Y.Sup.) A company formed as a business corporation, with wide and general commercial powers, is not entitled to the rights of a cemetery corporation.—*Grace v. Repose Mausoleums*, 139 N. Y. S. 300.

CERTIFICATE.

See Chattel Mortgages, §§ 11, 230; Partnership, §§ 361, 375; Property; Railroads, § 47; Replevin, §§ 4, 57; Street Railroads, § 22.

CERTIORARI.

See Attorney and Client, § 182; Taxation, § 496.

CHAMPERTY AND MAINTENANCE.

§ 7 (N.Y.Sup.) Where the title to the surface of land has been severed from that to the mines and minerals underlying it, a conveyance of the mines and minerals while the owner of the surface is carrying on mining operations is not champertous.—*White v. Miller*, 139 N. Y. S. 660.

CHANGE OF VENUE.

See Venue, §§ 68, 77.

CHARACTER.

See Witnesses, § 349.

CHARGE.

To jury, see Criminal Law, §§ 1038, 1172, 1173; Trial, § 251.

CHARITIES.

I. CREATION, EXISTENCE, AND VALIDITY.

§ 10 (N.Y.Sup.) "Needy young women students" constitute a class, public in character.

and the limitation of a charitable bequest to the use of such students at a certain university, which is a public institution, does not affect such public character.—*Sawyer v. Dearstyne*, 139 N. Y. S. 955.

§ 12 (N.Y.Sup.) A bequest of property to a graduate association, to be used in aiding and assisting needy young women students at a university, held to indicate a charitable and benevolent purpose, educational in character, and as such enforceable.—*Sawyer v. Dearstyne*, 139 N. Y. S. 955.

§ 18 (N.Y.Sup.) Since under Personal Property Law, § 12, and Real Property Law, § 113, a trust for which no trustee has been designated vests in the Supreme Court, failure to designate the trustee of a charitable trust will not avoid it.—*Sawyer v. Dearstyne*, 139 N. Y. S. 955.

§ 21 (N. Y. Sup.) Under Personal Property Law, § 12, and Real Property Law, § 113, declaring that no bequest to educational uses shall be invalid for indefiniteness of beneficiaries, a bequest for the benefit of young women students at a university who needed aid in securing an education, was sufficiently definite as to the beneficiaries.—*Sawyer v. Dearstyne*, 139 N. Y. S. 955.

CHATTEL MORTGAGES.

See Fixtures.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Transfers of Chattels as Security.

§ 11 (N.Y.Sup.) A liquor tax certificate is not a chattel within the chattel mortgage law.—*Bachmann-Bechtel Brewing Co. v. Gehl*, 139 N. Y. S. 807.

VII. REMOVAL OR TRANSFER OF PROPERTY BY MORTGAGOR.

(B) Criminal Responsibility.

§ 230 (N.Y.Sup.) A liquor tax certificate is not a chattel, within Pen. Code, § 571, which makes it a misdemeanor to sell, assign, or secrete any mortgaged personal property.—*Bachmann-Bechtel Brewing Co. v. Gehl*, 139 N. Y. S. 807.

CHECKS.

See Bills and Notes.

CHILDREN.

See Adoption; Guardian and Ward; Infants; Negligence; Parent and Child; Receiving Stolen Goods.

CHOSE IN ACTION.

See Assignments; Trover and Conversion.

CITIES.

See Municipal Corporations.

CIVIL RIGHTS.

See Constitutional Law, § 39; Injunction, § 21; Torts.

CLAIM AND DELIVERY.

See Replevin.

CLAIMS.

See Executors and Administrators, §§ 209, 509.

CLERKS OF COURTS.

§ 3 (N.Y.Sup.) Laws 1909, c. 35, known as the "Judiciary Law," as amended by Laws 1911, cc. 640, 826, authorizing the county clerk of Kings county to appoint a chief clerk of the County Court for a term of five years, while the county clerk only holds for two years, does not invade the constitutional rights of the county clerk.—*People ex rel. Wogan v. Rafferty*, 139 N. Y. S. 572.

In view of Const. art. 8, § 19, merely providing that the several county clerks shall be clerks of the Supreme Court with powers and duties prescribed by law, the Legislature has power to provide for all other clerkships, including clerks of the County Court.—*Id.*

§ 18 (N.Y.Sup.) A county clerk, acting as clerk of the Supreme Court, is not entitled to a fee for entering an order requiring plaintiff to give security for costs, under Code Civ. Proc. § 3306a, entitling the county clerk to a certain sum for making the entries required of him by law of moneys deposited with the county treasurer.—*Coe v. Champlain Graphite Co.*, 139 N. Y. S. 329.

A clerk of the Supreme Court properly refused to file and enter an order until it had been judicially determined whether he was entitled to a fee therefor, if he was in doubt as to his right to a fee.—*Id.*

§ 71 (N.Y.Sup.) If defendant acted as a county clerk, and not as clerk of the Supreme Court, in entering an order requiring plaintiff to give security for costs, he could only be compelled to enter such order by mandamus, and could not be summarily compelled to do so by an order of the Supreme Court.—*Coe v. Champlain Graphite Co.*, 139 N. Y. S. 329.

CLOUD ON TITLE.

See Quieting Title.

COLLATERAL AGREEMENT.

See Evidence, §§ 441, 445.

COLLATERAL SECURITY.

See Pledges.

COLLATERAL UNDERTAKINGS.

See Guaranty.

COLLEGES AND UNIVERSITIES.

See Charities.

COLLISION.

See New Trial, § 35.

COMMISSION.

See Railroads; Street Railroads, §§ 13, 22.

COMMISSIONERS.

See Eminent Domain, §§ 230, 232; Street Railroads, §§ 25, 41.

COMMISSIONS.

See Brokers, §§ 8, 74, 88.

COMMON CARRIERS.

See Carriers.

COMMON LAW.

See Action, § 25; Courts, § 188; Jury; Marriage.

§ 8 (N.Y.Sur.) Interpretations made of the common law by the courts of England since American independence have no weight or authority in determining the present common law in New York.—*In re Lamb's Estate*, 139 N. Y. S. 685.

COMPENSATION.

See Attorney and Client, §§ 136-189; Brokers, §§ 8, 74, 88; Clerks of Courts; Corporations, §§ 308, 312, 320; Eminent Domain, §§ 119, 158, 232, 262; Master and Servant, § 70; Physicians and Surgeons; Witnesses, § 27.

COMPENSATORY DAMAGES.

See Damages, §§ 39, 45.

COMPETENCY.

See Witnesses, §§ 139-214.

COMPETITION.

See Trade-Marks and Trade-Names.

COMPLAINT.

See Indictment and Information; Pleading.

COMPROMISE AND SETTLEMENT.

See Accord and Satisfaction; Attorney and Client, §§ 150, 189; Insurance, § 579; Payment; Release.

COMPUTATION.

See Limitation of Actions, §§ 46-100.

CONCEALED WEAPONS.

See Weapons.

CONCLUSION.

See Pleading, § 8.

CONDEMNATION.

See Eminent Domain.

CONDITIONAL SALES.

See Sales, §§ 429, 467-481.

CONDITIONS.

See Deeds, § 145; Insurance, § 505.

CONFIDENTIAL RELATIONS.

See Witnesses, §§ 211, 214.

CONFLICT OF LAWS.

See Marriage; Powers, § 36; Wills, § 436.

CONSENT.

See Novation; Reference; States; Street Railroads, § 41.

CONSIDERATION.

See Bills and Notes, §§ 92, 96, 316, 493; Contracts, § 47; Guaranty, § 16; Release, § 12.

CONSPIRACY.

See Corporations, § 319.

CONSTITUTIONAL LAW.

See Clerks of Courts, § 3; Courts, §§ 41, 95; Criminal Law, § 87; Infants, § 12; Intoxicating Liquors, § 23; Officers, §§ 2, 49; Statutes, §§ 35½, 64; Weapons.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 20 (N.Y.Sup.) A uniform construction of constitutional provisions and statutes enacted thereunder often has controlling weight in the determining of a constitutional question.—*People ex rel. Wogan v. Rafferty*, 139 N. Y. S. 572.

§ 39 (N.Y.Sup.) The rights enumerated in the Civil Rights Law were not created by the statute, but pertain to the character of free men in a free state.—*People ex rel. Darling v. Warden of City Prison*, 139 N. Y. S. 277.

In order to declare a statute void for violating the fundamental rights enumerated in Civil Rights Law, the statute should be clearly shown to directly violate such fundamental rights.—*Id.*

§ 45 (N.Y.Sup.) An unconstitutional statute cannot be sustained, though it has remained unchallenged for many years.—*People ex rel. Robert Simpson Co. v. Kempner*, 139 N. Y. S. 440.

§ 46 (N.Y.Sup.) One seeking to have a statute declared invalid as beyond the legislative power must definitely and clearly point out the want of power.—*People ex rel. Darling v. Warden of City Prison*, 139 N. Y. S. 277.

§ 48 (N.Y.Sup.) While it is presumed that a statute is constitutional, the courts should not hesitate to hold a statute unconstitutional if it clearly appears so.—*People ex rel. Wogan v. Rafferty*, 139 N. Y. S. 572.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) Legislative Powers and Delegation Thereof.

§ 65 (N.Y.Sup.) The referendum provision of Bronx County Act, § 16, that the act should be inoperative unless a majority of the votes in the new county should be in its favor, *held* in conflict with Const. art. 1, § 3, vesting legislative power in the Senate and Assembly.—People ex rel. Unger v. Kennedy, 139 N. Y. S. 896.

(B) Judicial Powers and Functions.

§ 70 (N.Y.Sup.) The courts are not concerned with the wisdom of the law, or whether it will accomplish its purpose, if it be constitutional.—People ex rel. Darling v. Warden of City Prison, 139 N. Y. S. 277.

§ 70 (N.Y.Sup.) The courts cannot determine the propriety of a statute, but merely its constitutionality.—People ex rel. Wogan v. Rafferty, 139 N. Y. S. 572.

IV. POLICE POWER IN GENERAL.

§ 81 (N.Y.Sup.) Legislation for the public welfare and safety is valid as an exercise of the police power, though it imposes restraints and burdens on individuals; the question being only whether the means employed are appropriate and reasonably necessary to accomplish the purpose, and are not unduly oppressive.—People ex rel. Darling v. Warden of City Prison, 139 N. Y. S. 277.

V. PERSONAL, CIVIL, AND POLITICAL RIGHTS.

§ 89 (N.Y.Sup.) Under its police power the state may limit the hours which women may work in certain industries, and Labor Law (Consol. Laws 1909, c. 31) § 77, limiting the hours women may work in factories other than canning establishments does not unconstitutionally interfere with liberty to contract.—People ex rel. Hoelderlin v. Kane, 139 N. Y. S. 350.

X. EQUAL PROTECTION OF LAWS.

§ 238 (N.Y.Sup.) Labor Law, § 77, which limits, under a penalty, the hours women may work in all factories other than canning establishments, is not invalid as depriving the employer of the equal protection of the law.—People ex rel. Hoelderlin v. Kane, 139 N. Y. S. 350.

§ 240 (N.Y.Sup.) Liquor Tax Law, § 8, subd. 9, concerning notice of abandonment of premises for liquor purposes, does not make an unlawful discrimination between the owners of property used for different purposes.—In re Nyce, 139 N. Y. S. 204.

XI. DUE PROCESS OF LAW.

§ 277 (N.Y.Sup.) The right of an apparent pledgee to retain articles pledged as security for his loan is a "property right," which is protected by the constitutional requirement of due process of law.—People ex rel. Robert Simpson Co. v. Kempner, 139 N. Y. S. 440.

§ 278 (N.Y.Sup.) Liquor Tax Law, § 8, subd. 9, which permits a tenant to abandon the right

to use premises for liquor purposes, *held* not to deprive the owner of property without due process of law.—In re Nyce, 139 N. Y. S. 204.

§ 305 (N.Y.Sup.) A hearing or opportunity to be heard and notice thereof *held* absolutely essential to constitute "due process of law."—People ex rel. Robert Simpson Co. v. Kempner, 139 N. Y. S. 440.

§ 309 (N.Y.Sup.) Code Cr. Proc. §§ 687, 806-809, relating to the possession of stolen or embezzled property, *held* invalid as a deprivation of due process of law as to a pledgee for failure to require the giving of notice as to the time and place at which his claim of right as pledgee shall be heard and determined.—People ex rel. Robert Simpson Co. v. Kempner, 139 N. Y. S. 440.

CONSTRUCTION.

See Common Law; Constitutional Law, § 20; Contracts, § 176; Insurance, §§ 146, 164, 505; Statutes, §§ 181-231; Wills, §§ 436-698.

CONTEMPT.

See Appeal, § 875; Execution, § 450.

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

§ 55 (N.Y.Sup.) Under Code Civ. Proc. §§ 796, 797, 802, construed in view of Judiciary Law, §§ 760, 761, an order to show cause why a judgment debtor should not be punished for contempt was properly served by leaving a copy at his residence with a person of suitable age between the hours of 5 and 6 p. m.—Barrie v. Friedman, 139 N. Y. S. 337.

§ 63 (N.Y.Sup.) Where a motion to set aside a judgment for nonservice of summons was referred and denied, the court had no jurisdiction to insert in the order a provision for punishment as for contempt if defendant failed to pay the costs of the reference.—Davidson v. Unger, 139 N. Y. S. 157.

CONTINGENT REMAINDERS.

See Wills, §§ 630, 634, 852.

CONTRACTS.

See Accord and Satisfaction; Account Stated; Action, § 47; Appeal, §§ 221, 1041, 1171; Assignments; Attachment; Attorney and Client, §§ 136, 189; Bills and Notes; Brokers; Champerty and Maintenance; Chattel Mortgages; Constitutional Law, § 89; Corporations, §§ 82, 308; Counties, §§ 132, 134; Covenants; Damages, §§ 45, 124; Deeds; Evidence, §§ 314, 393-445; Executors and Administrators, § 311; Fixtures; Frauds, Statute of; Guaranty; Indemnity; Injunction, § 61; Insurance; Interest; Joint Adventures; Judgment, § 250; Landlord and Tenant; Master and Servant; Mechanics' Liens; Mortgages; Municipal Corporations, § 354; Novation; Parties, § 6; Partnership; Payment; Perpetuities, § 6; Pleading, §§ 193, 321; Pledges; Principal and Agent, §§ 154, 184; Principal and Surety; Release; Sales;

Stipulations; Subrogation; Telegraphs and Telephones; Undertakings; Usury; Vendor and Purchaser; Waters and Water Courses, §§ 154-156; Wills, § 745; Work and Labor, §§ 14, 28.

I. REQUISITES AND VALIDITY.

(D) Consideration.

§ 47 (N.Y.Sup.) A promise by a seller of a business not to engage in a similar business for a specified term within specified territory will not be enforced at the suit of the buyer, where there was no consideration for the purchase of the business and the promise.—*Fries v. Parr*, 139 N. Y. S. 220.

(F) Legality of Object and of Consideration.

§ 117 (N.Y.Sup.) A contract binding a seller of a business not to engage in similar business will not be enforced, unless the restrictions are limited as to time and territory, and it is necessary to uphold the contract in order to give the purchaser of the business the benefit of his purchase.—*Fries v. Parr*, 139 N. Y. S. 220.

§ 127 (N.Y.Sup.) A provision in a lease that it should be inadmissible in evidence in any legal proceeding between the parties held invalid.—*Trustees of Leake and Watts Orphan House in City of New York v. Hoyle*, 139 N. Y. S. 1098.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 176 (N.Y.Sup.) The interpretation of a written contract is a question of law, except where the interpretation depends on the sense in which the words are used, in which case it is a mixed question of law and fact.—*Bartholdi v. Hickson*, 139 N. Y. S. 847.

(C) Subject-Matter.

§ 198 (N.Y.Sup.) A building construction contract providing for \$300 to be allowed to the owners from the price, for foundation walls to be built by them, left with the owners the responsibility for their construction.—*Romeo v. Grappone*, 139 N. Y. S. 867.

CONTRADICTION.

See Witnesses, §§ 387, 390.

CONTRIBUTORY NEGLIGENCE.

See Negligence.

CONVERSATION.

See Evidence, § 393.

CONVERSION.

See Trover and Conversion.

§ 11 (N.Y.Sup.) Where an owner of an undivided interest in the estate of a testator executed a deed of trust of the interest, consisting chiefly of real estate, and the executor converted the estate into cash and paid it to the trustee, the corpus of the trust estate was personalty.—*Sperry v. Farmers' Loan & Trust Co.*, 139 N. Y. S. 192.

CONVEYANCES.

See Assignments; Champerty and Maintenance; Chattel Mortgages; Deeds; Estoppel; Evidence, § 273; Mines and Minerals, § 55; Mortgages; Partition; Powers, § 33; Quiet-ing Title, § 23; Vendor and Purchaser; Waters and Water Courses, §§ 154, 156.

CORPORATIONS.

See Attorney and Client, § 136; Banks and Banking; Carriers; Cemeteries; Costs, § 169; Evidence, § 314; Executors and Administrators, § 115; Guaranty, § 87; Insurance; Limitation of Actions; Municipal Corporations; Novation; Railroads; Street Railroads; Telegraphs and Telephones; Waters and Water Courses, § 192.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(B) Subscription to Stock.

§ 82 (N.Y.Sup.) In an action against a corporation to recover the purchase price of corporate stock, under its agreement for repurchase, evidence held sufficient to sustain the verdict on the theory of ratification of the agreement.—*Malcomson v. Monaton Realty Investing Corporation*, 139 N. Y. S. 405.

(D) Transfer of Shares.

§ 121 (N.Y.Sup.) An action for the purchase price of corporate stock, begun after the time for the payment of all installments due had elapsed, cannot be maintained without a tender.—*Security Title & Trust Co. of York, Pa. v. Stewart*, 139 N. Y. S. 74.

(E) Interest, Dividends, and New Stock.

§ 151 (N.Y.Sup.) Where a private business is conducted by a corporation, all stockholders of the same class must be treated alike in the distribution of profits.—*Godley v. Crandall & Godley Co.*, 139 N. Y. S. 236.

§ 153 (N.Y.Sup.) Discriminatory dividends, paid by a corporation to certain stockholding employes, held not recoverable in a representative action by a minority stockholder.—*Godley v. Crandall & Godley Co.*, 139 N. Y. S. 236.

§ 155 (N.Y.Sup.) Issuance of extra dividends to certain stockholding employes of a corporation, not on the basis of length or faithfulness of service, but according to the amount of stock held, held, unsustainable as a scheme of profit-sharing with faithful employes.—*Godley v. Crandall & Godley Co.*, 139 N. Y. S. 236.

VI. OFFICERS AND AGENTS.

(C) Rights, Duties, and Liabilities as to Corporation and Its Members.

§ 308 (N.Y.Sup.) Additional salary voted by directors of a corporation to themselves held illegal, and recoverable for the benefit of the corporation in a representative suit by a minority stockholder.—*Godley v. Crandall & Godley Co.*, 139 N. Y. S. 236.

A director of a corporation is disqualified to vote on a resolution fixing his salary as an officer.—*Id.*

Where directors of a corporation voted to

themselves additional salary as officers, but the proof showed that their services were worth at least what they had received before, they were only required to account for the excess.—Id.

§ 308 (N.Y.Sup.) Where majority stockholders elected themselves directors, then officers, and then distributed a substantial part of the profits to themselves by voting themselves excessive salaries, the minority by a representative action could compel a return of the fund to the corporation's treasury.—Carr v. Kimball, 139 N. Y. S. 253.

Directors of a corporation being incapable of contracting with themselves, a contract fixing a director's salary was voidable, where his vote was essential to pass the resolution.—Id.

A by-law of a corporation, authorizing the directors to fix salaries, did not validate a resolution fixing the salary of a member of the board whose vote was necessary to constitute a quorum.—Id.

A director of a corporation, who was not an officer, and who did not draw a salary or benefit by his vote in favor of resolutions improperly appropriating money from the corporation to other directors, was not liable for the refund thereof.—Id.

Where a corporation's treasurer was not a director, a minority stockholder could not recover, for the corporation's benefit, money voted to the treasurer as additional salary.—Id.

§ 312 (N.Y.Sup.) Directors of a corporation were not accountable for sums voted to employes, not directors, as additional salary.—Godley v. Crandall & Godley Co., 139 N. Y. S. 236.

Where majority stockholders of a corporation formed a new corporation, and appropriated the good will of the old, in order to freeze out the minority interest, they were liable to account for the reasonable value of such good will.—Id.

§ 319 (N.Y.Sup.) Complaint in a corporation's action against directors and officers, alleging that through their negligence and fraudulent conspiracy they had prevented the corporation from obtaining a valuable railroad concession, held not to allege sufficient facts upon which to predicate a liability.—Occidental Const. Co. v. Miller, 139 N. Y. S. 166.

§ 320 (N.Y.Sup.) Minority stockholders of a railroad corporation in their individual capacity held not authorized to enjoin a sale of majority stock to a competing railroad company.—Delevan v. New York, N. H. & H. R. Co., 139 N. Y. S. 17.

§ 320 (N.Y.Sup.) Directors of a corporation may be compelled to account for misconduct or dishonorable dealing for their own benefit in a suit by a minority stockholder for the benefit of the corporation.—Godley v. Crandall & Godley Co., 139 N. Y. S. 236.

In a representative suit by a minority stockholder to recover alleged additional salaries voted by directors to themselves, it was not material to a judgment for plaintiff that the court omitted to find that the additional salaries so paid were excessive.—Id.

Where directors of a corporation voted to themselves various sums as additional salary,

the burden was on them to prove the value of their services.—Id.

Where misconduct of directors of a corporation made necessary the institution of a representative suit by minority stockholders, the expense of defending the suit, including the premium on a bond given for the discharge of a receiver, was properly taxed against them.—Id.

VII. CORPORATE POWERS AND LIABILITIES.

(F) Civil Actions.

§ 522 (N.Y.Sup.) Service of summons upon an agent of a corporation, he being the sole defendant named, and who was not shown to be an officer of the company, or to have authority to consent to amendment of summons by naming the company as defendant, was not effective to bring the company into court, so that a judgment rendered against it must be reversed.—Booth v. A. Feldman Const. Co., 139 N. Y. S. 315.

VIII. INSOLVENCY AND RECEIVERS.

§ 545 (N.Y.Sup.) "Such" corporation, which under Stock Corporation Law, § 66, may not make a transfer when insolvent to prefer particular creditors, and for doing which the directors are liable, is one which, before the transfer, had refused to pay an obligation.—Caesar v. Bernard, 139 N. Y. S. 974.

XII. FOREIGN CORPORATIONS.

§ 642 (N.Y.Sup.) A foreign corporation, which sends its produce for sale through a commission merchant, who transacts the business, makes the sales, and receives the consideration, is not "doing business in the state," within General Corporation Law (Laws 1892, c. 687) § 15, re-enacted in Laws 1909, c. 28 (Consol. Laws 1909, c. 23).—Brookford Mills v. Baldwin, 139 N. Y. S. 195.

§ 642 (N.Y.Sup.) Where orders for special building reports were sent to a Chicago publishing company and filed there, the transaction did not constitute "doing business" in New York by the publishing company, within General Corporation Law, § 15, though it had an office there for soliciting business.—American Contractor Pub. Co. v. Michael Nocenti Co., 139 N. Y. S. 853.

§ 668 (N.Y.Sup.) Service of process upon an officer or director of a foreign corporation casually within the state gives the court jurisdiction of such corporation.—Smith v. Western Pac. Ry. Co., 139 N. Y. S. 129.

CORROBORATION.

See Witnesses, § 414.

COSTS.

See Appeal, § 875; Clerks of Courts; Contempt; New Trial, § 74.

V. AMOUNT, RATE, AND ITEMS.

§ 152 (N.Y.Sup.) The practice of disposing of demurrers under Code Civ. Proc. §§ 547, 964, 965, 969, 976, 1010, and 1021, with the proper

imposition of costs, stated.—*Kramer v. Barth*, 139 N. Y. S. 341.

§ 169 (N.Y.Sup.) Under Code Civ. Proc. § 3268, which provides that a defendant may require a foreign corporation to give security for costs, but which does not require a surety company's bond, *held*, that the amount paid for a surety company's undertaking was not taxable as cost.—*Louisville Lumber Co. v. Smith*, 139 N. Y. S. 357.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

§ 227 (N.Y.Sup.) On an appeal to the Appellate Term from an order of the City Court at Special Term, granting or denying a new trial on the ground of newly discovered evidence, only \$10 costs and disbursements are allowed, and disbursements are not taxable, unless specified in the order of the Appellate Term.—*Benjamin v. Brownstein*, 139 N. Y. S. 318.

§ 240 (N.Y.Sup.) A magistrate being a public officer is not liable for costs on appeal on reversal of an order denying an application for prohibition against him.—*People ex rel. Robert Simpson Co. v. Kempner*, 139 N. Y. S. 440.

§ 264 (N.Y.Sup.) Where an allowance of costs and disbursements was, by an oversight, omitted from the order of the Appellate Term affirming an order of the City Court granting a new trial for newly discovered evidence, a motion to resettle the order to include such costs and disbursements will be entertained.—*Benjamin v. Brownstein*, 139 N. Y. S. 318.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTERFEITING.

See Criminal Law, § 1212.

COUNTIES.

See Clerks of Courts; Paupers.

II. GOVERNMENT AND OFFICERS.

(D) Officers and Agents.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

(C) County Expenses and Charges and Statutory Liabilities.

§ 132 (N.Y.Sup.) Agreement between board of elections and board of supervisors as to compensation for labor and clerk hire *held* not annulled, or its performance rendered impossible, by the subsequent enactment of Laws 1911, c. 891, increasing the duties of the board of elections.—*People ex rel. Wheeler v. Holmes*, 139 N. Y. S. 923.

§ 134 (N.Y.Sup.) Under Election Law, §§ 193, 197, as amended by Laws 1911, c. 649, an agreement between the board of supervisors and board of elections that the salaries of the commissioners of election, fixed by the board of supervisors, should include all expenses for labor and clerk hire, *held* valid, and to prevent the board of elections from making the salaries of

its employes a county charge.—*People ex rel. Wheeler v. Holmes*, 139 N. Y. S. 923.

An agreement between a board of supervisors and a board of elections that the salaries of the commissioners of election, fixed by the board of supervisors, should include all expenses for labor and clerk hire, could not be terminated by the board of elections without the consent of the board of supervisors.—*Id.*

Board of supervisors *held* to have power to grant an allowance for clerk hire to a board of elections, which had agreed that the commissioners' salary should include clerk hire, even if Election Law, § 193, as amended by Laws 1911, c. 649, should be read in connection with County Law, § 12, subd. 5, as amended by Laws 1911, c. 359, relative to increasing the salary of county officers.—*Id.*

COURTS.

See Appeal; Appearance; Clerks of Courts; Constitutional Law, § 70; Contempt; Corporations, § 668; Criminal Law, §§ 87, 97; Execution, § 450; Guardian and Ward, § 8; Husband and Wife, § 300; Jury; Justices of the Peace; Municipal Corporations, § 697; Pleading, § 250; Receivers; Reference; Trial, § 394; Wills, §§ 248, 253, 695, 698.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(A) Creation and Constitution, and Court Officers.

§ 41 (N.Y.Sup.) The present County Courts are essentially new courts, being first created by the Constitution of 1846, and are not merely continuances of the courts of common pleas and general sessions of the peace.—*People ex rel. Wogan v. Rafferty*, 139 N. Y. S. 572.

(D) Rules of Decision, Adjudications, Opinions, and Records.

§ 95 (N.Y.Sup.) Decisions of the courts of one state on the validity of a statute, under the fourteenth amendment to the United States Constitution, are to be regarded in another as those of a court of concurrent jurisdiction.—*People ex rel. Hoelderlin v. Kane*, 139 N. Y. S. 350.

§ 98 (N.Y.Sur.) The surrogate, in construing the duties of American executors of an English subject in distributing the estate in this country, should recognize the decision of the English courts that property sent to Great Britain by the American executors may be there appropriated for any unpaid legacy due.—*In re Hollins*, 139 N. Y. S. 713.

§ 98 (N.Y.Sur.) Cases in the ecclesiastical courts of England, although decided since our independence, are still of some indirect authority in the Surrogate's Court.—*In re Swartz's Will*, 139 N. Y. S. 1105.

An English decision in 1771 is binding here.—*Id.*

It is only in case of an original question devoid of modern authority that the surrogate may resort to the principles of the civil or canon law.—*Id.*

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 169 (N.Y.Co.Ct.) Where, in an action in a County Court for money only, the complaint demands judgment for an amount not over \$2,000, the court has jurisdiction to render judgment on the counterclaim, irrespective of its amount.—Weinstein v. Helfenberg, 139 N. Y. S. 303.

§ 170 (N.Y.Co.Ct.) A complaint in the County Court demanding judgment for \$800 for property converted, \$200 for ten months' work, and \$2,000 for breach of contract held to state a cause of action beyond the jurisdiction of the County Court under Code Civ. Proc. § 340, subd. 3.—Owen v. Brown, 139 N. Y. S. 451.

Whether the court has jurisdiction of the subject of the action depends, not on the facts as they actually exist, but on the facts as stated by the plaintiff.—Id.

Though a complaint is not ordinarily demurrable because the relief demanded is not that to which plaintiff is entitled, it is otherwise when the action is brought in an inferior court, and jurisdiction depends on the relief demanded.—Id.

§ 188 (N.Y.Sup.) Under Code Civ. Proc. § 3347, subd. 4, permitting equitable defenses in common-law actions, the City Court of the city of New York, having jurisdiction of a common-law action, has jurisdiction to entertain an equitable defense, except that it may not grant affirmative, equitable relief.—Oppenheimer v. Trebla Realty Co., 139 N. Y. S. 894.

§ 188 (N.Y.Sup.) Under Municipal Court Act, § 42, subd. 2, and section 187, providing that any person may be made a defendant who has an interest in the controversy, and authorizing a defendant to apply for an order to bring into court a third person as a codefendant, the Municipal Court has jurisdiction of an action by a donee of a bank deposit against the bank and the administrator of the deceased donor.—Elliott v. Bank for Savings, 139 N. Y. S. 939.

§ 188 (N.Y.City Ct.) Where an agreement of partnership or for division of profits renders an accounting necessary to determine the rights of the parties, the City Court of the city of New York has no jurisdiction of the cause of action.—Cukor v. Rothman, 139 N. Y. S. 1015.

§ 189 (N.Y.Sup.) Where one made a defendant in the Municipal Court appeared generally by attorney, the court had jurisdiction to retain him as a party and determine his claim, as against the objection relating to the manner of bringing him into court.—Elliott v. Bank for Savings, 139 N. Y. S. 939.

V. COURTS OF PROBATE JURISDICTION.

§ 198 (N.Y.Sur.) A jurisdiction is not for the benefit of the judge, but a matter of public concern, for which reason the surrogate should not be slow to assert and protect his jurisdiction.—In re Swartz's Will, 139 N. Y. S. 1105.

§ 202 (N.Y.Sur.) While there is no such thing as a demurrer in the Surrogate's Court, held, in an accounting, that determination of a motion by a respondent to dismiss a defense set up in the answer of an adverse respondent necessari-

ly involved the admission of all the allegations of the original petition so far as not denied by the answer, and all the allegations of the answer.—In re New York Life Ins. & Trust Co., 139 N. Y. S. 695.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(A) Courts of Same State, and Transfer of Causes.

§ 472 (N.Y.Sur.) The only remedy in cases of mistake on the face of a will is in a court of probate and after such will is admitted to probate there is no remedy in any other court.—In re Swartz's Will, 139 N. Y. S. 1105.

(C) Courts of Different States or Countries.

§ 512 (N.Y.Sur.) This state should recognize the right of a foreign state or nation to impose a succession tax upon personalty belonging to its subjects wherever situated; New York imposing a similar tax.—In re Hollins, 139 N. Y. S. 713.

The courts of this state will not ordinarily aid a foreign country in the enforcement of its revenue laws.—Id.

COVENANTS.

See Deeds, § 145; Injunction, §§ 61, 113; Landlord and Tenant, § 152; Mortgages, § 51.

IV. ACTIONS FOR BREACH.

§ 124 (N.Y.Sup.) On breach of a grantee's covenant to build a sidewalk fronting lots, held, that the damages were the difference between the value of the grantor's remaining land with the sidewalk and its value without such sidewalk.—Rockwell v. Utz, 139 N. Y. S. 529.

In an action for a grantee's breach of a covenant to build a sidewalk fronting the lots, where the grantor offered no proof of damage, the court may only assume that he has suffered nominal damages.—Id.

CREDITORS.

See Attachment; Bankruptcy; Insurance, § 590; Novation; Principal and Surety, § 147; Subrogation.

CRIMINAL LAW.

See Arrest; Arson; Assault and Battery; Chattel Mortgages, § 230; Contempt; Highways, § 186; Indictment and Information; Libel and Slander, § 146; Municipal Corporations, §§ 630, 631; Nuisance, § 91; Perjury; Receiving Stolen Goods; Sunday; Weapons; Witnesses.

IV. JURISDICTION.

§ 87 (N.Y.Sup.) Under the Bronx County Act, § 9, giving the Courts of Special Sessions as now constituted the same jurisdiction of offenses triable by such courts as provided, the Court of Special Sessions has jurisdiction of the crime of impairing the morals of a minor, committed after the enactment of the Bronx

County Act.—*People v. Manett*, 139 N. Y. S. 614.

Under Const. art. 6, § 23, giving Courts of Special Sessions such jurisdiction of misdemeanor offenses as may be prescribed by law, any crime graded by law as a misdemeanor, including the offense of impairing a minor's morals, may be prosecuted in that court.—*Id.*

§ 97 (N.Y.Sup.) Under Pen. Code, § 16, making one punishable within the state for any crime committed in whole or in part therein, one who wrote and deposited in the post office in New York City a criminal libel addressed to another in a foreign country would be guilty of criminal libel.—*People v. Bihler*, 139 N. Y. S. 819.

VII. FORMER JEOPARDY.

§ 178 (N.Y.Sup.) The inadvertent noting by the court, on the back of an indictment for libel, of the granting of a motion to dismiss, which motion was made with reference to an indictment for larceny against the same person, was not a dismissal of the indictment for libel so as to bar a prosecution thereon.—*People v. Bihler*, 139 N. Y. S. 819.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

§ 217 (N.Y.Mag.Ct.) Any statement under oath that brings to a magistrate's notice that a crime has been committed, however crude or imperfectly drawn, is sufficient to justify the issuing of a warrant for the arrest of the party charged with the offense alleged to have been committed.—*People v. Kingston*, 139 N. Y. S. 649.

§ 231 (N.Y.Sup.) A person under arrest held not entitled to a discharge on habeas corpus because held for trial without being confronted with or having an opportunity to examine the complaining witness, in violation of Code Cr. Proc. §§ 194, 195, giving such rights as to witnesses if in the county, where it appeared that such witness was not within the state.—*People ex rel. Domens v. Warden or Keepers of City Prison*, 139 N. Y. S. 828.

§ 233 (N.Y.Sup.) A deposition upon which a warrant was issued for the arrest of defendant could not be used against him at his trial examination, where he had no opportunity to cross-examine such witness at the preliminary examination.—*People ex rel. Domens v. Warden or Keepers of City Prison*, 139 N. Y. S. 828.

X. EVIDENCE.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§ 345 (N.Y.Sup.) In a prosecution for larceny of stock, by conspiring to loan money to another upon collateral of much greater value, and dispose of the collateral, evidence was admissible that accused solicited a broker to assist in finding a suitable ostensible lender to make the loan.—*People v. Katz*, 139 N. Y. S. 137.

(F) Admissions, Declarations, and Hearsay.

§ 406 (N.Y.Sup.) Statements by one charged with arson, voluntarily made to a fire marshal with knowledge that he was such officer, were admissible in evidence; Greater New York Charter, § 779, as to formal examinations by the fire marshal not referring to a conversation with one charged with arson and not under oath.—*People v. Schneider*, 139 N. Y. S. 104.

(H) Documentary Evidence and Exclusion of Parol Evidence Thereby.

§ 438 (N.Y.Sup.) On a trial for perjury at the preliminary examination of one charged with committing an offense in a private office, photographs of the office, not taken at the time of the offense, held admissible to illustrate the location of the furniture in the office.—*People v. Veld*, 139 N. Y. S. 788.

XII. TRIAL.

(K) Verdict.

§ 874 (N.Y.Sup.) Under Code Cr. Proc. §§ 6, 450, it was not error to discharge a jury without polling it, where the defendant was present and did not require it, although defendant's attorney was not there; no reason being shown why he was not present.—*People v. Schneider*, 139 N. Y. S. 104.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 968 (N.Y.Co.Ct.) Motion in arrest, under Code Cr. Proc. § 467, of a conviction of defendant, under 16 years, of burglary and sentence, will be granted; the grand jury not having jurisdiction to find an indictment because of defendant's age, under Laws 1905, cc. 655, 656, no certificate by a judge having been filed, under said Code, § 57, that an indictment was proper.—*People v. Gardner*, 139 N. Y. S. 1013.

XV. APPEAL AND ERROR, AND CERTIORARI.

(A) Form of Remedy, Jurisdiction, and Right of Review.

§ 1023 (N.Y.Sup.) Where sentence is suspended and no judgment is rendered, there can be no appeal from the conviction.—*People v. Davis*, 139 N. Y. S. 643.

§ 1023 (N.Y.Co.Ct.) A sentence by the Court of Special Sessions does not present an erroneous decision or determination of law or fact upon the trial within Code Cr. Proc. § 750, allowing an appeal, and the County Court cannot modify the sentence on the ground that it is excessive, notwithstanding section 764, relating to rendition of judgment on appeal.—*People v. Dinehart*, 139 N. Y. S. 678.

A claim that a sentence imposed by a justice of Special Sessions is excessive does not present the question whether the verdict is against the evidence.—*Id.*

§ 1024 (N.Y.Sup.) Under Code Cr. Proc. § 518, the state may appeal from a judgment of the Court of Special Sessions sustaining a demurrer to an information.—*People v. Hammerstein*, 139 N. Y. S. 1075.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

§ 1038 (N.Y.Sup.) Where a court stated that its reasons for refusing to charge several requests were that they had already been covered, it was counsel's duty to call the court's attention to any omitted propositions, and request specific instruction thereon; and, not having done so, he cannot complain on appeal of failure to give an instruction.—*People v. Katz*, 139 N. Y. S. 137.

(C) Proceedings for Transfer of Cause, and Effect Thereof.

§ 1073 (N.Y.Sup.) Where from the language of bribery statute, in the absence of decisions, questions of law should be determined on appeal, a certificate of reasonable doubt will be granted, to review a conviction and determine whether the indictment charged a crime, and whether the acts of defendant constituted the crime of receiving a bribe.—*People v. Hyde*, 139 N. Y. S. 1000.

(G) Review.

§ 1137 (N.Y.Sup.) The court will not reverse a conviction for the admission of improper testimony, acquiesced in by accused's counsel at the trial.—*People v. Veld*, 139 N. Y. S. 788.

§ 1159 (N.Y.Sup.) It is not the duty of the appellate court to examine the evidence *de novo* to determine whether it would have arrived at the same result as the jury, and it will not reverse because it might have decided differently.—*People v. Katz*, 139 N. Y. S. 137.

§ 1169 (N.Y.Sup.) The admission of testimony that an officer looked for accused was not prejudicial to accused.—*People v. Longebodi*, 139 N. Y. S. 721.

§ 1170½ (N.Y.Sup.) Where defendant's counsel was allowed to interrupt the examination of a witness by the district attorney, and ask questions of the witness to show that statements by defendant to witness were the result of unlawful pressure, the sustaining of objections to certain further questions, the court stating that such questions could be asked on cross-examination, was not error.—*People v. Schneider*, 139 N. Y. S. 104.

§ 1170½ (N.Y.Sup.) Where accused gave answers favorable to himself to improper questions on cross-examination, but the prosecuting officer immediately by further questions insinuated that the answers were not true, or were open to suspicion, the error in permitting the cross-examination was prejudicial.—*People v. Veld*, 139 N. Y. S. 788.

§ 1172 (N.Y.Sup.) Error, if any, in submitting a count under Penal Law, § 881, for uttering a forged instrument, *held* cured by a conviction of forgery in the second degree.—*People v. Carlesi*, 139 N. Y. S. 309.

§ 1173 (N. Y. Sup.) Where requested charges were not read in the jury's presence, a refusal to charge any of them could not have been taken by the jury as equivalent to charging the contrary.—*People v. Katz*, 139 N. Y. S. 137.

Failure to instruct that, if the jury believed that the witness testified falsely as to any ma-

terial fact, they could disregard his entire testimony if they saw fit, was not reversible error, especially where the jury was specially selected under the statute.—*Id.*

(H) Determination and Disposition of Cause.

§ 1186 (N. Y. Sup.) Where there is nothing to show that defendant did not have a fair and impartial trial, a judgment of conviction will be affirmed, under Code Cr. Proc. § 542.—*People v. Schneider*, 139 N. Y. S. 104.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

§ 1206 (N.Y.Sup.) A sentence to the penitentiary of New York county for receiving stolen property was authorized under New York City Consolidated Act (Laws 1882, c. 410) § 1453, providing therefor; such statute being in harmony with the Penal Code and not repealed by Pen. Law, § 1308, prescribing as punishment for receiving stolen property imprisonment in the state prison.—*People ex rel. Rodenberg v. Warden*, 139 N. Y. S. 212.

The "penitentiary" of the county of New York is not the county jail of that county in the sense which the phrase "county jail" is used in the Penal Laws.—*Id.*

§ 1212 (N.Y.Sup.) Under Penal Law, § 1941, providing punishment for second offense of felony, sections 881, 894, defining forgery and the offense of possessing counterfeit coin, and U. S. Rev. St. § 5457 (U. S. Comp. St. 1901, p. 3683), making it an offense to possess counterfeit coin with intent to defraud, *held* that there was no distinction between the federal offense and the state offense, so that, after conviction under the federal statute, defendant might be convicted of forgery as a second offense.—*People v. Carlesi*, 139 N. Y. S. 309.

Under Penal Law, § 1941, providing punishment for the second offense of felony, *held*, that a conviction under the federal law of an offense amounting to a felony in this state, after pardon and restoration to civil rights, might be the basis of a conviction of a subsequent felony as a second offense.—*Id.*

§ 1217 (N.Y.Sup.) The uniform administration of criminal laws throughout the state does not require that all sentences to imprisonment should be carried out in similar institutions.—*People ex rel. Rodenberg v. Warden*, 139 N. Y. S. 212.

CROPS.

See Landlord and Tenant, § 139.

CROSS-EXAMINATION.

See Witnesses, §§ 277, 349, 387.

CUSTODY.

See Guardian and Ward, § 29.

CUSTOMS AND USAGES.

See Municipal Corporations, § 818.

DAMAGES.

See Appeal, §§ 215, 221; Attachment; Carriers, § 382; Covenants; Eminent Domain, §§ 119, 158, 232, 262; Libel and Slander, § 121; Mechanics' Liens, §§ 254, 281; Mines and Minerals, § 51; New Trial, § 74; Sales, §§ 418, 442; Street Railroads, § 13; Telegraphs and Telephones; Vendor and Purchaser, § 174.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.**(A) Direct or Remote, Contingent, or Prospective Consequences or Losses.**

§ 39 (N.Y.Sup.) Damages for the deprivation of the use of an automobile while it was being repaired after a collision *held* not recoverable, where no loss to plaintiff's business was shown, and no other vehicle was hired to take its place.—Donnelly v. Poliakoff, 139 N. Y. S. 999.

§ 45 (N.Y.Sup.) A party performing a contract at a loss may recover nominal damages for its breach, and also incidental expenses necessarily made in anticipation of performance.—Borough Development Co. v. Harmon, 139 N. Y. S. 362.

VI. MEASURE OF DAMAGES.**(C) Breach of Contract.**

§ 124 (N.Y.Sup.) Where performance of a contract is wrongfully prevented, incidental expenses made in anticipation of performance may be recovered as damages, but not in addition to a recovery for prospective profits.—Borough Development Co. v. Harmon, 139 N. Y. S. 362.

DEAD BODIES.

See Cemeteries.

DEATH.

See Abatement and Revival, § 79; Electricity; Evidence, § 579; Executors and Administrators, §§ 24, 51, 507; Gifts, § 41; Limitation of Actions, § 195; Marriage; Master and Servant, §§ 280, 286, 288, 289; Municipal Corporations, § 706; Stipulations.

I. EVIDENCE OF DEATH AND OF SURVIVORSHIP.

§ 2 (N.Y.Sup.) Unmarried woman of 34, who in 1873 disappeared from her home without explanation, and from whom nothing was afterwards heard, will be presumed to have been dead after 7 years from the date of her disappearance.—In re Benjamin, 139 N. Y. S. 1091.

II. ACTIONS FOR CAUSING DEATH.**(B) Jurisdiction, Venue, and Limitations.**

§ 39 (N.Y.Sup.) Action by one's representative for his death from negligent injury is barred, he having died after the three years in which he could have sued for the injury, without having sued therefor within such time.—Casey v. Auburn Telephone Co., 139 N. Y. S. 579.

DEBTOR AND CREDITOR.

See Attachment; Bankruptcy; Insurance, § 590; Novation; Principal and Surety, § 147; Subrogation.

DECEDENTS.

See Descent and Distribution; Executors and Administrators; Witnesses, §§ 150, 159.

DECLARATION.

See Pleading.

DECLARATIONS.

See Evidence, §§ 271, 273.

DEDICATION.**I. NATURE AND REQUISITES.**

§ 16 (N.Y.Sup.) Acts and consent of owner of premises *held* to constitute a dedication of a way thereover as a public highway.—Village of Wellsville v. Hallock, 139 N. Y. S. 961.

§ 35 (N.Y.Sup.) Acts of village authorities in getting consent of owner and constructing a roadway *held* to constitute an acceptance of the way as public highway.—Village of Wellsville v. Hallock, 139 N. Y. S. 961.

§ 38 (N.Y.Sup.) An owner, after orally consenting to the use of a highway over part of his premises, and after a village had constructed such highway and connected it with an iron bridge on the faith of such consent, *held* not entitled to revoke his consent.—Village of Wellsville v. Hallock, 139 N. Y. S. 961.

DEEDS.

See Covenants; Limitation of Actions, § 100; Mortgages; Taxation, § 788; Vendor and Purchaser, §§ 175, 230.

I. REQUISITES AND VALIDITY.**(E) Validity.**

§ 70 (N.Y.Sup.) Where a deed from a mother to two of her children was drawn by reputable attorneys, the mere fact of the close relationship of the parties and the extreme age of the mother will not warrant its cancellation on the ground of fraud.—Gabriel v. Gabriel, 139 N. Y. S. 778.

III. CONSTRUCTION AND OPERATION.**(E) Conditions and Restrictions.**

§ 145 (N.Y.Sup.) Where it is doubtful whether a clause in a deed is a condition or a covenant, it will be construed to be a covenant, leaving the grantor to his action for damages for its breach.—Rockwell v. Utz, 139 N. Y. S. 529.

The clause, "provided, always, and this indenture is made upon condition," contained in a deed of two lots requiring the grantee within two years to build upon each lot a house to cost not less than \$5,000, *held* a covenant, and not a condition.—Id.

IV. PLEADING AND EVIDENCE.

§ 196 (N.Y.Sup.) Where a mother conveyed and to her son and daughter, the presumption of fraud arising from the conveyance is greatly weakened by the lapse of over 20 years without attack upon the instrument.—*Gabriel v. Gabriel*, 139 N. Y. S. 778.

DEFAMATION.

See Libel and Slander.

DEFAULT JUDGMENT.

See Appeal, § 127; Judgment, §§ 143-163, 654.

DELAY.

See Landlord and Tenant, § 211; Mechanics' Liens, § 254.

DELIVERY.

See Gifts, § 30; Insurance, § 136; Sales, § 173.

DEMURRER.

See Pleading, §§ 193-222.

DENIALS.

See Pleading, §§ 120, 121, 129.

DEPOSITIONS.

See Criminal Law, § 233; Witnesses.

§ 25 (N.Y.Sur.) Under Code Civ. Proc. § 913, authorizing letters rogatory, such letters are properly issued to take the testimony of a German judge who approved the adoption of intestate's daughter, who claims the estate as such, where intestate's brother disputes the validity of the adoption.—*In re Smith*, 139 N. Y. S. 522.

A German judge to whom letters rogatory are addressed to obtain his testimony may decline to answer any interrogatories he deems improper, though that fact is not ground for refusal to issue the letters.—*Id.*

The fact that the evidence of a German judge taken pursuant to letters rogatory addressed to him may be incompetent under *lex fori* is not ground for refusing to issue the letters.—*Id.*

§ 40 (N.Y.Sur.) Letters rogatory issued to obtain evidence of a German judge need not run to the judge, but should be addressed generally to the courts and magistrates of the German Empire.—*In re Smith*, 139 N. Y. S. 522.

§ 46 (N.Y.Sup.) Where a commission issues under Code Civ. Proc. § 892, for the examination of a party, interrogatories proposed by the adverse party, not pertinent to the issues, must on motion be stricken out.—*Zeggio v. Robinson*, 139 N. Y. S. 1070.

§ 95 (N.Y.Sur.) Where the deposition of the proponent of a will is taken before trial, the contestants may read any portion of it they desire, and omit the remainder; the basis of the ruling being on the ground of admissions.—*In re Van Ness' Will*, 139 N. Y. S. 485.

DEPOSITS.

See Banks and Banking, §§ 126, 148.

DEPOSITS IN COURT.

See Banks and Banking, § 317; Eminent Domain, § 158.

DESCENT AND DISTRIBUTION.

See Executors and Administrators; Wills.

I. NATURE AND COURSE IN GENERAL.

§ 5 (N.Y.Sur.) The disposition of the personality of an English woman is primarily governed by the laws of England, including the laws taxing bequests.—*In re Hollins*, 139 N. Y. S. 713.

II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.**(A) Heirs and Next of Kin.**

§ 21 (N.Y.Sup.) Where the death of a woman without issue has been judicially determined as of a date before the death of her sister intestate, the share which she otherwise would have taken must be divided among the intestate's next of kin.—*In re Benjamin*, 139 N. Y. S. 1091.

§ 47 (N.Y.Sup.) Under Decedent Estate Law, § 26, providing for after-born children, and under a will of a testator with three children, giving the residue of an estate to his wife, stating that he mentioned no children because of his confidence that she would provide for them, an after-born child took one-fourth of the estate.—*Crocker v. Mulligan*, 139 N. Y. S. 381.

DESCRIPTION.

See Boundaries, § 20; Wills, § 587.

DEVISES.

See Wills.

DIRECTORS.

See Corporations, §§ 308, 312, 319, 320.

DISBARMENT.

See Attorney and Client, §§ 40-61.

DISCHARGE.

See Accord and Satisfaction; Bankruptcy, § 433; Guaranty, §§ 53, 74; Master and Servant, §§ 39-43; Release.

DISCOVERY.

See Appeal, § 1180.

II. UNDER STATUTORY PROVISIONS.**(A) Interrogatories and Examination of Parties and of Other Persons.**

§ 37 (N.Y.Sup.) An order may issue for an examination of defendants before trial, where the plaintiff's uncontroverted affidavit shows

that he has a cause of action and is without sufficient information to intelligently frame a complaint as to matters other than the question of the amount to which he is entitled.—*Mendelson v. Newborg*, 139 N. Y. S. 1052.

§ 38 (N.Y.Sup.) In libel against a publishing company and individual defendants, plaintiff was entitled to examine before trial the individual defendants and the actual publisher of the libel, to establish their connection with the publication, and show that they knew the article to be false.—*Mason v. New York Review Pub. Co.*, 139 N. Y. S. 639.

DISCRIMINATION.

See Constitutional Law, § 240.

DISMISSAL AND NONSUIT.

See Appeal, §§ 419, 927, 1169, 1177; Appearance; Attorney and Client, § 54; Courts, § 202; Criminal Law, § 178; False Imprisonment, § 37; Husband and Wife, § 300; Injunction, § 21; Landlord and Tenant, § 22; Master and Servant, § 287; Municipal Corporations, § 689; Pleading, § 40; Trial, §§ 139, 165.

II. INVOLUNTARY.

§ 58 (N.Y.Sup.) Defendant *held* entitled to a dismissal for failure to serve a complaint, where plaintiff, on motion for leave to serve complaint, served no copy of his proposed complaint, no affidavit of merits, and gave no excuse for default.—*Stout v. White*, 139 N. Y. S. 77.

DISSOLUTION.

See Partnership, §§ 290-336.

DISTRIBUTION.

See Descent and Distribution; Executors and Administrators, § 311.

DIVIDENDS.

See Corporations, §§ 151-155.

DIVORCE.

See Abatement and Revival, § 79; Attorney and Client, § 86.

II. GROUNDS.

§ 37 (N.Y.Sup.) Where a husband provided a place for his destitute mother in his home, and she interfered with the wife's control of the home and made the home distressing to her, the husband was not entitled to a decree of separation because the wife left him, but offered to return under proper conditions.—*Field v. Field*, 139 N. Y. S. 673.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

(A) Jurisdiction, Venue, and Limitations.

§ 62 (N.Y.Sup.) A wife, abandoned in another country, and who had never been in the state, *held* not entitled to maintain an action for a separation under Code Civ. Proc. § 1763, subd. 1, especially in view of the former provi-

sion of the Revised Statutes on the same subject.—*Wacker v. Wacker*, 139 N. Y. S. 78.

(C) Pleading.

§ 107 (N.Y.Sup.) In an action for divorce for adultery, a complaint which abounds with such phrases as "divers other men" and "divers other places," which would permit plaintiff to show adulteries committed anywhere, with any man, within two years, was so sweeping that a motion for a bill of particulars should be granted.—*Furthmann v. Furthmann*, 139 N. Y. S. 1055.

Where a motion asks for a bill of particulars, and that evidence be not admitted as to matters concerning which plaintiff fails to give particulars, the part of the motion as to the admission of testimony is premature.—*Id.*

(D) Evidence.

§ 129 (N.Y.Sup.) That plaintiff, on the advice of her attorney, procured evidence of her husband's adultery by subterfuge, did not warrant the court in rejecting the evidence.—*Hyman v. Hyman*, 139 N. Y. S. 65.

(E) Dismissal, Trial or Hearing, and New Trial.

§ 151 (N.Y.Sup.) Under Code Civ. Proc. § 1757, subd. 2, giving a corespondent in an action for divorce the right to appear and defend, *held*, that a corespondent, who, on learning of the pendency of the action, though after verdict, served plaintiff's attorney with notice of appearance and demand for a copy of the complaint, was entitled to have his default opened, to litigate the issues affecting him.—*Dicks v. Dicks*, 139 N. Y. S. 1068.

DOCTORS.

See Physicians and Surgeons.

DOCUMENTS.

See Criminal Law, § 438; Evidence, §§ 332, 349.

DOMICILE.

See Husband and Wife, § 3; Paupers.

§ 5 (N.Y.Sur.) The marriage of a New York lady to a subject of Italy, there domiciled, made Italy her domicile.—*In re New York Life Ins. & Trust Co.*, 139 N. Y. S. 695.

§ 8 (N.Y.Sup.) A domicile, once acquired, is presumed to continue until a new one is acquired.—*Wacker v. Wacker*, 139 N. Y. S. 78.

§ 10 (N.Y.Sup.) A husband's domicile is *prima facie* that of the wife.—*Wacker v. Wacker*, 139 N. Y. S. 78.

DONATIONS.

See Gifts.

DOWER.

See Execution, § 386.

DRAFTS.

See Bills and Notes, § 121.

DRAINS.

See Master and Servant, §§ 118, 199, 288;
Municipal Corporations, §§ 277, 993.

DRAMSHOPS.

See Intoxicating Liquors.

DUE PROCESS OF LAW.

See Constitutional Law, §§ 277-309.

EASEMENTS.

See Dedication; Evidence, § 273; Highways;
Licenses; Waters and Water Courses, § 154.

EJECTION.

See Carriers, § 382; Landlord and Tenant, § 90.

EJECTMENT.

See Judgment, § 743.

ELECTION OF REMEDIES.

See Landlord and Tenant, § 90.

ELECTRICITY.

See Trial, § 352.

§ 16 (N.Y.Sup.) Where a street lamp had been lowered from its normal position only about an hour and a half, and the fact was in no way indicated at the power house, the finding that the electric light company had constructive notice was contrary to the evidence.—*Huscher v. New York & Queens Electric Light & Power Co.*, 139 N. Y. S. 537.

§ 19 (N.Y.Sup.) That a street lamp, from contact with which plaintiff's intestate received an electric shock causing his death, had in some way become lowered from its normal position was not evidence of negligence, or that it fell by reason of some defect in the apparatus which held it in place.—*Huscher v. New York & Queens Electric Light & Power Co.*, 139 N. Y. S. 537.

Jury's answer to special interrogatories that they did not know whether an electric light company exercised reasonable care in erecting and maintaining its lamps, poles, and apparatus held inconsistent with a general verdict for plaintiff and a finding that a lamp became lowered because of a defect in the apparatus.—*Id.*

ELEVATORS.

See Carriers, §§ 280, 293.

EMBEZZLEMENT.

See Constitutional Law, § 309.

EMINENT DOMAIN.**II. COMPENSATION.****(B) Taking or Injuring Property as Ground for Compensation.**

§ 119 (N.Y.Sup.) An owner of a fee of a highway is entitled to compensation for the use of

the highway for a telephone or telegraph line.—*New York Telephone Co. v. De Noyelles Brick Co.*, 139 N. Y. S. 748.

(D) Persons Entitled and Payment.

§ 158 (N.Y.Sup.) In view of Water Supply Act (Laws 1905, c. 724) § 17, requiring immediate payment of an award, it was improper for the city of New York to pay into court an award for property taken, made to a grantee in a conveyance by a trustee under a trust invalid as violating the statute against perpetuities; the heirs of the decedent having also conveyed to such grantee and thus confirmed the title in him.—*Morris v. City of New York*, 139 N. Y. S. 93.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 202 (N.Y.Sup.) An owner, whose land is sought to be condemned, can show the highest utility of the premises and point out the adaptability thereof for village lots and the possibilities of the improvement thereof, in order to show, with the opportunities for improvement, the present market value.—*New York Telephone Co. v. De Noyelles Brick Co.*, 139 N. Y. S. 748.

§ 230 (N.Y.Sup.) Compensation of a surviving commissioner of appraisal in a proceeding to acquire real estate for water supply of the city of New York will be allowed at the sum allowed to one of the commissioners with whom he served for the same length of time, with an additional amount for time subsequently served with the other commissioner.—*In re Board of Water Supply of City of New York*, 139 N. Y. S. 595.

A claim of commissioners of appraisal in a proceeding to acquire real estate for water supply of the city of New York for services of a stenographer which the corporation counsel refused to furnish, as required by Laws 1905, c. 724, § 32, must be disallowed.—*Id.*

A claim of commissioners of appraisal for 66 days' and 65 days' service and expenses, respectively, on presenting a report two years after organization on six tracts of land, is unwarranted, and will be reduced.—*Id.*

§ 232 (N.Y.Sup.) It is the duty of the commissioners in condemnation proceedings to view the premises, in addition to hearing the parties and their witnesses, to determine the amount of the compensation.—*New York Telephone Co. v. De Noyelles Brick Co.*, 139 N. Y. S. 748.

§ 262 (N.Y.Sup.) The court, on appeal from an order confirming the report of commissioners in condemnation proceedings, will not interfere with the award as excessive, unless an erroneous theory prevailed in arriving at the value of the premises and the damages sustained by the portion not taken.—*New York Telephone Co. v. De Noyelles Brick Co.*, 139 N. Y. S. 748.

Where the commissioners viewed the premises, and did not entertain any erroneous theories as to the compensation, the award, affirmed by the trial court, will not be disturbed because of the admission of speculative testimony, not shown to have affected the result.—*Id.*

EMPLOYÉS.

See Master and Servant.

ENCROACHMENT.

See Municipal Corporations, §§ 671, 680, 681;
Vendor and Purchaser, § 130.

EN VENTRE SA MERE.

See Infants, § 72.

EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, §§ 238, 240.

EQUITY.

See Conversion; Courts, § 188; Estoppel; Injunction; Interpleader; Jury; Mortgages, § 28; Municipal Corporations, § 697; Partition; Pleading, §§ 120, 193; Quieting Title; Receivers; Set-Off and Counterclaim; Subrogation; Trial, § 3; Trusts; Wills, §§ 440, 698.

ESTABLISHMENT.

See Highways, §§ 6-17.

ESTATES.

See Attorney and Client, § 150; Descent and Distribution; Executors and Administrators; Landlord and Tenant; Life Estates; Perpetuities; Wills.

ESTOPPEL.

See Boundaries, § 48; Insurance, § 579; Judgment, § 743; Landlord and Tenant, § 53; Mechanics' Liens, § 254; Release, § 29.

III. EQUITABLE ESTOPPEL.

(B) Grounds of Estoppel.

§ 93 (N.Y.Sup.) Where, after a mutual conveyance between cotenants, one of them entered into a party wall agreement, and afterwards in a schedule in bankruptcy stated that he owned no real property, and for 30 years made no claim, permitting improvements without objection, he was estopped to claim title to a portion omitted from the conveyances.—*Hamilton v. Hamilton*, 139 N. Y. S. 1095.

EVICTIION.

See Landlord and Tenant, § 172.

EVIDENCE.

See Account Stated; Appeal, §§ 204, 927, 1002, 1003, 1048, 1050-1052, 1057, 1195; Arson; Assault and Battery; Attorney and Client, § 54; Bills and Notes, §§ 489, 493, 497; Brokers, § 8; Carriers, §§ 317, 318, 320, 417; Constitutional Law, § 48; Contracts, § 127; Corporations, §§ 82, 320; Criminal Law, §§ 345-438, 1023, 1137, 1159, 1169, 1170½; Death, § 2; Deeds, § 196; Depositions; Discovery; Divorce, § 129; Domicile; Electricity; Eminent Domain, §§ 202, 262; False Imprisonment, § 4; Gifts, § 82; Good Will; Guaranty, § 53; Indictment and Informa-

tion, §§ 174, 191½; Insurance, §§ 646, 648, 665; Judgment, §§ 951, 952; Justices of the Peace; Landlord and Tenant, §§ 164, 194, 231, 308; Libel and Slander, §§ 104, 107; Limitation of Actions, §§ 195, 196; Master and Servant, §§ 39, 40, 265, 278, 280, 281, 288; Mechanics' Liens, § 281; Mortgages, § 186; Municipal Corporations, §§ 185, 706, 818; New Trial, §§ 35, 106; Novation; Partnership, §§ 296, 336, 375; Payment; Perjury; Pleading, §§ 312, 323; Principal and Agent, §§ 120, 184; Sales, §§ 416, 440; Street Railroads, § 113; Sunday; Taxation, § 788; Trial, §§ 48, 76, 337; Undertakings; Wills, §§ 52, 54, 55, 153, 155, 163-166, 288-303, 487-489, 745; Witnesses; Work and Labor, §§ 27, 28.

II. PRESUMPTIONS.

§ 80 (N.Y.Sur.) In the absence of proof of any New Jersey statute altering the common-law rule that a marriage with the other spouse living is void, the presumption was that such rule prevailed in New Jersey.—*In re Kutter's Estate*, 139 N. Y. S. 693.

III. BURDEN OF PROOF.

§ 90 (N.Y.Sur.) "Burden of proof," in its primary and secondary meanings, defined.—*In re Falabella's Will*, 139 N. Y. S. 1003.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(B) Res Gestæ.

§ 121 (N.Y.Sup.) In an action for conversion of a bank deposit, where the question was as to the ownership as between a father and son, who were both dead, evidence of a conversation between the two men as to such deposit was admissible as part of the *res gestæ*, establishing the relations of the parties in reference to the deposit.—*Scully v. Scully*, 139 N. Y. S. 622.

§ 121 (N.Y.Sur.) In an action for the probate of a will, contested on the ground of fraud and undue influence, letters received by the sole beneficiary, the testator's young wife, who married him only a few months before the execution of the will, showing that it was her intention to marry him for his money, are admissible as part of the *res gestæ*, being found in her possession.—*In re Van Ness' Will*, 139 N. Y. S. 485.

§ 122 (N.Y.Sup.) In an action by a drover, injured while in the caboose by being thrown against the end of the caboose by a severe jolt, statements of other drovers in the caboose before the accident, as to the manner in which the train was being handled by the engineer, were not admissible to show negligence in the operation of the air brake.—*Marlatt v. Erie R. Co.*, 139 N. Y. S. 771.

V. BEST AND SECONDARY EVIDENCE.

§ 181 (N.Y.Sup.) Evidence as to contents of books in plaintiff's possession after the commencement of the action was not admissible, where no sufficient reason was shown why plaintiff could not have produced them at trial.—*Union Nat. Bank of Franklinville v. Dean*, 139 N. Y. S. 835.

§ 182 (N.Y.Sup.) An identification of books, in the hands of strangers to them concerning entries in which witness testified to, as those of

the "D. & S. Manufacturing Co.," by the label on the books and by the fact that they contained interest against Messrs. D. & S., officers of the corporation, was insufficient to identify the books as those of the D. & S. Manufacturing Co.—*Union Nat. Bank of Franklinville v. Dean*, 139 N. Y. S. 835.

VII. ADMISSIONS.

(C) By Grantors, Former Owners, or Privies.

§ 236 (N.Y.Sup.) In an action for conversion of a bank deposit, where the question was as to the ownership as between a father and son, who were both dead, evidence of a conversation between the two men as to such deposit was admissible as declarations or admissions which were binding on their representatives.—*Scully v. Scully*, 139 N. Y. S. 622.

(E) Proof and Effect.

§ 263 (N.Y.Sup.) Where an insurer introduced letters from the insured to his agent or broker showing that the insured had returned the policy to the broker, it was in no position to object to evidence of oral communications between the insured and such agent, showing that the policy had been returned under the mistaken belief that the same agent had already procured insurance upon the property.—*Singer v. National Fire Ins. Co. of Hartford, Conn.*, 139 N. Y. S. 375.

Where a part of a communication is put in evidence, the party against whom it is used has a right to have the entire matter brought out.—*Id.*

§ 265 (N.Y.Sup.) Mere admissions of intestate, while certificates of deposit were in her possession, that they belonged to defendant, or that intestate had agreed that they or their proceeds should be his, did not show *prima facie* title in defendant, in absence of proof of assignment, indorsement, or delivery to him.—*Sands v. Saltzman*, 139 N. Y. S. 862.

VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

§ 271 (N.Y.Sup.) Plaintiff's letters, which were necessary to an understanding of defendant's letters, *held* improperly excluded as self-serving declarations.—*Hirsch v. Lichtenstein*, 139 N. Y. S. 4.

§ 273 (N.Y.Sup.) Declarations by grantor and grantee that the grantee had no right to use a water easement on the premises conveyed without the grantor's permission *held* admissible to show an intent not to convey such right as an appurtenance.—*Coatsworth v. Hayward*, 139 N. Y. S. 331.

IX. HEARSAY.

§ 314 (N.Y.Sup.) In an action on a contract of a corporation which agreed to repurchase its stock if the purchaser's brother should deem the investment unwise, evidence of hearsay statements made to the brother as to the value of the stock is admissible as showing the basis for his rejection.—*Malcomson v. Monaton Realty Investing Corporation*, 139 N. Y. S. 405.

X. DOCUMENTARY EVIDENCE.

(A) Public or Official Acts, Proceedings, Records, and Certificates.

§ 332 (N.Y.Sup.) In an action to recover on certificates of deposit belonging to plaintiff's intestate, it was error to admit the whole of the surrogate's record in proceedings against defendant to discover assets, as the certificates could have been produced by subpoena duces tecum.—*Sands v. Saltzman*, 139 N. Y. S. 862.

(B) Exemplifications, Transcripts, and Certified Copies.

§ 349 (N.Y.City Ct.) In an action on a mutual benefit certificate, an authenticated transcript of the birth or baptismal record of insured in the office of the mayor of a town in France *held* admissible on an issue of misrepresentation of insured's age, and not objectionable for want of identification of insured with the person named in the record.—*Waltz v. Workmen's Sick and Death Benefit Fund of the United States of America*, 139 N. Y. S. 1016.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

§ 393 (N.Y.Sup.) In an action by a tenant, suing for a deposit, having canceled the lease because the owner would not let him lower the floor, where the lease provided that he could make alterations "on the premises," being the first floor, conversations before the execution of the lease as to lowering the floor were not admissible.—*Cohen v. Simon Strauss*, 139 N. Y. S. 929.

§ 400 (N.Y.Sup.) A broker's bought and sold note, which contained all of the terms of the contract, is subject to the rule against varying a written instrument by parol.—*Standard Milling Co. v. De Pass*, 139 N. Y. S. 611.

§ 402 (N.Y.Sup.) Promissory notes cannot be varied by parol evidence, and consequently, in an action thereon, averments in the answer, merely attempting to change their terms, present no defense.—*Myers v. Stein*, 139 N. Y. S. 762.

(C) Separate or Subsequent Oral Agreement.

§ 441 (N.Y.Sup.) Where a contract provided that street sweepings would be furnished as delivered by the street cleaning department of a city, evidence of oral representations that the sweepings furnished would come from a particular part of the city was inadmissible.—*Borough Development Co. v. Harmon*, 139 N. Y. S. 362.

§ 441 (N.Y.Sup.) Where a written contract for the sale of rice expressly required merchantable rice, evidence that the sale was by sample and the rice shipped did not correspond to the sample was not admissible as varying the contract.—*Standard Milling Co. v. De Pass*, 139 N. Y. S. 611.

§ 441 (N.Y.Sup.) Parol evidence that a buyer, ordering in writing merchandise for delivery about December 30th, told the seller's salesman that the merchandise was intended for the

Christmas trade, was incompetent, as varying the written order.—*Hughes v. Constantin*, 139 N. Y. S. 865.

§ 445 (N.Y.Sup.) Though a partnership agreement be written, its dissolution may be shown by parol.—*Union Nat. Bank of Franklinville v. Dean*, 139 N. Y. S. 835.

XII. OPINION EVIDENCE.

(A) Conclusions and Opinions of Witnesses in General.

§ 474 (N.Y.Sup.) It was improper to permit the owner of a laundry to state what the laundry work sued for was worth, where he had no personal knowledge of the work done, except as shown by his books.—*Schneider v. Newgold*, 139 N. Y. S. 998.

(B) Subjects of Expert Testimony.

§ 506 (N.Y.Sur.) An attending physician may not testify directly as to competency to make a will.—*In re Schmidt's Will*, 139 N. Y. S. 464.

§ 508 (N.Y.Sur.) The opinions of skilled witnesses are admissible, whenever the subject is one upon which competency to form an opinion can be acquired only by a course of special study or experience.—*In re Schmidt's Will*, 139 N. Y. S. 464.

§ 510 (N.Y.Sur.) An attending physician may testify directly as to the fact of insanity.—*In re Schmidt's Will*, 139 N. Y. S. 464.

(F) Effect of Opinion Evidence.

§ 574 (N.Y.Sur.) The opinion of a physician as to the sanity of a testator drawn from a hypothetical statement of facts, no matter how correctly stated, cannot be accepted in preference to direct and positive testimony contradictory thereto.—*In re Schmidt's Will*, 139 N. Y. S. 464.

If a testator was proven to be rational on certain days, a medical diagnosis that from certain pathological symptoms he could not be rational on any day is in law rejected.—*Id.*

XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDING.

§ 579 (N.Y.Sup.) Under Code Civ. Proc. § 830, testimony of one who saw an accident at a railroad crossing in which a brother and sister, both unmarried, were killed, given in an action by an administrator for the death of one of them, was admissible in an action by the same administrator in an action for the death of the other; the witness having died.—*Cohen v. Long Island R. Co.*, 139 N. Y. S. 887.

XIV. WEIGHT AND SUFFICIENCY.

§ 590 (N.Y.Sup.) Although contrary to the ethics of the profession for an attorney voluntarily to place himself in a position where it is necessary for him to become a witness in order to establish his client's cause of action, such act ought not to deprive the client of his evidence.—*Hyman v. Hyman*, 139 N. Y. S. 65.

§ 598 (N.Y.Sur.) The weight of evidence is not determined by the number of witnesses.—*In re Schmidt's Will*, 139 N. Y. S. 464.

EXAMINATION.

See *Discovery*; *Execution*, §§ 372, 386; *Witnesses*, §§ 265, 277.

EXECUTION.

X. SUPPLEMENTARY PROCEEDINGS.

§ 372 (N.Y.Sup.) An application for the examination of a judgment debtor, under Code Civ. Proc. § 2436, held auxiliary and not supplementary to the execution, and was not barred by the expiration of 10 years from the date of the return of an execution on the judgment, where another execution has been issued and no return made.—*R. F. Stevens Co. v. Maus*, 139 N. Y. S. 1059.

§ 386 (N.Y.Sup.) An order cannot be granted in supplementary proceedings, under Code Civ. Proc. § 2441, for the examination of a third person, who is possessed of no property of the judgment debtor, except a dower interest in real estate claimed to have been fraudulently assigned.—*Steinmann v. Hosier*, 139 N. Y. S. 863.

The receiver of a judgment debtor appointed in supplementary proceedings can alone reduce to possession real property in the hands of third persons, and the judgment creditor cannot have such third person examined.—*Id.*

Under Code Civ. Proc. § 2441, an order for examination of third party in supplementary proceedings cannot be issued while the third party is under subpoena as a witness in supplementary proceedings against the judgment debtor.—*Id.*

§ 410 (N.Y.Sup.) An order directing a sale of certain stock of a judgment debtor should have directed a sale of the debtor's right, title, and interest in the stock.—*Hawes v. Hawes*, 139 N. Y. S. 639.

XI. EXECUTION AGAINST THE PERSON.

§ 450 (N.Y.Sup.) The failure to give notice to a judgment creditor of the application for the discharge, under Judiciary Law, § 775, of the judgment debtor, adjudged guilty of contempt and fined, and confined in jail until payment of the fine or discharge, does not render the order of discharge void for want of jurisdiction, but the order protects the sheriff acting thereunder.—*Goldreyer v. Foley*, 139 N. Y. S. 190.

EXECUTORS AND ADMINISTRATORS.

See *Conversion*; *Courts*, §§ 98, 188, 198, 202; *Descent and Distribution*; *Evidence*, § 579; *Pleading*, § 317; *Trusts*; *Wills*; *Witnesses*, §§ 139, 144.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 24 (N.Y.Sur.) Where a father, who was the sole next of kin of his deceased daughter, died after taking out letters of administration on her estate, letters must be granted, under Code Civ. Proc. § 2669, to the public administrator, as against the right of either intestate's brother, or a creditor, or the father's widow and administratrix.—*In re Hagan's Estate*, 139 N. Y. S. 463.

III. ASSETS, APPRAISAL, AND INVENTORY.

§ 51 (N.Y.Sur.) A cause of action for death is no part of the assets of the decedent's estate, nor are the damages.—Cohen v. Long Island R. Co., 139 N. Y. S. 887.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

(A) In General.

§ 115 (N.Y.Sur.) On the settlement of an executor's account, the surrogate cannot decree that the executor return to the estate the salary received by him as an officer of a corporation in which the estate held stock.—In re Brown, 139 N. Y. S. 459.

Such return cannot be compelled on the assumption that the corporation was the estate.—Id.

An objection to the retention by the executor of a dividend on stock in such corporation, while assenting to the repayment of the dividend in which the estate was interested, has no merit.—Id.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(A) Liabilities of Estate.

§ 209 (N.Y.Sur.) Where an estate was not liable upon a guaranty agreement executed by the decedent, the administratrix could not, by acquiescence and recognition, create such liability.—Metropolitan Trust Co. of City of New York v. Truax, 139 N. Y. S. 181.

VII. DISTRIBUTION OF ESTATE.

§ 311 (N.Y.Sur.) Proceeds of milk of dairy farms, received by an executor under contracts of the testator, represent earnings of the personal estate, and, when they are paid to the devisees of the farms, the executor's account will be surcharged therewith.—In re Ellis' Estate, 139 N. Y. S. 1011.

XI. ACCOUNTING AND SETTLEMENT.

(E) Stating, Settling, Opening, and Review.

§ 507 (N.Y.Sur.) The fact of the death of one of the next of kin should be determined by the Surrogate's Court on a judicial settlement of the account of an administrator, and not necessarily in a separate proceeding for that purpose.—In re Benjamin, 139 N. Y. S. 1091.

§ 509 (N.Y.Sur.) Proof that a claim against a decedent's estate had not been paid nor taken into consideration in a settlement held sufficient cause for vacating a decree discharging the heir and her sureties from liability on a bond to pay debts, under Code Civ. Proc. § 2481, subd. 6, authorizing modification of surrogates' decrees.—In re Henry's Estate, 139 N. Y. S. 690.

XII. FOREIGN AND ANCILLARY ADMINISTRATION.

§ 518 (N.Y.Sur.) Though executors were appointed in this country, where an English subject had securities, and the will was proved

here de novo, England remained the principal place of administration; it not being permissible to have two principal places of administration.—In re Hollins, 139 N. Y. S. 713.

§ 523 (N.Y.Sur.) The American executors of an English subject leaving personalty in this country from which bequests were made properly deducted the succession tax required by the laws of England, before paying over such bequests.—In re Hollins, 139 N. Y. S. 713.

EXEMPTIONS.

See Taxation, § 200.

EXPERT TESTIMONY.

See Evidence, §§ 474-574.

EXTRA WORK.

See Interest, § 19.

FACTORIES.

See Constitutional Law, §§ 89, 238; Master and Servant, § 10.

FACTORS.

See Brokers; Principal and Agent.

FALSE IMPRISONMENT.

I. CIVIL LIABILITY.

(A) Acts Constituting False Imprisonment and Liability Therefor.

§ 4 (N.Y.Sur.) In an action for false imprisonment, the sole question was whether the arrest was lawful, and the mental attitude of defendant in causing the arrest was unimportant.—Reisler v. Interborough Rapid Transit Co., 139 N. Y. S. 335.

(B) Actions.

§ 37 (N.Y.Sur.) Where, in an action for false imprisonment, the plaintiff and two witnesses testified that plaintiff did not commit the misdemeanor for which he was arrested, it was error to dismiss the complaint.—Reisler v. Interborough Rapid Transit Co., 139 N. Y. S. 335.

FALSE SWEARING.

See Perjury.

FARES.

See Carriers, § 382.

FEES.

See Attorney and Client, §§ 136-189; Clerks of Courts; Physicians and Surgeons; Witnesses, § 27.

FELLOW SERVANTS.

See Master and Servant, §§ 163-199, 287.

FILING.

See Mechanics' Liens, § 115; Railroads.

FINAL JUDGMENT.

See Appeal, § 78.

FIRE INSURANCE.

See Insurance.

FIRES.

See Arson; Landlord and Tenant, §§ 200, 211.

FIXTURES.

§ 27 (N.Y.Sup.) Where plumbing fixtures became, on installation, a part of the realty, because they could not be removed without substantial injury, they were subject to a prior recorded mortgage on the realty, notwithstanding an agreement that they should retain their character as personalty.—*Croxson v. Flynn Plumbing & Heating Co.*, 139 N. Y. S. 1093.

Plumbing fixtures, removable without injury to the building, as between seller and buyer for installation in a building, are proper subjects of agreement that they should retain their character as personalty, and a chattel mortgage to secure the price gave the seller an interest therein, unaffected by notice of a prior recorded mortgage on the realty.—*Id.*

FOLLOWING TRUST PROPERTY.

See Trusts, §§ 349, 358.

FORECLOSURE.

See Mechanics' Liens, § 271.

FOREIGN ADMINISTRATION.

See Executors and Administrators, §§ 518, 523.

FOREIGN CORPORATIONS.

See Corporations, §§ 642-668.

FORFEITURES.

See Sales, § 467.

FORGERY.

See Criminal Law, §§ 1172, 1212.

FORMER ADJUDICATION.

See Judgment, §§ 596-952.

FORMER JEOPARDY.

See Criminal Law, § 178.

FRANCHISES.

See Gas.

FRAUD.

See Appeal, §§ 564, 1051; Deeds, §§ 70, 196; Evidence, § 121; Frauds, Statute of; Good Will; Insurance, § 646; Libel and Slander, § 7; Limitation of Actions, § 100; Trusts, § 349; Wills, §§ 153-166, 216, 745.

FRAUDS, STATUTE OF.**VII. SALES OF GOODS.****(A) Contracts Within Statute.**

§ 83 (N.Y.Sup.) The statute of frauds does not apply to a contract for a belt to be manufactured in a special manner, even though a third party is to manufacture the belt, where the vendor has to pay for such manufacture.—*Morse v. Canaswacta Knitting Co.*, 139 N. Y. S. 634.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

§ 118 (N.Y.Sup.) A note or memorandum of a sale, sufficient to satisfy the statute of frauds, need not be confined to a single paper, but may rest in letters, telegrams, bills, receipts, and other forms of signed writings.—*Poel v. Brunswick-Balke-Collender Co.*, 139 N. Y. S. 602.

Certain writings with reference to a sale of rubber for future delivery held to constitute a sufficient memorandum to satisfy the statute of frauds.—*Id.*

IX. OPERATION AND EFFECT OF STATUTE.

§ 125 (N.Y.Sup.) The statute of frauds does not declare an oral contract for the sale of goods to be invalid, but only requires that, to be valid, there must be a note or memorandum thereof.—*Poel v. Brunswick-Balke-Collender Co.*, 139 N. Y. S. 602.

GARAGES.

See Landlord and Tenant, § 157.

GAS.

See Mines and Minerals, § 77.

§ 7 (N.Y.Sup.) Gas franchise, granting the right to lay mains in streets in general terms, contemplates extension of the mains in new streets as opened and in old ones as extended.—*Carroll v. Silver Creek Gas & Improvement Co.*, 139 N. Y. S. 161.

§ 7 (N.Y.Sup.) Transportation Corporations Law, §§ 60, 61, constitute the franchise of the gas companies subject to its provisions, and the consent of municipal authorities to use of the streets merely makes the franchise operative in that municipality.—*Northern Westchester Lighting Co. v. Village of Ossining*, 139 N. Y. S. 373.

Consent of municipal authorities to use of streets by gas companies under Transportation Corporations Law, §§ 60, 61, gives the company the right to exercise within the municipality all the powers given by the statute during the whole term of its corporate existence.—*Id.*

GIFTS.

See Charities; Witnesses, §§ 150, 159.

I. INTER VIVOS.

§ 30 (N.Y.Sup.) The delivery of an order for money on deposit, as a gift, does not pass title until the order is accepted or paid, and where it is necessary to present a bank book, as well

as the order, it must be shown that the book was delivered with the intent that title to it pass also.—*Foley v. New York Savings Bank*, 139 N. Y. S. 915.

§ 41 (N.Y.Sup.) Unless title has passed, the death of the donor of an order to pay money revokes it.—*Foley v. New York Savings Bank*, 139 N. Y. S. 915.

II. CAUSA MORTIS.

§ 82 (N.Y.Sup.) A gift causa mortis of a bank deposit is not established by the testimony of a third person that she witnessed the transaction between decedent and the donee, but did not notice the bank book which was delivered by the decedent to the donee, and did not know whether it was the one sued on.—*Elliott v. Bank for Savings*, 139 N. Y. S. 939.

GOOD FAITH.

See Bills and Notes, § 371; Vendor and Purchaser, §§ 230-242.

GOOD WILL.

See Corporations, § 312.

§ 7 (N.Y.Sup.) Evidence held to show that defendants were induced to make a note through the fraudulent representations of the plaintiff that a certain restaurant for which the note was given would pay the owner \$200 a month profit.—*Butler v. Alter*, 139 N. Y. S. 882.

GRAND JURY.

See Indictment and Information.

GUARANTY.

See Executors and Administrators, § 209; Indemnity; Principal and Surety.

I. REQUISITES AND VALIDITY.

§ 16 (N.Y.Sup.) Where the form of a guaranty contemplated subsequent deliveries in reliance thereon, the deliveries themselves are sufficient consideration.—*J. P. Duffy Co. v. Todebush*, 139 N. Y. S. 112.

III. DISCHARGE OF GUARANTOR.

§ 53 (N.Y.Sup.) Where the note given for a loan guaranteed varied materially from the stipulations of the guaranty agreement, the guarantors were not bound unless there was a subsequent ratification.—*Metropolitan Trust Co. of City of New York v. Truax*, 139 N. Y. S. 181.

Where it appeared that a loan was made some time after the execution of the guaranty agreement upon terms differing materially therefrom, the presumption was that the guarantors did not consent to the variance.—*Id.*

§ 74 (N.Y.Sup.) Defendant, who guaranteed to put New York bankers in funds 15 days before each of his drafts became due, upon which they guaranteed a foreign correspondent against loss on payment of such drafts, held, upon taking up drafts accepted by the correspondent before they became due, and as to which he had

not put the New York bankers in funds, to have thereby performed his obligation to the bankers, so that he owed them nothing upon his guaranty.—*Sexton v. Fensterer*, 139 N. Y. S. 811.

IV. REMEDIES OF CREDITORS.

§ 87 (N.Y.Sup.) Plaintiff, who furnished goods to T. Co., a corporation, under a contract of guaranty which used the name T. & Co., instead of T. Co., held entitled to recover, though there was a partnership by the name contained in the guaranty.—*J. P. Duffy Co. v. Todebush*, 139 N. Y. S. 112.

GUARDIAN AND WARD.

II. APPOINTMENT, QUALIFICATION, AND TENURE OF GUARDIAN.

§ 8 (N.Y.Sur.) A surrogate's power to appoint guardians of infants is not incidental to a court of probate, but is derived from statute, originally Laws 1802, c. 110 (3 Webster, p. 158; 1 Rev. Laws 1813, p. 454, § 30), and since then often re-enacted.—*In re Lamb's Estate*, 139 N. Y. S. 685.

The power conferred upon the surrogate by Rev. St. 1830 (2 Rev. St. [1st Ed.] pt. 2, c. 8, tit. 3, § 6 [now Code Civ. Proc. § 2821]), providing that the surrogate shall have the same power to allow and appoint guardians as the chancellors possessed, ought not to be taken away by mere implications of an inconsiderate or partial character.—*Id.*

§ 10 (N.Y.Sur.) While the surrogate may appoint a guardian other than the parent, it should do so only on a showing that such appointment is for the child's best interest.—*In re Lamb's Estate*, 139 N. Y. S. 685.

III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

§ 29 (N.Y.Sur.) Maternal aunts who had cared for infant since the death of the mother held entitled to letters of guardianship subject to a provision requiring that the child be brought up in the father's religious faith.—*In re Lamb's Estate*, 139 N. Y. S. 685.

§ 30 (N.Y.Sur.) On application by maternal aunts for letters of guardianship, the father was entitled to have his request that the child be brought up in his religious faith complied with, though he had neglected the child and forfeited his right to any other consideration in the matter of the application.—*In re Lamb's Estate*, 139 N. Y. S. 685.

HABEAS CORPUS.

See Criminal Law, § 231.

HARMLESS ERROR.

See Appeal, §§ 1033-1060; Criminal Law, §§ 1169-1173.

HEARING.

See Constitutional Law, § 305.

HEARSAY.

See Evidence, § 314.

HEIRS.

See Descent and Distribution.

HIGHWAYS.

See Boundaries, § 20; Dedication; Eminent Domain, § 119; Gas; Licenses; Municipal Corporations, §§ 658-706, 796, 806; Negligence; Street Railroads, §§ 22, 25.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(A) Establishment by Prescription, User, or Recognition.

§ 6 (N.Y.Sup.) Under Highway Law, § 209, declaring that land used by the public as a highway for 20 years or more shall be a public highway, held, that a road across defendant's land had become a highway by public user.—Village of Wellsville v. Hallock, 139 N. Y. S. 961.

§ 7 (N.Y.Sup.) Permitted use of land as a public highway for 20 years, with maintenance by public authorities, creates a highway; but, unless it is taken charge of and maintained, a mere public use for 20 years, with consent of the owner, will not make it a highway.—Village of Wellsville v. Hallock, 139 N. Y. S. 961.

§ 17 (N.Y.Sup.) Where there was evidence of such user by the public as would have justified a record of a road as a highway by the public authorities, their failure to enter such record did not change the statutory mandate that the road should be a public highway.—Village of Wellsville v. Hallock, 139 N. Y. S. 961.

V. REGULATION AND USE FOR TRAVEL.

(B) Use of Highway and Law of the Road.

§ 186 (N.Y.Sup.) An information which does not charge that defendant operated a motor vehicle at a speed in excess of 30 miles an hour "for a distance of one-fourth of a mile" charges no crime under Laws 1910, c. 374, § 287.—People v. Winston, 139 N. Y. S. 1072.

HOLDING OVER.

See Landlord and Tenant, § 90.

HOLIDAYS.

See Sunday.

HOSPITALS.

See Physicians and Surgeons.

HOURS OF LABOR.

See Constitutional Law, §§ 89, 238; Infants, § 12; Master and Servant, § 10.

HUSBAND AND WIFE.

See Divorce; Domicile; Evidence, § 121; Insurance, § 590; Marriage; Powers, § 33; Vendor and Purchaser, §§ 175, 334; Wills, §§ 160, 164, 166, 587, 741.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

§ 3 (N.Y.Sup.) Where a married woman is wrongfully abandoned by, or for good and sufficient reason leaves, her husband, she may acquire a separate domicile for the purpose of enforcing her rights.—Wacker v. Wacker, 139 N. Y. S. 78.

§ 14 (N.Y.Sup.) The fee in the street in front of property of tenants by the entirety is in both, subject to the public easement, and the consent of the husband to a private party to put pipes therein is not binding on the wife.—Wightman v. Cottrell, 139 N. Y. S. 564.

VIII. SEPARATION AND SEPARATE MAINTENANCE.

§ 300 (N.Y.Sup.) The Appellate Division, affirming a judgment dismissing the complaint of a wife for separation, has no power to make provision therein to compel the husband to support her.—Edwards v. Edwards, 139 N. Y. S. 1069.

IMPEACHMENT.

See Witnesses, §§ 321, 390.

IMPLIED CONTRACTS.

See Work and Labor.

IMPRISONMENT.

See Arrest; False Imprisonment.

IMPROVEMENTS.

See Landlord and Tenant, §§ 152-157, 200, 211; Mechanics' Liens; Municipal Corporations, §§ 277, 354.

INDEMNITY.

See Guaranty; Principal and Surety.

§ 11 (N.Y.Sup.) Where a contractor to grade an avenue employed one to carry earth from another street, where the contractor was excavating, for use in grading the avenue, the employé could recover for work in grading the avenue, and one agreeing to indemnify the city against claims was liable to the city, paying a judgment obtained by the employé.—City of New York v. Mechanics' & Traders' Bank of City of New York, 139 N. Y. S. 92.

INDICTMENT AND INFORMATION.

See Criminal Law, § 1024; Highways, § 186; Nuisance, § 91; Sunday.

III. FORMAL REQUISITES OF INDICTMENT.

§ 21 (N.Y.Co.Ct.) The inadvertent striking from the printed form of the indictment of the words "at the borough of Brooklyn, in the city of New York, in the county of Kings," does not render it demurrable, where it bears the caption, "County Court of the County of Kings."—People v. Kings County Iron Foundry, 139 N. Y. S. 447.

IX. ISSUES, PROOF, AND VARIANCE.

§ 174 (N.Y.Sup.) Though an indictment for larceny does not allege any one else as being concerned in the larceny, or explain that accused is only charged as accessory, but simply charges that he committed the crime, he may be convicted upon proof that he was an accessory.—*People v. Katz*, 139 N. Y. S. 137.

X. CONVICTION OF OFFENSE INCLUDED IN CHARGE.

§ 191½ (N.Y.Sup.) The crimes of larceny and receiving stolen goods are separate, and one indicted for criminally receiving stolen goods may not be convicted on proof that he was a principal in the larceny.—*People v. Pollak*, 139 N. Y. S. 831.

INFANTS.

See Adoption; Criminal Law, §§ 87, 968; Guardian and Ward; Negligence; Parent and Child; Receiving Stolen Goods.

II. CUSTODY AND PROTECTION.

§ 12 (N.Y.Sup.) Labor Law, § 77, as amended in 1912, is constitutional, in so far as it limits the working hours of minors; the state having power to protect its wards.—*People ex rel. Hoelderlin v. Kane*, 139 N. Y. S. 350.

VII. ACTIONS.

§ 72 (N.Y.Sup.) A child cannot after its birth recover from a railroad company damages for a deformity caused by the company's negligence in transporting its mother, who was then enceinte.—*Nugent v. Brooklyn Heights R. Co.*, 139 N. Y. S. 367, 372.

INFERIOR COURTS.

See Courts, §§ 169-189.

INFORMATION.

See Indictment and Information.

INHERITANCE.

See Descent and Distribution.

INITIATIVE AND REFERENDUM.

See Constitutional Law, § 65; Statutes, §§ 35½, 64.

INJUNCTION.

See Canals; Corporations, § 320; Landlord and Tenant, § 134; Limitation of Actions, § 55; Mines and Minerals, § 52; Municipal Corporations, § 993; Nuisance, § 72; Trade-Marks and Trade-Names; Waters and Water Courses, § 154.

I. NATURE AND GROUNDS IN GENERAL.**(B) Grounds of Relief.**

§ 21 (N.Y.Sup.) Under Civil Rights Law, § 51, a complaint to enjoin the use of plaintiff's picture on a placard, to illustrate, with other pictures, the right and wrong way to get on and

off cars, will be dismissed, where the court is satisfied that plaintiff orally consented to such use.—*Almind v. Sea Beach Co.*, 139 N. Y. S. 559.

II. SUBJECTS OF PROTECTION AND RELIEF.**(C) Contracts.**

§ 61 (N.Y.Sup.) A bill of sale of a business, which stipulates that the seller will not engage or compete in the business for 10 years, and a contemporaneous contract requiring the buyer to hire the seller for a year, if construed together, will not be enforced at the suit of the buyer by enjoining the seller from engaging in the manufacturing of articles in competition with the buyer.—*Fries v. Parr*, 139 N. Y. S. 220.

A buyer of a business who breaches his contract, may not enjoin the seller from breaching his covenant not to engage in similar business during a specified period within specified territory.—*Id.*

III. ACTIONS FOR INJUNCTIONS.

§ 113 (N.Y.Sup.) A buyer of a business who without protest permitted the seller to engage in similar business for two years, *held* barred by laches from suing to restrain the seller from engaging in similar business in violation of his covenant.—*Fries v. Parr*, 139 N. Y. S. 220.

INNKEEPERS.

See Set-Off and Counterclaim, § 22.

§ 11 (N.Y.Sup.) An overcoat of a guest of a restaurant, hung on a hook provided by the restaurateur for that purpose near to the place where the guest was seated, *held* "actually delivered" to the restaurateur, who was liable for its loss.—*Wentworth v. Riggs*, 139 N. Y. S. 1082.

IN PAIS.

See Estoppel.

INSANE PERSONS.

See Evidence, §§ 510, 574; Wills, §§ 52, 54, 55, 166.

INSOLVENCY.

See Bankruptcy; Corporations, § 545; Libel and Slander, § 9; Trusts, § 349.

INSPECTION.

See Sales, § 168½.

INSTRUCTIONS.

To jury, see Criminal Law, §§ 1038, 1172, 1173; Trial, § 251.

To servant, see Master and Servant, § 152.

INSURANCE.

See Appeal, § 1051; Evidence, §§ 263, 349; Judgment, § 199.

III. INSURANCE AGENTS AND BROKERS.

(B) Agency for Applicant or Insured.

§ 96 (N.Y.CityCt.) A broker, who is employed to secure insurance, is the agent of the insured, and not of the insurer.—*Morriss v. Home Ins. Co.*, 139 N. Y. S. 674.

§ 102 (N.Y.CityCt.) After delivery of a policy by a broker to insured, his authority to deal with the insurance ceases.—*Morriss v. Home Ins. Co.*, 139 N. Y. S. 674.

§ 103 (N.Y.CityCt.) Possession of a policy by an insurance broker is the test of what he may do therewith, and what notices will be held binding on insured, if sent to the broker.—*Morriss v. Home Ins. Co.*, 139 N. Y. S. 674.

V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

§ 136 (N.Y.Sup.) A delivery of an insurance policy to an agent for the insured and his delivery to the insured constitutes a good delivery by the insurer with an intent to become bound thereby.—*Singer v. National Fire Ins. Co. of Hartford, Conn.*, 139 N. Y. S. 375.

§ 136 (N.Y.CityCt.) In an action on a policy returned by the broker soliciting it, because of plaintiff's failure to pay the premium, plaintiff held not entitled to recover, for want of a legal delivery of such policy.—*Morriss v. Home Ins. Co.*, 139 N. Y. S. 674.

(B) Construction and Operation.

§ 146 (N.Y.Sup.) The intention of the parties to an insurance contract, even though extraneous evidence is permissible, must primarily be sought in the instrument itself.—*Czerweny v. National Fire Ins. Co. of Hartford*, 139 N. Y. S. 345.

§ 146 (N.Y.Sup.) A policy insuring against loss from theft, etc., is to be liberally construed in favor of assured.—*Duschenes v. National Surety Co. of New York*, 139 N. Y. S. 881.

§ 164 (N.Y.Sup.) Under a fire insurance policy on goods held "in trust," recovery could be had for the loss of matches stored with the insured as a bailee for hire.—*Czerweny v. National Fire Ins. Co. of Hartford*, 139 N. Y. S. 345.

VI. PREMIUMS, DUES, AND ASSESSMENTS.

§ 182 (N.Y.Sup.) Defendant is not liable for premium for increasing amount of a policy, in accordance with a letter signed "M. J.," his name; the evidence being that that was also the name of his uncle, who owned the property, and that the letter was written by defendant's bookkeeper, without his authority, at request of the uncle.—*Schroeder v. Jarmulowsky*, 139 N. Y. S. 45.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(B) Insurance of Property and Titles.

§ 505 (N.Y.Sup.) A condition for separation by insured after a fire of the damaged goods from the undamaged is given a liberal construction in favor of insured; and it is enough that

there is such a separation that insurer can estimate the loss.—*Greengrass v. North River Ins. Co.*, 139 N. Y. S. 937.

XIV. NOTICE AND PROOF OF LOSS.

§ 559 (N.Y.Sup.) An unqualified denial of liability under the trust clause of a fire insurance policy waived proof of loss.—*Czerweny v. National Fire Ins. Co. of Hartford*, 139 N. Y. S. 345.

§ 559 (N.Y.Sup.) An insurer who repudiates a policy, and denies liability, because there was no valid policy in force at the time of the loss, cannot show that the insured has lost his rights thereunder by failing to give immediate notice of loss, as required by the policy.—*Singer v. National Fire Ins. Co. of Hartford, Conn.*, 139 N. Y. S. 375.

XV. ADJUSTMENT OF LOSS.

§ 579 (N.Y.Sup.) The assignee of the owner of matches covered by a policy, and stored with insured as a bailee for hire, held not affected by a settlement between the insured and the insurer with knowledge of the owner's claim; there being no estoppel or waiver.—*Czerweny v. National Fire Ins. Co. of Hartford*, 139 N. Y. S. 345.

XVI. RIGHT TO PROCEEDS.

§ 590 (N.Y.Sup.) In determining whether annual insurance premiums on the husband's life exceeds \$500 within Domestic Relations Law, § 52, so as to subject the excess to the claims of creditors, assessments paid benefit insurance societies should not be considered, in view of Insurance Law, §§ 212, 238.—*Dominick v. Stern*, 139 N. Y. S. 59.

XVIII. ACTIONS ON POLICIES.

§ 624 (N.Y.Sup.) The owner of matches burned while stored with insured as a bailee for hire held the proper plaintiff in an action under the trust clause of a policy.—*Czerweny v. National Fire Ins. Co. of Hartford*, 139 N. Y. S. 345.

§ 646 (N.Y.Sup.) Fraud by insured in applying for a life policy is not presumed, and must be proved.—*Denaro v. Prudential Ins. Co. of America*, 139 N. Y. S. 758.

§ 648 (N.Y.Sup.) Evidence of correspondence between third parties to policy sued on and of a void policy on merchandise taken out pursuant thereto held incompetent in an action by assignee of owner of the merchandise destroyed, under a trust clause of insurance policy obtained on the merchandise by a bailee of same for hire.—*Czerweny v. National Fire Ins. Co. of Hartford*, 139 N. Y. S. 345.

§ 665 (N.Y.Sup.) Insertion of trust clause held strong probative evidence that insured intended to insure another's merchandise which was stored with him as bailee for hire.—*Czerweny v. National Fire Ins. Co. of Hartford*, 139 N. Y. S. 345.

§ 665 (N.Y.Sup.) Under a policy requiring insured to produce "direct and affirmative evidence" that the loss of the insured articles was due to burglary, theft, or larceny, a recovery cannot be had merely by proof of the disappear-

nce of jewelry from a place in insured's room o which only she had access.—*Duschenes v. National Surety Co. of New York*, 139 N. Y. S. 81.

§ 668 (N.Y.Sup.) Whether insurer, by retaining, without objection, an inventory furnished after a fire and negotiating for settlement, did not waive more formal proof of loss, is a question for the jury.—*Greengrass v. North River Ins. Co.*, 139 N. Y. S. 937.

XX. MUTUAL BENEFIT INSURANCE.
(B) **The Contract in General.**

§ 723 (N.Y.CityCt.) In an action on a mutual benefit certificate, a misstatement of insured's age to such an extent that, if he had truthfully stated his age, he would not have been insurable, *held* a defense, whether considered a warranty or mere misrepresentation.—*Waltz v. Workmen's Sick and Death Benefit Fund of the United States of America*, 139 N. Y. S. 1016.

§ 730 (N.Y.CityCt.) Defendant, sued on a mutual benefit certificate, having elected to rescind because of an alleged misrepresentation as to insured's age, *held* bound to tender a return of dues and assessments paid by insured, with interest.—*Waltz v. Workmen's Sick and Death Benefit Fund of the United States of America*, 139 N. Y. S. 1016.

(E) **Beneficiaries and Benefits.**

§ 777 (N.Y.Sup.) Under the laws of a fraternal order, where a member designates his "affinced wife" as a beneficiary, and at the time he has a lawfully wedded wife, the latter at his death is entitled to the death benefit.—*Mendelson v. Gausman*, 139 N. Y. S. 947.

INTENT.

See Statutes, §§ 224, 226; Wills, § 439, 489.

INTEREST.

See Usury; Wills, § 734; Witnesses, § 367.

I. RIGHTS AND LIABILITIES IN GENERAL.

§ 19 (N.Y.Sup.) A claim for extra work being unliquidated as to amount, interest thereon should not be allowed.—*Fenichel v. Zicherman*, 139 N. Y. S. 118.

§ 19 (N.Y.Sup.) In an action on an unliquidated demand, interest was properly denied.—*Tradesman's Nat. Bank of Conshohocken v. Boldt*, 139 N. Y. S. 531.

II. RATE.

§ 37 (N.Y.Sup.) A bond secured by a mortgage providing for the payment of the principal sum in five years, at a fixed rate of interest, and after that time interest to be paid semiannually until the sum shall be paid, permits the obligee to increase the rate of interest after default; the provision fixing the rate applying only to the payments before maturity.—*Savage v. Beecher*, 139 N. Y. S. 173.

INTERLOCUTORY JUDGMENT.

See Appeal, § 78.

INTERPLEADER.

I. RIGHT TO INTERPLEADER.

§ 11 (N.Y.Sup.) A complaint by a warehouseman, alleging that goods in his possession are claimed by the depositor and others, and praying that the defendants be required to interplead, states a cause of action under General Business Law, §§ 103 and 104, authorizing interpleader by a warehouseman in such cases, and excusing his failure to deliver until he has had time to ascertain the owner or to sue for that purpose.—*Manhattan Storage & Warehouse Co. v. Benguiat Art Museum*, 139 N. Y. S. 1073.

INTERPRETATION.

See Common Law; Constitutional Law, § 20; Contracts, § 176; Insurance, §§ 146, 164, 505; Statutes, §§ 181-231; Wills, §§ 436-698.

INTERROGATORIES.

See Depositions; Trial, § 352.

INTER VIVOS.

See Gifts, §§ 30, 41.

INTESTACY.

See Descent and Distribution.

INTOXICATING LIQUORS.

See Chattel Mortgages, §§ 11, 230; Constitutional Law, §§ 240, 278; Evidence, § 393; Landlord and Tenant, § 134; Property; Replevin, §§ 4, 57.

I. POWER TO CONTROL TRAFFIC.

§ 6 (N.Y.Sup.) The state, in the exercise of its police powers, may absolutely prohibit the sale of intoxicating liquors or impose any limitation or restriction on the use of property for that purpose, if such exercise of the police power is reasonable, and affects alike all persons of the same class.—*In re Nyce*, 139 N. Y. S. 204.

II. CONSTITUTIONALITY OF ACTS AND ORDINANCES.

§ 23 (N.Y.Sup.) Liquor Tax Law, § 8, subd. 9, which permits a tenant to abandon the right to use premises for liquor purposes, *held* constitutional.—*In re Nyce*, 139 N. Y. S. 204.

ISSUES.

See Appeal, §§ 171, 179.

JEOPARDY.

See Criminal Law, § 178.

JOINDER.

See Action, §§ 47, 48; Parties, §§ 80, 92.

JOINT ADVENTURES.

§ 1 (N.Y.Sup.) Under a contract of attorneys, one of whom had been retained to prosecute

claims on a contingent fee, to prosecute them together, the one retained to be attorney of record, the other to act as counsel whenever required, they to each pay half the expenses, and to divide the profits equally, the survivor, in case of one dying before the end of the litigation, to carry it to its conclusion for the benefit of both, they were joint venturers.—*Hill v. Curtis*, 139 N. Y. S. 428.

JUDGES.

See Appeal, §§ 569, 570; Courts; Depositions; Justices of the Peace.

JUDGMENT.

See Appeal; Bankruptcy, §§ 196, 433; Contempt; Corporations, § 522; Criminal Law, § 1023; Divorce, § 151; Execution; Executors and Administrators, § 509; Justices of the Peace; Mortgages, § 175; Pleading, §§ 345, 346, 350; References, § 99; Replevin, § 124; Stipulations; Wills, §§ 344, 346.

IV. BY DEFAULT.

(B) Opening or Setting Aside Default.

§ 143 (N.Y.Sup.) A default not willfully or intentionally allowed, but attributable to the inexperience of defendant's attorney will be opened on motion, since it is the duty of the courts to protect litigants from the neglect of their attorneys.—*Kraus v. Comet Film Co.*, 139 N. Y. S. 306.

§ 161 (N.Y.Sup.) Defendant's motion to open a default should have been granted, where his affidavits, if true, showed that he probably had a meritorious defense, though his proposed answer was improperly verified.—*Miller v. Peters*, 139 N. Y. S. 316.

§ 163 (N.Y.Sup.) That the time fixed for defendants to file an answer after the overruling of their demurrer was not set in motion by service of notice may be raised upon a motion to vacate a judgment entered for want of an answer, predicated upon an affidavit showing the facts.—*Kramer v. Barth*, 139 N. Y. S. 341.

VI. ON TRIAL OF ISSUES.

(A) Rendition, Form, and Requisites in General.

§ 199 (N.Y.CityCt.) Where insurer, electing to rescind for misrepresentations as to age, failed to tender repayment of dues, the court, having directed verdict for insurer subject to opinion, might, under Code Civ. Proc. § 1185, set aside such verdict and render judgment for plaintiff.—*Waltz v. Workmen's Sick and Death Benefit Fund of the United States of America*, 139 N. Y. S. 1016.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

§ 250 (N.Y.Sup.) Where the theory of the complaint was that the defendant's agreement was for the purchase of stock, and not to subscribe to capital stock, no recovery could be had on the theory that the agreement constituted a subscription agreement.—*Security Title & Trust Co. of York, Pa., v. Stewart*, 139 N. Y. S. 74.

VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

§ 326 (N.Y.Sup.) The Supreme Court has power to amend its judgment *nunc pro tunc*, so as to have the caption read "Supreme Court, County of Erie," instead of "County Court, County of Erie."—*Buffalo Commercial Bank v. Nice*, 139 N. Y. S. 322.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

§ 596 (N.Y.Sup.) Judgment for tenants in an action for rent for specified months *held not res judicata* against a landlord's right to recover for subsequent months.—*Gerson v. Blanck*, 139 N. Y. S. 47.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(A) Judgments Conclusive in General.

§ 654 (N.Y.Sup.) A default judgment against defendant is not conclusive as to the issues raised by a counterclaim which was dismissed.—*Simon v. Bierbauer*, 139 N. Y. S. 327.

(B) Persons Concluded.

§ 677 (N.Y.Sup.) A final judgment in an action by one in behalf of himself and all others in like situation, in which all claimants are required to prove claims, is binding not only upon those who so appear, but upon those who do not, where it determines that no others than those appearing are entitled to recover.—*Santilli v. Illinois Surety Co.*, 139 N. Y. S. 656.

(C) Matters Concluded.

§ 743 (N.Y.Sup.) In an ejectment to compel defendants to remove water pipes in the street in front of plaintiff's property, a decision in a prior action by the defendants to restrain him from interfering with the pipes that the defendants had a revocable license estops such defendants to claim more.—*Wightman v. Cottrell*, 139 N. Y. S. 564.

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

§ 948 (N.Y.Sup.) A former decree between the same parties involving the same subject-matter is not conclusive, unless pleaded.—*Gabriel v. Gabriel*, 139 N. Y. S. 778.

§ 951 (N.Y.Sup.) In an action on a check, the burden is on defendant, pleading a prior judgment in bar, to show that such judgment was not for a balance of account reached by including in defendant's credits the amount of the check.—*Lembeck & Betz Eagle Brewing Co. v. Crudo*, 139 N. Y. S. 927.

§ 952 (N.Y.Sup.) The findings of fact in a former decree between the same parties, involving the same subject-matter, though not pleaded, would at least be presumptive evidence on the same issue between the same parties.—*Gabriel v. Gabriel*, 139 N. Y. S. 778.

JUDICIAL POWER.

See Constitutional Law, § 70.

JURISDICTION.

See Appearance; Contempt; Corporations, § 668; Courts; Criminal Law, §§ 87, 97; Execution, § 450; Guardian and Ward, § 8; Husband and Wife, § 300; Municipal Corporations, § 697; Pleading, § 250; Receivers; Reference; Wills, §§ 248, 253, 695, 698.

JURY.

See Criminal Law, § 874; Electricity; Trial, §§ 139-337.

II. RIGHT TO TRIAL BY JURY.

§ 13 (N.Y.Sup.) No right to a jury trial upon a counterclaim for money only interposed in an equity action exists at common law.—*Gersmann v. Walpole*, 139 N. Y. S. 1.

§ 14 (N.Y.Sup.) Where an undertaking has been given to discharge a mechanic's lien, and the sureties are made parties defendant, the action to foreclose is triable by the court without a jury; the proceeding being equitable.—*Gersmann v. Walpole*, 139 N. Y. S. 1.

§ 25 (N.Y.Sup.) Under court rule 31, the privilege of a jury trial in an equity action on a counterclaim must be applied for within 10 days after joinder of issue, and an application made months after the joinder of issue is properly denied.—*Gersmann v. Walpole*, 139 N. Y. S. 1.

JUSTICES OF THE PEACE.

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

§ 190 (N.Y.Sup.) Under Code Civ. Proc. § 2063, which provides that, where the judgment is against the weight of the evidence the appellate court may reverse and order a new trial, the County Court, reversing a judgment of a justice's court on the ground that the verdict was against the weight of the evidence, should order a new trial before the same justice.—*Brown v. Sullivan*, 139 N. Y. S. 555.

KEY.

See Landlord and Tenant, §§ 194, 231.

KNOWLEDGE.

See Evidence, § 474; Master and Servant, §§ 217, 220; Notice.

LACHES.

See Injunction, § 113.

LANDLORD AND TENANT.

See Accord and Satisfaction; Constitutional Law, § 278; Contracts, § 127; Husband and Wife, § 14; Intoxicating Liquors, § 23; Judgment, § 596; Mines and Minerals, § 77; Principal and Agent, §§ 100, 106, 120, 154; Taxation, § 788; Trial, § 251; Waters and Water Courses, § 154.

II. LEASES AND AGREEMENTS IN GENERAL.

(A) Requisites and Validity.

§ 22 (N.Y.Sup.) Where the evidence in a landlord's action for breach of an oral agreement to lease showed a binding agreement between the parties as to the terms of a lease, it was error to grant a nonsuit, though defendant did not sign the lease.—*Hirsch v. Lichtenstein*, 139 N. Y. S. 4.

§ 22 (N.Y.Sup.) Where the parties only agreed in oral discussion on the term of the lease and the rental, without discussing other terms, except that it should be reduced to writing and other conditions added, there was a mere agreement for a lease, and not a parol letting.—*Herb v. Day*, 139 N. Y. S. 931.

§ 23 (N.Y.Sup.) A parol lease for a year arises when the parties agree upon all the terms, though they intend thereafter to reduce them to writing.—*Herb v. Day*, 139 N. Y. S. 931.

Where the tenant knew that the landlord expected a written lease for a year before taking possession, and the landlord stated the terms upon which he would lease when the printed lease was submitted, to which terms the tenant did not object, but continued in possession for several months, there was a valid parol lease.—*Id.*

§ 30 (N.Y.Sup.) A provision in a lease that it shall terminate upon 60 days' notice of a bona fide sale is a valid limitation of the term.—*Bruder v. Crafts & D'Amora Co.*, 139 N. Y. S. 307.

(B) Construction and Operation.

§ 44 (N.Y.Sup.) Under a lease which provided that if landlord made a bona fide sale of the premises during the term, he might cancel the lease upon 60 days' written notice to the tenant, the right of termination on sale was reserved only to the original lessor, and did not pass to his assignee on sale of the premises.—*Bruder v. Crafts & D'Amora Co.*, 139 N. Y. S. 307.

III. LANDLORD'S TITLE AND REVERSION.

(A) Rights and Powers of Landlord.

§ 53 (N.Y.Sup.) On facts stated, *held* that the grantee of the lessor of farm land by tenancy from year to year was not estopped from proceeding to remove the tenant.—*In re Steele*, 139 N. Y. S. 550.

IV. TERMS FOR YEARS.

(C) Extensions, Renewals, and Options to Purchase or Sell.

§ 90 (N.Y.Sup.) Where a tenant from year to year holds over, the landlord may either treat him as a wrongdoer, and eject him without notice, or may waive the right to possession, and recover the rent for another year on the ground that by holding over he has become a tenant for another year.—*In re Steele*, 139 N. Y. S. 550.

§ 90 (N.Y.Sup.) The leaving of certain material on leased premises by the lessee, on vacating at the end of the term, did not constitute a

holding over beyond the term.—Trustees of Leake and Watts Orphan House in City of New York v. Hoyle, 139 N. Y. S. 1098.

Where a lease authorized a renewal for from three to nine months at the lessee's election, its holding over without stating the period would be deemed for the shortest period under the privilege.—Id.

Where a lease, providing for renewal, declared that, if renewed for less than six months, the rent should be paid monthly, instead of quarterly, the lessee, by continuing to pay quarterly, renewed for six months, and by holding over extended the lease for another six months.—Id.

(D) Termination.

§ 109 (N.Y.Sup.) That a tenant informed the landlord's agent that he had sickness, and was unable to pay the rent, and asked to be released, and moved from the premises, did not constitute a surrender and acceptance, where the agent declined to release him.—Ivy Court Realty Co. v. Knapp, 139 N. Y. S. 918.

V. TENANCIES FROM YEAR TO YEAR AND MONTH TO MONTH.

§ 116 (N.Y.Sup.) A tenancy from year to year may be terminated at the end of any year by either the landlord or the tenant without previous notice of intention to do so.—In re Steele, 139 N. Y. S. 550.

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

(B) Possession, Enjoyment, and Use.

§ 134 (N.Y.Sup.) An owner, leasing a building for use as a hotel after the tenant has surrendered his hotel license and taken out a license to run a saloon, cannot restrain such tenant from abandoning the saloon, under Liquor Tax Law, § 8, subd. 9, as added by Laws 1910, c. 494, as amended by Laws 1911, c. 298, providing that there shall be no more than one saloon for each 750 persons, but that a saloon license may be abandoned and the business moved to another place.—Young v. Rogers, 139 N. Y. S. 553.

§ 139 (N.Y.Sup.) One renting farm land under an oral lease at a yearly rental, without provision as to how long he should have the premises, became a tenant from year to year, and had no implied right to remove crops which matured after the termination of his tenancy.—In re Steele, 139 N. Y. S. 550.

(C) Incumbrances, Taxes, and Assessments.

§ 149 (N.Y.Sup.) The contractual relation of landlord and tenant imposes no obligation upon the landlord to pay water rates, which are not a tax upon the property.—Brandt v. Stadler, 139 N. Y. S. 884.

(D) Repairs, Insurance, and Improvements.

§ 152 (N.Y.Sup.) A landlord's covenant to pay for repairs upon termination of the lease on notice of sale is a "covenant running with the land," and binds the heirs and assigns of the parties.—Bruder v. Crafts & D'Amora Co., 139 N. Y. S. 307.

§ 152 (N.Y.Sup.) A lease of the ground or first floor allowing the tenant to make alterations on the "premises," did not permit the tenant to lower the floor three feet at one end for the purpose of making a moving picture house of it; the basement being rented to another tenant.—Cohen v. Simon Strauss, 139 N. Y. S. 929.

§ 157 (N.Y.Sup.) A stipulation in a lease that the lessee shall erect on the premises a garage costing not less than \$1,000 requires him to use his judgment, and unless it is shown that he acted in bad faith, or improvidently, or without reasonable skill, the money expended by him must be accepted by the lessor.—Parrish v. Fishel, 139 N. Y. S. 1033.

A lessor, in a lease requiring the lessee to erect a garage on the premises costing not less than \$1,000, who accepted the garage at a cost of \$1,000 in fulfillment of the lease, and who, with knowledge of the insufficiency of the building, deducted a specified sum per month from the rent on account of the garage until the whole amount was so accepted, could not recover back the amount so allowed.—Id.

(E) Injuries from Dangerous or Defective Condition.

§ 164 (N.Y.Sup.) A landlord was not negligent for failure to nail a rug to the floor in the hall of a tenement house over which rug the tenant's child fell.—Goldstein v. Hershkowitz, 139 N. Y. S. 3.

§ 164 (N.Y.Sup.) A tenant cannot recover for injuries caused by the ceiling falling, though she relied on the promise of the janitor to take care of it, having noticed that it was cracked, where there is no evidence of any duty by the owner other than a contract duty.—Weiss v. Valenstein, 139 N. Y. S. 851.

(F) Eviction.

§ 172 (N.Y.Sup.) Nightly noises of rats in the walls and ceiling of a tenement, coupled with an offensive odor, which increased until the premises became untenable, amounted to a constructive eviction.—Barnard Realty Co. v. Bonwit, 139 N. Y. S. 1050.

VIII. RENT AND ADVANCES.

(A) Rights and Liabilities.

§ 194 (N.Y.Sup.) The delivery and acceptance of the keys to an apartment, though evidence of a surrender, does not of itself constitute a surrender, relieving from liability for rent, unless delivered to one authorized to accept them and under circumstances justifying an inference that the parties intended to terminate the lease.—Herb v. Day, 139 N. Y. S. 931.

§ 200 (N.Y.Sup.) Under a lease relieving the lessees from liability for rent while the premises are put in good repair after a fire, they were not liable during months when the building was untenable because of the absence of a stairway required by law.—Gerson v. Blanck, 139 N. Y. S. 47.

§ 211 (N.Y.Sup.) Landlords held not guilty of unreasonable delay in making necessary repairs to the rented premises to restore it to tenant-

able condition after a fire as required by the lease.—*Gerson v. Blanck*, 139 N. Y. S. 47.

A lessee *held* not entitled to complain that, in making certain repairs on rented premises after they had been damaged by fire, doors were hung to open outwardly to comply with the Labor Law of the state.—*Id.*

(B) Actions.

§ 231 (N.Y.Sup.) The defense of surrender of the premises and their acceptance by the landlord must be established by the tenant, when sued for rent.—*Herb v. Day*, 139 N. Y. S. 931.

Evidence in a landlord's action for rent *held* not to show that the keys to an apartment were delivered to the landlord's agent when the lease was claimed to be terminated, so as to constitute surrender.—*Id.*

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

§ 308 (N.Y.Sup.) In a proceeding for the removal of a tenant from year to year, evidence *held* insufficient to show that the tenant had put a new roof on a barn under a verbal agreement that he should remain as tenant until the rental reimbursed him for the amount so expended.—*In re Steele*, 139 N. Y. S. 550.

LARCENY.

See Carriers, § 413; Constitutional Law, § 309; Criminal Law, § 345; Indictment and Information, §§ 174, 191½; Insurance, §§ 146, 665; Pleading, § 52; Receiving Stolen Goods.

LAW OF THE CASE.

See Appeal, §§ 1090, 1195.

LEASE.

See Landlord and Tenant.

LEGACIES.

See Wills.

LEGISLATIVE POWER.

See Constitutional Law, § 65.

LETTERS.

See Evidence, §§ 121, 271.

LETTERS ROGATORY.

See Depositions.

LEX LOCI.

See Marriage; Powers, § 36; Wills, § 436.

LIBEL AND SLANDER.

See Action, § 48; Criminal Law, §§ 97, 178; Discovery.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

§ 6 (N.Y.Sup.) An article charging Charles F. Murphy and Mayor Gaynor with wrongfully retiring a deputy fire chief on full pay under a

plan to have him appointed state fire marshal, and that "the first step was the preparation of a long letter to the mayor by James Creelman," the plaintiff, did not reflect upon plaintiff's act or motive in writing the letter, and was not libelous as to him.—*Creelman v. Star Co.*, 139 N. Y. S. 66.

§ 7 (N.Y.Sup.) A false charge that an attorney had admitted advising giving a witness money to get her out of the way was libelous per se.—*Bird v. Press Pub. Co.*, 139 N. Y. S. 88.

§ 7 (N.Y.Sup.) An article intimating that plaintiff had been arrested for and was guilty of fraudulent sales of corporate stock, *held* libelous per se.—*Smith v. New Yorker Staats Zeitung*, 139 N. Y. S. 325.

§ 9 (N.Y.Sup.) A charge that a draft accepted by a merchant had been protested for nonpayment, standing alone, is libelous per se.—*Maldonado & Co. v. Yglesias*, 139 N. Y. S. 102.

Defendant's notice to customers that, because plaintiff had accepted a draft which was afterwards protested for nonpayment, it would not accept drafts against plaintiff, except for collection, the reason assigned being in fact true, *held* not libelous as charging that plaintiff was insolvent and unworthy of credit.—*Id.*

§ 16 (N.Y.Sup.) Publication of a story falsely purporting to be by plaintiff, and relating in the first person an absurd and improbable adventure, *held* as to plaintiff, a member of geographical societies and a noted newspaper correspondent and traveler, and the holder of political and editorial positions, an actionable libel.—*D'Alto monte v. New York Herald Co.*, 139 N. Y. S. 200.

II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.

§ 42 (N.Y.Sup.) The qualified privilege against libel for the publication by a newspaper of the report of a judicial, legislative, or other public and official proceeding created by Code Civ. Proc. §§ 1907, 1908, *held* only to apply to a fair and true report of the proceedings, and not to extend to matters added thereto.—*Smith v. New Yorker Staats Zeitung*, 139 N. Y. S. 325.

§ 49 (N.Y.Sup.) An article published in defendant's newspaper of and concerning plaintiff *held* not privileged.—*Smith v. New Yorker Staats Zeitung*, 139 N. Y. S. 325.

IV. ACTIONS.

(C) Evidence.

§ 104 (N.Y.Sup.) A letter to a publisher, stating that a publication was false, and containing many self-serving declarations, and that he was going to sue, was not a request for a retraction, and its admission in evidence was reversible error.—*Bird v. Press Pub. Co.*, 139 N. Y. S. 88.

§ 107 (N.Y.Sup.) In a libel action, plaintiff may testify as to the effect of a publication upon his feelings.—*Bird v. Press Pub. Co.*, 139 N. Y. S. 88.

(D) Damages.

§ 121 (N.Y.Sup.) A verdict for \$3,000 was not excessive, where plaintiff, an attorney, was

falsely charged with advising giving a witness money to leave the country.—*Bird v. Press Pub. Co.*, 139 N. Y. S. 88.

VI. CRIMINAL RESPONSIBILITY.

(A) Offenses.

§ 146 (N.Y.Sup.) The publication of a libelous letter addressed to one in Switzerland was complete when deposited in the post office in New York City with postage prepaid for its transmission to Switzerland.—*People v. Bihler*, 139 N. Y. S. 819.

LICENSES.

See Municipal Corporations, § 185.

II. IN RESPECT OF REAL PROPERTY.

§ 44 (N.Y.Sup.) Where plaintiff said that he had no objections to defendants putting pipes in the street in front of his property, provided the defendants would allow him to put in hydrants for \$3 per year, it was no more than a revocable license, and could not be construed to give an easement.—*Wightman v. Cottrell*, 139 N. Y. S. 564.

LIENS.

See Attorney and Client, §§ 182, 189; Bankruptcy, §§ 196, 433; Mechanics' Liens; Mortgages, §§ 151-186; Pleading, § 258; Pledges; Subrogation; Taxation, § 708; Wills, § 741.

LIFE ESTATES.

§ 25 (N.Y.City Ct.) In an action to recover taxes paid by plaintiffs, the remaindermen on premises occupied by defendant and leased to him by the life tenant, it is no defense that defendant, pending appeal from a judgment in his favor on demurrer to the complaint to recover the taxes paid, tendered the rent, and it was accepted by plaintiffs without prejudice.—*Hinton v. Bogart*, 139 N. Y. S. 1021.

LIFE INSURANCE.

See Insurance.

LIMITATION OF ACTIONS.

See Death, § 39; Execution, § 372; Taxation, § 496; Waters and Water Courses, § 154.

I. STATUTES OF LIMITATION.

(A) Nature, Validity, and Construction in General.

§ 2 (N.Y.Sup.) Under Code Civ. Proc. §§ 390, 401, a foreign corporation, sued by a nonresident for broker's commissions, may plead the limitations of its domicile.—*Smith v. Western Pac. Ry. Co.*, 139 N. Y. S. 129.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

§ 46 (N.Y.Sup.) A bond broker's cause of action for commissions for procuring purchasers for first mortgage bonds accrued when the corporation executed its mortgage, pursuant to the

acceptance of the purchasers, procured by the broker, of the offer to sell.—*Smith v. Western Pac. Ry. Co.*, 139 N. Y. S. 129.

A broker's commissions become due upon the acceptance by his employers of purchasers produced by him ready, willing, and able to perform upon the prescribed terms.—*Id.*

§ 55 (N.Y.Sup.) Where an elevated railroad was completed January 15, 1880, though not opened to the public until March 1, 1880, it was in operation from the former date, so that an action first brought by the defendant or his predecessors on February 28, 1900, to restrain its operation and maintenance, was barred by the statutory period of 20 years.—*Rothmann v. Interborough Rapid Transit Co.*, 139 N. Y. S. 1041.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

§ 100 (N.Y.Sup.) Where a grandson of the grantor learned in 1893 of defendants' fraud in procuring the deed, *held* that, under Code Civ. Proc. § 382, subd. 5, his time to sue for cancellation was, despite section 396, limited to 6 years from that date, although he was then only 20 years old.—*Gabriel v. Gabriel*, 139 N. Y. S. 778.

III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

§ 155 (N.Y.Sup.) Payments of principal or interest upon indebtedness must have been made with the debtor's knowledge and acquiescence, in order to remove the bar of limitations.—*Union Nat. Bank of Franklinville v. Dean*, 139 N. Y. S. 835.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 195 (N.Y.Sup.) An action for death of one from an injury that he received more than three years before his death is presumptively barred, and the burden is on his representative to show that he commenced an action within the three years, which is still pending, with the result of keeping alive the cause of action for death.—*Casey v. Auburn Telephone Co.*, 139 N. Y. S. 579.

§ 195 (N.Y.Sup.) Where plaintiff in an action for goods sold made a prima facie showing of defendant's absence from the state after the sale and delivery, the burden was on defendant to show his presence in the state after the debt accrued for a sufficient time to bar the action by limitations.—*Goldberg v. Lackshin*, 139 N. Y. S. 943.

§ 196 (N.Y.Sup.) Where a reply to the defense of limitations alleges a new promise in writing by defendant within six years, parol evidence is admissible to identify the debt, and letters between the parties are admissible to aid in the interpretation of the writing pleaded in the reply.—*Zinn v. Stamm*, 139 N. Y. S. 992.

§ 199 (N.Y.Sup.) Where the uncontradicted evidence in an action for money loaned was that there was no other transaction between the parties, and the reception in evidence of a letter of plaintiff to defendant was limited to identifying the debt, which was acknowledged

by defendant, it was error to direct a verdict for defendant, and a verdict should have been directed for plaintiff.—*Zinn v. Stamm*, 139 N. Y. S. 992.

LIMITED PARTNERSHIP.

See Partnership, §§ 361, 375.

LIQUOR SELLING.

See Intoxicating Liquors.

LIS PENDENS.

See Abatement and Revival, § 8.

LOANS.

See Guaranty, § 53; Limitation of Actions, § 199; Usury.

LOCATION.

See Railroads.

LOCO PARENTIS.

See Parent and Child.

LUCID INTERVALS.

See Wills, §§ 52-55.

MACHINERY.

See Master and Servant, §§ 121, 125, 126.

MAINTENANCE.

See Champerty and Maintenance.

MALICIOUS PROSECUTION.

See Appeal, § 1060; False Imprisonment.

MANDAMUS.

See Clerks of Courts.

MANDATE.

See Appeal, § 1195.

MAPS.

See Railroads.

MARRIAGE.

See Divorce; Domicile; Evidence, § 80; Husband and Wife.

§ 3 (N.Y.Sur.) The validity of a marriage in New Jersey must be determined by the law of that state.—*In re Kutter's Estate*, 139 N. Y. S. 693.

§ 54 (N.Y.Sur.) Under Domestic Relations Law, § 6, a second marriage in New York in good faith of a person whose spouse has been absent for five successive years without being known to be living subsists until death or an adjudication avoiding it, and cannot be questioned collaterally.—*In re Kutter's Estate*, 139 N. Y. S. 693.

At common law, the remarriage of a person

having a husband or wife actually living, although unheard of for years and believed to be dead, was void from the beginning.—*Id.*

MASTER AND SERVANT.

See Appeal, § 1099; Constitutional Law, §§ 89, 238; Corporations, §§ 153, 155; Indemnity; Infants, § 12; Trial, § 251; Work and Labor.

I. THE RELATION.

(B) Statutory Regulation.

§ 10 (N.Y.Sup.) Under its police power, the state may limit the hours which women may work in certain industries and Labor Law (Consol. Laws 1909, c. 31) § 77, limiting the hours women may work in factories other than canning establishments is valid.—*People ex rel. Hoelderlin v. Kane*, 139 N. Y. S. 350.

(C) Termination and Discharge.

§ 39 (N.Y.Sup.) Where, in an action by an employé for his wrongful discharge, the only issue under the pleadings was whether the employer discharged the employé, the employer could not prove a justification of the discharge.—*Geiger v. Rapaport*, 139 N. Y. S. 55.

§ 40 (N.Y.Sup.) Evidence held to support a finding that the discharge of an employé was not justified.—*Geiger v. Rapaport*, 139 N. Y. S. 55.

An employer, who pleads justification, has the burden of establishing the defense.—*Id.*

§ 43 (N.Y.Sup.) The proper construction of a contract of employment held to depend on the sense in which certain words were used, and the construction must be submitted to the jury.—*Bartholdi v. Hickson*, 139 N. Y. S. 847.

II. SERVICES AND COMPENSATION.

(B) Wages and Other Remuneration.

§ 70 (N.Y.Sup.) A contract by a buyer of a business to employ the seller at a specified sum per week, and at the end of each six months' continuous employment to strike a balance and pay a half of the actual cash net profits, requires the buyer to strike a balance and ascertain the profits every six months, and pay one-half thereof, at their cash value, regardless of the form in which they exist.—*Fries v. Parr*, 139 N. Y. S. 220.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

§ 89 (N.Y.Sup.) Where a foreman of a company manufacturing interior woodwork ordered a servant to help a former employé, who was going away, to move his furniture, the company was not liable for injuries to such servant, received while doing so.—*Crowley v. Murray & Hill Co.*, 139 N. Y. S. 188.

Where plaintiff was ordered by his employer's foreman to assist in some outside work with other employés, the mere fact that he thought he was acting as his employer's servant is not sufficient to fix liability on the employer for a

negligent injury, in the absence of further proof of the foreman's authority.—*Id.*

(B) Tools, Machinery, Appliances, and Places for Work.

§§ 101, 102 (N.Y.Sup.) A master is bound to furnish his servant a safe place to work and reasonably safe tools to work with.—*Wistinetz v. Goldman*, 139 N. Y. S. 402.

§ 103 (N.Y.Sup.) Where an employé prepares his own place in which to do his work, the employer is not liable for injuries resulting from the dangerous character of the place.—*Leddy v. Carley*, 139 N. Y. S. 227.

§ 104 (N.Y.Sup.) If an employer provided chisel bars for use in cutting rivets, which were upon the premises and easily accessible at the time of an accident, defendant would not be liable for injuries claimed to have been caused by failure to furnish a chisel bar.—*Muench v. Terry & Tench Co.*, 139 N. Y. S. 781.

§ 107 (N.Y.Sup.) Where an employé had no right to assume that a way to his work lay in part over planks, there was no obligation on the employer to make the planks reasonably secure as a way.—*Kennedy v. John N. Robins Co.*, 139 N. Y. S. 745.

§ 107 (N.Y.Sup.) Under Consol. Laws, c. 31 (Laws 1909, c. 36) §§ 200-204, as amended by Laws 1910, c. 352, relating to compensation of an employé for injuries from defects in the ways, works, machinery, or plant, "plant" includes anything animate or inanimate, fixed or movable, regularly used in the business, that is neither ways, works, nor machinery, and without which the business could not be carried on in the usual manner.—*Lipstein v. Provident Loan Society of New York*, 139 N. Y. S. 799.

A ladder furnished to an employé to enable him to clean electric light globes was a part of the employer's "plant," within Consol. Laws, c. 31 (Laws 1909, c. 36) §§ 200-204, as amended by Laws 1910, c. 352.—*Id.*

That a ladder furnished to an employé had no means to prevent it from slipping constituted a "defect," within Consol. Laws, c. 31 (Laws 1909, c. 36) §§ 200-204, as amended by Laws 1910, c. 352.—*Id.*

§ 107 (N.Y.Sup.) Chain tongs, which broke, causing an injury to a servant, are a part of the employer's plant.—*McKeon v. Proctor & Gamble Mfg. Co.*, 139 N. Y. S. 805.

§ 118 (N.Y.Sup.) Where an employé laying a sewer asked the employer to shore up the trench which he had dug, but the employer with knowledge of the conditions refused the request, and directed the employé to lay the pipe, the employer was under the duty to furnish a safe place in which to work.—*Leddy v. Carley*, 139 N. Y. S. 227.

§ 121 (N.Y.Sup.) Where a statutory saw guard was removed because it was impracticable for a particular kind of work, the master was under an absolute duty to promptly replace the guard on the finishing of the work.—*Pockrass v. Kaplan*, 139 N. Y. S. 398.

§ 125 (N.Y.Sup.) In an action for injuries to a servant by reason of the removal of a statutory guard from a saw a half hour before the injury, defendant *held* entitled to an instruc-

tion that such length of time was not necessarily sufficient to charge defendant with notice of the removal of the guard.—*Pockrass v. Kaplan*, 139 N. Y. S. 398.

§ 126 (N.Y.Sup.) A statutory saw guard having been removed temporarily without the direction or knowledge of defendant's superintendent or foreman, defendant was entitled to a reasonable time in which to discover its absence, and have it replaced.—*Pockrass v. Kaplan*, 139 N. Y. S. 398.

(C) Methods of Work, Rules, and Orders.

§ 141 (N.Y.Sup.) Where decedent's yardmaster directed him to get certain cars from switch No. 3, it was negligence to also order another engine to work on the switch from the other end without promulgating rules to govern such joint use of the switch by different train crews.—*Judd v. Lake Shore & M. S. Ry. Co.*, 139 N. Y. S. 542.

(D) Warning and Instructing Servant.

§ 152 (N.Y.Sup.) A master was under no duty to instruct a servant as to the proper way of putting a belt over a pulley where the servant had worked around machinery for seven years, and in defendant's shop for a year and a half, and had frequently put belts over pulleys.—*Mattos v. Felgenhauer*, 139 N. Y. S. 379.

(E) Fellow Servants.

§ 163 (N.Y.Sup.) Defendants were not liable for failure to provide plaintiff with a helper to do certain work as promised by their foreman, until a reasonable time had elapsed within which the foreman could give the necessary directions.—*Wistinetz v. Goldman*, 139 N. Y. S. 402.

A master is bound to furnish his servant a sufficient number of efficient fellow servants.—*Id.*

§ 190 (N.Y.Sup.) Where plaintiff was directed by his foreman to hold a shaft while the foreman negligently struck it with a hammer, causing sparks to fly into plaintiff's eyes, from which he became blind, the master was liable under Labor Law § 200, subd. 2, as amended by Laws 1910, c. 352.—*Cashmore v. Peerless Motor Car Co. of New York*, 139 N. Y. S. 359.

§ 190 (N.Y.Sup.) Failure of defendants' foreman to designate a helper from among defendants' other employés to assist plaintiff in accordance with the promise of the foreman *held* negligence of a fellow servant, for which defendants were not liable.—*Wistinetz v. Goldman*, 139 N. Y. S. 402.

§ 190 (N.Y.Sup.) A railroad company would be liable for the negligence of its freighthouse foreman in directing freight handlers to work upon a skid known to be insecure, though it was not a defect in the ways, etc.—*Nappa v. Erie R. Co.*, 139 N. Y. S. 547.

§ 196 (N.Y.Sup.) Where a place in which an employé is to work is prepared by a fellow employé, and the progress of the work creates a danger, and the employés are engaged in the prosecution of the same enterprise, the employer is not liable for injuries to the employé resulting from the dangerous character of the place.—*Leddy v. Carley*, 139 N. Y. S. 227.

§ 199 (N.Y.Sup.) One set of employes preparing and finishing a trench for the laying of sewer pipe are not fellow servants of employes sent into the trench to lay the pipe.—*Leddy v. Carley*, 139 N. Y. S. 227.

(F) Risks Assumed by Servant.

§ 217 (N.Y.Sup.) An employe who continues his work with knowledge of a danger assumes the risk.—*Leddy v. Carley*, 139 N. Y. S. 227.

§ 217 (N.Y.Sup.) A servant who continued to operate a lumber cutting machine without protest or objection after the removal of a stopping device assumed the risk of injury because of the absence of such device.—*Wistinetz v. Goldman*, 139 N. Y. S. 402.

§ 220 (N.Y.Sup.) Where an employe has equal knowledge of a danger with the employer, the latter's assurance of safety does not relieve the employe of the assumption of risk; but, where the employer has superior knowledge, an assurance of safety relieves the employe from the assumption of risk, unless the danger is so imminent as to prevent a reasonably prudent man from risking it.—*Leddy v. Carley*, 139 N. Y. S. 227.

An employe will not be deemed to have waived performance by the employer of a common-law duty to provide a safe place because he has some knowledge of the danger, where the employer with better knowledge assures him it is safe.—*Id.*

(G) Contributory Negligence of Servant.

§ 238 (N.Y.Sup.) An experienced laborer, ordered to go to the hold of a ship in dry dock to clean the tops of water tanks, *held* not entitled to recover for injuries caused by the breaking of a plank used by him, instead of grabirons provided for his use.—*Kennedy v. John N. Robins Co.*, 139 N. Y. S. 745.

(H) Actions.

§ 252 (N.Y.Sup.) A notice of injury to a freight handler, which stated that the injuries were caused by the falling of the skid on which he was standing, causing him to fall and a barrel of sugar to fall upon him, and that its fall was caused by the unsafe manner in which the skid, furnished by defendant's superintendent, was secured, sufficiently stated the cause of the injury, as required by Labor Law, § 201.—*Nappa v. Erie R. Co.*, 139 N. Y. S. 547.

§ 252 (N.Y.Sup.) A servant's notice of injury, alleging that the cause was furnishing defective tools and cutters, and in not furnishing a chisel bar, etc., and which failed to state any negligent act by a superintendent, or any defect in the ways, works, or machinery, would not support an action under the Employer's Liability Act of 1902 (Laws 1902, c. 600).—*Muench v. Terry & Tench Co.*, 139 N. Y. S. 781.

§ 265 (N.Y.Sup.) The burden of proving that an employe assumed a risk is on the employer.—*Leddy v. Carley*, 139 N. Y. S. 227.

§ 278 (N.Y.Sup.) Evidence in a servant's action for injuries by being caught by a belt and revolving shaft while trying to put the belt on a pulley *held* not to show negligence as to the

belt and its fastenings.—*Mattos v. Felgenhauer*, 139 N. Y. S. 379.

§ 278 (N.Y.Sup.) Evidence *held* to support jury's finding that at the time of an accident street car was not equipped with reasonably safe wheels or trucks.—*Moran v. New York State Rys.*, 139 N. Y. S. 731.

§ 278 (N.Y.Sup.) In an action for injuries to a driver of a truck, resulting from the breaking of the tongue, evidence *held* insufficient to show negligence of the employer.—*Limerick v. Holdsworth*, 139 N. Y. S. 737.

§ 278 (N.Y.Sup.) Under Labor Law, § 200, as amended by Laws 1910, c. 352, making an employer liable for injuries from negligence in not discovering or remedying a defect in the plant, evidence that chain tongs were somewhat worn, but that an experienced employe believed they were sufficient, did not show negligence of the employer.—*McKeon v. Proctor & Gamble Mfg. Co.*, 139 N. Y. S. 805.

§ 279 (N.Y.Sup.) In an action for an iron worker's injuries while riding a beam which was being hoisted in a building by the rope breaking, evidence *held* to sustain a finding that the foreman's acts in ordering plaintiff to ride the beam were acts of superintendence, so as to make the employer liable.—*Holmstrom v. Ward*, 139 N. Y. S. 592.

§ 280 (N.Y.Sup.) In an action for the death of an employe, evidence *held* to justify a finding that the employer assured the employe that the work was safe.—*Leddy v. Carley*, 139 N. Y. S. 227.

§ 281 (N.Y.Sup.) Where a servant was caught in a belt revolving over a pulley and drawn around a revolving shaft, evidence *held* to establish his contributory negligence.—*Mattos v. Felgenhauer*, 139 N. Y. S. 379.

§ 285 (N.Y.Sup.) In motorman's action for injuries, question whether car would have made a curve notwithstanding the rate of speed if there had been no defect in the truck *held* to be for the jury.—*Moran v. New York State Rys.*, 139 N. Y. S. 731.

§ 286 (N.Y.Sup.) In an action for a yard brakeman's death by being crushed between cars as a result of two engines operating on the same switch, whether it was negligent to so operate the train without special rules relating to such operation *held* a jury question.—*Judd v. Lake Shore & M. S. Ry. Co.*, 139 N. Y. S. 542.

§ 286 (N.Y.Sup.) Evidence, in an action for injuries to a freight handler by a skid slipping from a platform and permitting him to fall, *held* to make it a jury question whether the foreman was negligent in directing the men to work upon an insecure skid.—*Nappa v. Erie R. Co.*, 139 N. Y. S. 547.

§ 287 (N.Y.Sup.) Where neglect of a fellow servant working with plaintiff, a minor, at a machine, was the cause of plaintiff's hand being injured, and defendant prior to the accident had promised to discharge the incompetent fellow servant, motions to dismiss on the evidence and, after verdict for plaintiff, for a new trial, will be denied.—*Ginsburg v. Wolf*, 139 N. Y. S. 920.

§ 288 (N.Y.Sup.) Where an employé laying sewer pipe was assured by his employer, who was present and directed the work, that it was unnecessary to shore up the trench because the work of laying the pipe would take only a short time, the employé, relying on the assurance, did not assume the risk as a matter of law of the trench caving in.—*Leddy v. Carley*, 139 N. Y. S. 227.

§ 288 (N.Y.Sup.) In an action for a yard brakeman's death by being crushed between cars while two engines were switching on the same switch, whether decedent assumed the risk of injury from two engines operating at the same time *held* a jury question.—*Judd v. Lake Shore & M. S. Ry. Co.*, 139 N. Y. S. 542.

§ 288 (N.Y.Sup.) Evidence in an action for an iron worker's injuries while riding a beam which was being hoisted by the rope breaking and permitting it to fall *held* to make it a jury question whether plaintiff assumed the risk.—*Holmstrom v. Ward*, 139 N. Y. S. 592.

§ 289 (N.Y.Sup.) An employé digging a sewer trench and laying pipe *held* not guilty of contributory negligence as a matter of law in relying on the employer's assurance that the work of laying the pipe could be done safely without shoring the trench.—*Leddy v. Carley*, 139 N. Y. S. 227.

§ 289 (N.Y.Sup.) In an action for a yard brakeman's death by being caught between cars while his own and another engine were both switching on the same switch, whether decedent was guilty of contributory negligence *held* for the jury.—*Judd v. Lake Shore & M. S. Ry. Co.*, 139 N. Y. S. 542.

§ 289 (N.Y.Sup.) In an action for injuries to an iron worker while riding a beam which was being hoisted by the rope breaking, evidence *held* to make it a jury question whether plaintiff was guilty of contributory negligence.—*Holmstrom v. Ward*, 139 N. Y. S. 592.

§ 289 (N.Y.Sup.) In motorman's action for injuries from derailment of car, question whether he was negligent in running the car around a curve at an excessive rate of speed *held* to be for the jury.—*Moran v. New York State Rys.*, 139 N. Y. S. 731.

§ 293 (N.Y.Sup.) In an action for injuries from the breaking of chain tongs, the modification of defendant's requested charge that no negligence may be based on the worn condition of the tongs, if they were reasonably safe for use by hand, if that is the manner in which they were to be used properly, by adding, "provided it was improper or unusual to use them as plaintiff did," is error.—*McKeon v. Proctor & Gamble Mfg. Co.*, 139 N. Y. S. 805.

MEASURE OF DAMAGES.

See Damages, § 124.

MECHANICS' LIENS.

See Appeal, § 1177; Jury; Work and Labor, § 14.

II. RIGHT TO LIEN.

(E) Subcontractors' and Contractors' Workmen and Materialmen.

§ 115 (N.Y.Sup.) Person making contract for construction of building *held* not liable to a

subcontractor whose lien was ineffective because filed too late, although upon payment to the principal contractor he had taken a bond of indemnity against the subcontractor's claim.—*Tradesman's Nat. Bank of Conshohocken v. Boldt*, 139 N. Y. S. 531.

III. PROCEEDINGS TO PERFECT.

§ 146 (N.Y.Sup.) Where the notice of lien did not comply with Lien Law, § 9, subd. 6, requiring it to state when the first and last items of work were performed, the lien was invalid.—*Fenichel v. Zicherman*, 139 N. Y. S. 118.

VII. ENFORCEMENT.

§ 254 (N.Y.Sup.) Owner *held* precluded from claiming liquidated damages from contractor's delay by his agreement with the subcontractor as against such subcontractor's claim for materials furnished both before and after the agreement.—*Schloss v. Troman*, 139 N. Y. S. 616.

Owner's agreement with subcontractor not to reduce amount due principal contractor by claiming liquidated damages for delay in performance *held* to inure to the benefit of person furnishing materials to subcontractor.—*Id.*

Promise by owner not to claim liquidated damages *held* on the theory of estoppel to entitle subcontractor, who delayed filing its lien and lost its priority, to such benefits as would have followed the filing, but on the theory of an agreement to the amount of its claim without deduction of liquidated damages, regardless of prejudice from the delay.—*Id.*

§ 271 (N.Y.Sup.) A subcontractor suing to foreclose a mechanic's lien should, if he wishes to hold the owner personally liable, allege the facts showing such liability, and demand a personal judgment.—*Tradesman's Nat. Bank of Conshohocken v. Boldt*, 139 N. Y. S. 531.

§ 281 (N.Y.Sup.) Evidence *held* to show an agreement by owner with subcontractor not to enforce provision for liquidated damages, and a reliance thereon by the subcontractor to its prejudice.—*Schloss v. Troman*, 139 N. Y. S. 616.

MEMORANDA.

See Frauds, Statute of, § 118.

MERCANTILE AGENCIES.

See Attorney and Client, § 136.

MESSAGES.

See Télégraphs and Telephones

MINES AND MINERALS.

See Champerty and Maintenance.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(A) Rights and Remedies of Owners.

§ 49 (N.Y.Sup.) Where there has been a severance between the surface of the soil and the minerals underneath, the owner of the surface, by carrying on mining operations, has no ad-

verse possession of the minerals remaining in the land.—*White v. Miller*, 139 N. Y. S. 660.

Where the title to the surface of lands is severed from that to the mines and minerals underlying the surface, the owner of the surface acquires no rights by prescription, as distinguished from adverse possession, to the minerals which have not been removed, by carrying on mining operations.—*Id.*

§ 51 (N.Y.Sup.) Where plaintiff became the owner of mines and minerals, he was entitled to damages from the owner of the surface for the removal of gypsum during the six years next preceding the commencement of the action.—*White v. Miller*, 139 N. Y. S. 660.

§ 52 (N.Y.Sup.) No period of inaction will bar the right to injunction against the removal of minerals from land belonging to plaintiff, unless continued for such time as will authorize the presumption of a grant.—*White v. Miller*, 139 N. Y. S. 660.

Where plaintiff became the owner of mines, he was entitled to an injunction against the owner of the surface who had quarried minerals during the six years next preceding the commencement of the action.—*Id.*

(B) Conveyances in General.

§ 55 (N.Y.Sup.) Where a conveyance of land excepts and reserves to the grantor all mines and minerals, it works a severance between the ownership of the surface, including the limestone thereon, and the minerals, including the gypsum, beneath.—*White v. Miller*, 139 N. Y. S. 660.

(C) Leases, Licenses, and Contracts.

§ 77 (N.Y.Sup.) Reservation in a release of an oil and gas lease covering property platted for a city addition *held* not to renew complainant's rights in the tract, on a grant by the village to another company of the right to lay gas mains in the streets to supply consumers from an outside source.—*Carroll v. Silver Creek Gas & Improvement Co.*, 139 N. Y. S. 161.

III. OPERATION OF MINES, QUARRIES, AND WELLS.

(B) Mining Partnerships and Companies.

§ 99 (N.Y.Sup.) The act of a member of a mining partnership in refusing to consent to an advantageous sale *held* no defense to an action by a trustee for his benefit to foreclose a pledge of the interests of a copartner, irrespective of the motive of such refusal.—*Myers v. Stein*, 139 N. Y. S. 762.

MINORS.

See Infants.

MISREPRESENTATION.

See Insurance, §§ 723, 730.

MISTAKE.

See Municipal Corporations, § 354; Wills, §§ 215, 216, 220, 344, 440, 698.

MODIFICATION.

See Vendor and Purchaser, § 82.

MONEY LENT.

See Limitation of Actions, § 190; Pleading, § 280.

MONEY RECEIVED.

See Vendor and Purchaser, § 334; Witnesses, § 144.

MORTGAGES.

See Boundaries, § 20; Chattel Mortgages; Fixtures; Vendor and Purchaser, §§ 197, 230.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

§ 25 (N.Y.Sup.) A debtor's mortgage on realty, reciting a bond of the same date, and also a consideration, and covenanting to pay the debt, although no bond was ever executed, even if given to secure an antecedent debt, was valid as between the parties and against all then having no equitable interests or not acquiring rights as subsequent purchasers for value.—*Sullivan v. Corn Exch. Bank*, 139 N. Y. S. 97.

Where a mortgage recited a debt secured by bond and a consideration of \$1, the fact that no bond was actually given did not impair the mortgage, since there was other sufficient consideration therefor.—*Id.*

The validity of a mortgage does not depend upon the form of the debt, whether by note, bond, or otherwise, but upon the existence of the debt which it is given to secure.—*Id.*

§ 28 (N.Y.Sup.) An equitable mortgage may be constituted by any writing from which the intention may be gathered, and an attempt to make a legal mortgage, which fails for want of some solemnity, is valid in equity.—*Sullivan v. Corn Exch. Bank*, 139 N. Y. S. 97.

It is not necessary to bring an action to reform an equitable mortgage, so as to make it a legal obligation, in order to enforce it.—*Id.*

(B) Form and Contents of Instruments.

§ 51 (N.Y.Sup.) A mortgage which contains an express covenant to pay the debt is not unenforceable because no date for payment is specified; since in such case the right to enforce it accrues immediately or in a reasonable time after demand.—*Sullivan v. Corn Exch. Bank*, 139 N. Y. S. 97.

III. CONSTRUCTION AND OPERATION.

(D) Lien and Priority.

§ 151 (N.Y.Sup.) An equitable mortgage takes precedence over a lien, whether general or special, which only attaches, as does a judgment, to such right, title, or interest as the debtor has in such real property.—*Sullivan v. Corn Exch. Bank*, 139 N. Y. S. 97.

§ 173 (N.Y.Sup.) Within Real Property Law, § 291, providing for the record of conveyances, a mortgage is a "conveyance."—*Sullivan v. Corn Exch. Bank*, 139 N. Y. S. 97.

§ 175 (N.Y.Sup.) Under Real Property Law, § 291, providing for the recording of mortgages, *held*, that a judgment creditor was not a "subsequent purchaser," and that an unrecorded mortgage had preference over his judgment, in the absence of some superior equity.—*Sullivan v. Corn Exch. Bank*, 139 N. Y. S. 97.

A judgment creditor *held* to have no such superior equity as to entitle him to a preference over the holder of a mortgage previously executed by the judgment debtor, but not recorded.—*Id.*

§ 186 (N.Y.Sup.) Where a mortgage specifies no date for payment, and hence is enforceable in a reasonable time, a defendant in foreclosure proceedings, asserting a claim as a judgment creditor, has the burden of showing that a lapse of nearly two years without payment of either interest or taxes is not such reasonable time.—*Sullivan v. Corn Exch. Bank*, 139 N. Y. S. 97.

MOTIONS.

See Abatement and Revival, § 79; Appeal, §§ 854, 875; Appearance; Criminal Law, § 968; Divorce, § 107; Judgment, §§ 143, 161; Pleading, §§ 345-367; Stipulations; Trusts, § 298.

§ 19 (N.Y.Sup.) Neither Code Civ. Proc. § 780, relating to notices, nor general rule of practice 37, providing for notice of argument and motions, defines the cases in which notice of motion is required.—*Goldreyer v. Foley*, 139 N. Y. S. 190.

§ 59 (N.Y.Sup.) Where a motion is made *ex parte*, and the adverse party should have received notice, the order granting the motion is merely irregular, and may be vacated.—*Goldreyer v. Foley*, 139 N. Y. S. 190.

MOTOR VEHICLES.

See Highways, § 186.

MUNICIPAL CORPORATIONS.

See Counties; Covenants; Dedication; Eminent Domain, § 158; Evidence, § 441; Gas; Husband and Wife, § 14; Indemnity; Licenses; Mines and Minerals, § 77; Negligence; Street Railroads; Subrogation; Waters and Water Courses, § 192.

V. OFFICERS, AGENTS, AND EMPLOYÉS.

(B) Municipal Departments and Officers Thereof.

§ 185 (N.Y.Sup.) Evidence on proceedings for removal of a member of the police force *held* sufficient to sustain a finding that he, as examining officer, by prearrangement, asked questions of a candidate for an engineer's license, so enabling him to pass.—*People ex rel. Lynch v. Waldo*, 139 N. Y. S. 1044.

§ 213 (N.Y.Mun.Ct.) Under New York City Charter, § 1543, providing that heads of departments may deduct from the salaries of subordinates for absence from duty without leave, the commissioner of bridges had authority to deduct from auditor's salary for time

absent without leave or notice, though his absence was caused by sickness.—*Reilly v. City of New York*, 139 N. Y. S. 718.

IX. PUBLIC IMPROVEMENTS.

(A) Power to Make Improvements or Grant Aid Therefor.

§ 277 (N.Y.Sup.) Under Greater New York Charter, § 383 (9), relating to sewers, the governing power with reference to the construction of a sewer system and the maintenance of sewers is in the borough president, who may provide for outlets beyond the corporate limits of his borough.—*Kelly v. Miller*, 139 N. Y. S. 991.

(C) Contracts.

§ 354 (N.Y.Sup.) Where plaintiff, in bidding for a curbing contract, by mistake transposed the figures per lineal foot for stone and concrete curbing, and the city, without fraud or mutual mistake, accepted its bid for stone curbing, plaintiff thereafter was not entitled to a decree permitting it to rescind and recover its deposit.—*Abner M. Harper v. City of Newburgh*, 139 N. Y. S. 1057.

X. POLICE POWER AND REGULATIONS.

(B) Violations and Enforcement of Regulations.

§ 630 (N.Y.Gen.Sess.) Under Greater New York Charter, a violation of an ordinance of the city is not a misdemeanor, unless expressly so declared.—*People v. Lookstein*, 139 N. Y. S. 680.

A violation of New York City Ordinances, § 408, prohibiting the distribution of advertising matter in the streets or public places, not being a misdemeanor, one cannot be legally convicted of aiding and abetting a violation thereof.—*Id.*

§ 631 (N.Y.Gen.Sess.) New York City Ordinances, § 408, prohibiting the distribution of advertising matter on the streets, or public places, does not impose a penalty on one who furnishes another circulars for distribution on the streets.—*People v. Lookstein*, 139 N. Y. S. 680.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

§ 658 (N.Y.Sup.) The only interest of a municipal corporation in its streets is that of the public in the highways, and it has no interest in protecting the rights of abutting owners of the fee against interference with the highway by third persons without consent of such owners.—*Northern Westchester Lighting Co. v. Village of Ossining*, 139 N. Y. S. 373.

§ 671 (N.Y.Sup.) New York City Charter (Laws 1901, c. 466) §§ 5, 407, did not affect the legality of provisions of the Building Code prior to January 1, 1902, and did not prevent the city from removing encroachments on the streets prior to the time the act went into effect, if it had such power, on account of the Building Code being contrary to state laws.—*Acme Realty Co. v. Schinasi*, 139 N. Y. S. 266.

§§ 680, 681 (N.Y.Sup.) No local authority whatsoever can authorize any private individual to encroach on a public street.—*Acme Realty Co. v. Schinasi*, 139 N. Y. S. 266.

§ 689 (N.Y.Sup.) A complaint to annul a permit by the board of estimate to railroad companies for temporary operation over Manhattan Bridge, which fails to allege corruption, bad faith, or collusion of the city officials, will be dismissed on motion.—*Gross v. Gaynor*, 139 N. Y. S. 177.

§ 691 (N.Y.Sup.) The unauthorized operation of a surface railroad on a public highway is a public nuisance.—*Manhattan Bridge Three-Cent Line v. Third Avenue Ry. Co.*, 139 N. Y. S. 434.

§ 697 (N.Y.Sup.) A court of equity had jurisdiction of a cause of action by a municipality to restrain the obstruction of streets, although the statute provided that highway commissioners could maintain such action.—*Village of Wellsville v. Hallock*, 139 N. Y. S. 961.

§ 706 (N.Y.Sup.) Evidence in an action for injuries to plaintiff's team by collision with defendant's runaway team *held* not to sustain a verdict for plaintiff on the ground of negligence in tying the strap to the outside horse, so that the inside horse came in contact with it and broke it.—*Mumm v. Dance*, 139 N. Y. S. 566.

§ 706 (N.Y.Sup.) In an action for damage to plaintiff's automobile by collision with defendant's horse, which was running away because of a prior collision with another automobile, evidence *held* not to sustain a finding of negligence by defendant, on the ground that his horse was not attended when it started to run away.—*James v. Morten*, 139 N. Y. S. 941.

§ 706 (N.Y.Sup.) Plaintiff could not recover for the death of his intestate, who was run over by defendant's truck while crossing a street, however negligent defendant's servants were, in the absence of evidence that deceased was not guilty of contributory negligence.—*Neumann v. Hudson County Consumers' Brewing Co.*, 139 N. Y. S. 1028.

An instruction on contributory negligence after fright *held* erroneous, in that it did not require a finding that the fright was not due to the contributory negligence of deceased.—*Id.*

XII. TORTS.

(C) Defects or Obstructions in Streets and Other Public Ways.

§ 763 (N.Y.Sup.) If an abutting owner was permitted to keep an opening in the sidewalk, the city was bound to see that it was properly used and sufficiently guarded, and if the city knew, or should have known, that it was not so used or protected, it would be liable to one injured by falling into it.—*Myers v. City of New York*, 139 N. Y. S. 432.

§ 796 (N.Y.Sup.) Where the condition of a part of a street next a railroad track from which the asphalt was removed for repaving, was obvious, the city was not reasonably bound to erect a barrier along the side of the track to prevent driving on that part of the street.—*Maloney v. City of New York*, 139 N. Y. S. 794.

§ 806 (N.Y.Sup.) The driver of a fire engine assumed the risk of being jolted off of his seat by driving over a part of a street from which the asphalt had been removed for repaving, though such part was not barricaded.—*Maloney v. City of New York*, 139 N. Y. S. 794.

§ 818 (N.Y.Sup.) In an action for personal injuries by falling into an opening in the sidewalk, it was error not to permit a police officer, whose duty it was to observe the condition of the place and its negligent use, to testify as to the custom of leaving the place open when not in use.—*Myers v. City of New York*, 139 N. Y. S. 432.

§ 821 (N.Y.Sup.) Whether one was negligent in walking along the sidewalk with his eyes raised to the bulletin board of a newspaper office, causing him to fall into an opening in the walk, was a question for the jury.—*Myers v. City of New York*, 139 N. Y. S. 432.

Whether an opening in a sidewalk was sufficiently protected by the doors, and whether it was left open unnecessarily, and, if so, negligently, were questions of fact for the jury.—*Id.*

If the facts should show that a lift in a sidewalk was a nuisance, the question of the negligence of the city in allowing it to exist is a question for the jury.—*Id.*

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(E) Rights and Remedies of Taxpayers.

§ 993 (N.Y.Sup.) Taxpayer of city of New York *held* not entitled to maintain a suit to restrain connection between sewer in the Bronx and sewer belonging to the city of Yonkers at the sole expense of the petitioners, on condition that it be discontinued at the election of the city of New York; it being of benefit to the latter city.—*Kelly v. Miller*, 139 N. Y. S. 901.

MUTUAL BENEFIT INSURANCE.

See Insurance, §§ 723-777.

NAMES.

See Insurance, § 182; Torts; Trade-Marks and Trade-Names.

NAVIGABLE WATERS.

See Canals; Waters and Water Courses.

NEGLIGENCE.

See Appeal, §§ 1003, 1099; Carriers, §§ 280-320, 417; Death, § 39; Electricity; Evidence, § 122; Infants, § 72; Landlord and Tenant, § 164; Master and Servant, §§ 89-293; Municipal Corporations, §§ 706, 763-821; Street Railroads, § 113; Telegraphs and Telephones; Trial, §§ 337, 352.

III. CONTRIBUTORY NEGLIGENCE.

(B) Children and Others Under Disability.

§ 85 (N.Y.Sup.) A child exercising due care in crossing a street, who found herself in a position of danger caused by the negligence of de-

defendant's servants, was not chargeable with the exercise of what, in a moment of calmness, would be ordinary care.—*Neumann v. Hudson County Consumers' Brewing Co.*, 139 N. Y. S. 1028.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWLY DISCOVERED EVIDENCE.

See New Trial, § 106.

NEWSPAPERS.

See Libel and Slander; Torts.

NEW TRIAL.

See Appeal, §§ 1169, 1175, 1177; Costs, §§ 227, 264; Justices of the Peace.

II. GROUNDS.

(C) Rulings and Instructions at Trial.

§ 35 (N.Y.Sup.) The exclusion of testimony of a competent witness does not require the setting aside of the verdict, where his testimony would have been purely cumulative.—*Blass v. Linsley*, 139 N. Y. S. 540.

§ 35 (N.Y.Sup.) In an action for injuries from a collision with defendant's automobile, where defendant was asked a question relating to insurance, a verdict for plaintiff must be set aside, though the answer was stricken out, and the objection to the question sustained.—*Tincknell v. Ketchman*, 139 N. Y. S. 620.

(F) Verdict or Findings Contrary to Law or Evidence.

§ 74 (N.Y.Sup.) In an action for assault, willfully provoked by plaintiff, where the costs are substantial, a verdict for defendant will be set aside and a new trial granted, though plaintiff could recover only nominal damages, unless defendant enters into a stipulation waiving costs and disbursements.—*Blass v. Linsley*, 139 N. Y. S. 540.

(H) Newly Discovered Evidence.

§ 106 (N.Y.Sup.) Defendant should be granted a new trial, plaintiff's only witness, beside himself, having after the trial made affidavit that he did not see the accident as he testified, though he afterwards made one that he did.—*Shanahan v. Feltman*, 139 N. Y. S. 409.

NEXT OF KIN.

See Descent and Distribution; Executors and Administrators, § 507.

NOISE.

See Landlord and Tenant, § 172.

NONSUIT.

See Dismissal and Nonsuit.

NOTES.

See Bills and Notes.

NOTICE.

See Attorney and Client, § 189; Banks and Banking, § 116; Brokers, § 24; Constitutional Law, §§ 240, 305, 309; Divorce, § 151; Electricity; Execution, § 450; Fixtures; Insurance, §§ 103, 559, 668; Landlord and Tenant, §§ 30, 44, 116; Master and Servant, §§ 125, 252; Mechanics' Liens, § 146; Motions; Partnership, §§ 290-292, 296; Vendor and Purchaser, § 230.

§ 6 (N.Y.Sup.) Where one is put on inquiry, he is chargeable with the knowledge which he reasonably would have obtained on inquiry.—*Tuscarora Club of Millbrook v. Brown*, 139 N. Y. S. 766.

NOVATION.

§ 7 (N.Y.Sup.) That a creditor knows a corporation has assumed the debts of its organizer which were connected with the business incorporated does not substitute the corporation as debtor, there being no consent shown on the part of the creditor.—*Gibbs v. Warring*, 139 N. Y. S. 981.

§ 12 (N.Y.Sup.) Novation is not to be presumed, but must be established by clear proof that the old obligation was extinguished, and the new party assumed the obligation of the former contract.—*Gibbs v. Waring*, 139 N. Y. S. 981.

NUISANCE.

See Municipal Corporations, § 691.

II. PUBLIC NUISANCES.

(B) Rights and Remedies of Private Persons.

§ 72 (N.Y.Sup.) A private party can sue to abate a public nuisance only by alleging and proving greater injury than the injury to the public generally.—*Manhattan Bridge Three-Cent Line v. Third Avenue Ry. Co.*, 139 N. Y. S. 434.

The competition resulting from the unlawful operation of a street railroad is not such special injury as will authorize another railroad company to maintain a suit to abate it as a nuisance.—*Id.*

(D) Criminal Prosecutions.

§ 91 (N.Y.Co.Ct.) An indictment for maintaining a public nuisance, containing no allegation that the acts described annoy, injure, or endanger any considerable number of people, is demurrable, as not substantially conforming to the requirements of Code Cr. Proc. § 275.—*People v. Kings County Iron Foundry*, 139 N. Y. S. 447.

NUNC PRO TUNC.

See Judgment, § 326.

OATH.

See Criminal Law, § 217.

OBJECTIONS.

See Appeal, § 204; Trial, § 76.

OBSTRUCTIONS.

See Municipal Corporations, § 697.

ODORS.

See Landlord and Tenant, § 172.

OFFER.

See Vendor and Purchaser, § 16.

OFFICERS.

See Clerks of Courts; Costs, § 240; Justices of the Peace; Municipal Corporations, § 213; Quo Warranto; Receivers; Street Railroads, § 25; Witnesses, § 277.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(A) Offices, and Power to Appoint to and Remove from Office.

§ 2 (N.Y.Sup.) The Legislature has power to provide for a fixed or indeterminate term of office as to officers whose terms are not fixed by the Constitution.—People ex rel. Wogan v. Rafferty, 139 N. Y. S. 572.

(F) Term of Office, Vacancies, and Holding Over.

§ 49 (N.Y.Sup.) The Legislature has power to provide for a fixed or indeterminate term of office as to officers whose terms are not fixed by the Constitution, and even the power of removal of subordinates by constitutional officers may be restricted.—People ex rel. Wogan v. Rafferty, 139 N. Y. S. 572.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

§ 110 (N.Y.Sup.) The Legislature has power to regulate the duties of locally elected officers.—People ex rel. Wogan v. Rafferty, 139 N. Y. S. 572.

OPENING.

See Judgment, §§ 143, 161.

OPINION EVIDENCE.

See Evidence, §§ 474-574.

ORDERS.

See Appeal.

ORDINANCES.

See Municipal Corporations, §§ 630, 631.

PALACE CARS.

See Carriers, §§ 413, 417.

PARENT AND CHILD.

See Adoption; Deeds, §§ 70, 196; Divorce, § 37; Guardian and Ward; Infants; Paupers; Vendor and Purchaser, § 242; Wills, §§ 82, 741.

§ 15 (N.Y.Co.Ct.) A Roman Catholic charitable institution having statutory power to receive deserted children stands to them in loco parentis.—In re Korte, 139 N. Y. S. 444.

PAROL EVIDENCE.

See Criminal Law, § 438; Evidence, §§ 393-445.

PARTICULARS.

See Pleading, §§ 317-323.

PARTIES.

See Courts, § 188; Insurance, § 624; Interpleader; Sunday; Taxation, § 708.

I. PLAINTIFFS.

(A) Persons Who may or must Sue.

§ 6 (N.Y.Sup.) A company which confirms and assumes as made in its behalf a contract by a commission merchant for goods is bound thereby and may sue or be sued, it being the real party in interest.—Brookford Mills v. Baldwin, 139 N. Y. S. 195.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

§ 80 (N.Y.Sup.) Where plaintiff's failure to join parties has not been taken advantage of by demurrer or answer, it cannot be urged as a ground for defeating the action.—White v. Miller, 139 N. Y. S. 660.

§ 92 (N.Y.Sup.) Code Civ. Proc. § 488, subsec. 6, providing that a defendant may demur where there is a defect of parties plaintiff or defendant, permits a demurrer only for nonjoinder, not misjoinder, of parties.—Kramer v. Barth, 139 N. Y. S. 341.

PARTITION.

See Perpetuities, § 6.

II. ACTIONS FOR PARTITION.

(A) Right of Action and Defenses.

§ 16 (N.Y.Sup.) Purchaser at a tax sale of the fee, conducted pursuant to Laws 1883, c. 114, relating to tax sales, has a good title as against previous owners and all persons claiming under them, which is enforceable in partition.—De Baun v. Pardee, 139 N. Y. S. 1077.

(B) Proceedings and Relief.

§ 48 (N.Y.Sup.) Although some of the defendants in partition are not tenants in common, their rights may be tried and determined.—De Baun v. Pardee, 139 N. Y. S. 1077.

§ 55 (N.Y.Co.Ct.) Complaint in partition filed within three years after death of person whose estate was involved, held bad for failure to comply with Code Civ. Proc. § 1538, requiring allegations whether any executor or administrator had been appointed, though certain plaintiffs could have been joined as defendants instead.—Dueringer v. Klocke, 139 N. Y. S. 676.

PARTNERSHIP.

See Courts, § 188; Evidence, § 445; Guaranty, § 87; Joint Adventures; Mines and Minerals, § 90.

VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.**(B) Rights, Powers, and Liabilities after Dissolution.**

§ 290 (N.Y.Sup.) No formal notice of the dissolution of a partnership need be served to relieve a partner from individual liability; knowledge of facts leading one to believe that it had been dissolved being sufficient.—Union Nat. Bank of Franklinville v. Dean, 139 N. Y. S. 835.

§ 291 (N.Y.Sup.) Constructive notice of the dissolution of a partnership is sufficient as to persons not having previously dealt with it, but actual notice must be given to persons who had dealt with it.—Union Nat. Bank of Franklinville v. Dean, 139 N. Y. S. 835.

§ 292 (N.Y.Sup.) After the dissolution of a firm, neither partner could bind the other by the execution of a firm note to one having actual or constructive knowledge of dissolution.—Union Nat. Bank of Franklinville v. Dean, 139 N. Y. S. 835.

§ 296 (N.Y.Sup.) Evidence as to dissolution was admissible to show whether the firm was dissolved before the note was made on which a former partner is sought to be charged.—Union Nat. Bank of Franklinville v. Dean, 139 N. Y. S. 835.

In an action to charge defendant with liability on a note purporting to be signed by a firm of which he was formerly a member, evidence held to make it a jury question whether plaintiff had notice of the firm's dissolution when it received the note.—Id.

(D) Actions for Dissolution and Accounting.

§ 333 (N.Y.Sup.) Where defendant, in an action for a partnership accounting, elected to credit payments to principal account, he could not thereafter change that election and credit same to an interest account.—Keller v. Keller, 139 N. Y. S. 87.

§ 336 (N.Y.Sup.) In a firm accounting, the burden was upon the surviving partner to show that the firm was chargeable with an expense account not entered until after the death of the deceased partner.—Keller v. Keller, 139 N. Y. S. 87.

VIII. LIMITED PARTNERSHIP.

§ 361 (N.Y.Sup.) A certificate for the continuation of a special partnership, filed under Partnership Law, § 30, which mentioned the special partners by name instead of as a firm, as was done in the original certificate, will be considered as creating a valid special partnership if the capital originally contributed has remained intact.—Patterson v. Youngs, 139 N. Y. S. 670.

§ 375 (N.Y.Sup.) In an action against defendants as special partners, where the first certificate of special partnership was defective, but one for continuance was good as a certificate

forming a special partnership, plaintiffs have the burden of proving that the capital contributed by the special partners was not intact at the time of the filing of the second certificate.—Patterson v. Youngs, 139 N. Y. S. 670.

PART PAYMENT.

See Limitation of Actions, § 155.

PARTY WALLS.

See Estoppel.

PASSENGERS.

See Carriers, §§ 280-417.

PAUPERS.**IV. SUPPORT, SERVICES, AND EXPENSES.**

§ 37 (N.Y.Co.Ct.) Sons of an indigent veteran held bound to contribute \$2 each per week for his support under Code Cr. Proc. § 914.—In re Conklin, 139 N. Y. S. 449.

§ 39 (N.Y.Sup.) Under Poor Law, §§ 40, 42, 51, a town in a county or the county held chargeable for the support of a person and his family who had a legal settlement in the town, and had not lost it by their temporary removal to other counties.—Broome County v. Cortland County, 139 N. Y. S. 365.

PAYMENT.

See Accord and Satisfaction; Eminent Domain, § 158; Limitation of Actions, § 155; Principal and Agent, §§ 106, 120, 154; Sales, §§ 429, 481; Subrogation; Usury; Vendor and Purchaser, §§ 174, 175, 334.

IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 63 (N.Y.Sup.) Where plaintiff gave defendant a check, which the latter turned over to pay for his share in a chicken ranch, which they bought on equal terms, in an action by plaintiff for the amount of his check, claiming that it was a loan, evidence as to the distribution of the stock for which the ranch was incorporated was admissible, although defendant did not plead payment.—Mills v. Gold, 139 N. Y. S. 846.

PERJURY.

See Criminal Law, § 438; Witnesses, § 277.

II. PROSECUTION AND PUNISHMENT.

§ 33 (N.Y.Sup.) Evidence held to support a conviction of perjury.—People v. Veld, 139 N. Y. S. 788.

PERPETUITIES.

§ 4 (N.Y.Sup.) A testamentary trust to last five years is invalid where the property is not certain to vest within a life or two lives in being.—Smith v. Smith, 139 N. Y. S. 124.

§ 4 (N.Y.Sup.) A trust estate may be limited for an arbitrary period of time, provided its termination at an earlier time is called for in case of the expiration of two lives in being

at the creation of the trust.—*Anthony v. Van Valkenburgh*, 139 N. Y. S. 590.

§ 4 (N.Y.Sur.) A remainder which because of an uncertain event cannot vest in possession until the termination of more than four lives in being at the creation of the first estate is invalid.—*In re Raab's Will*, 139 N. Y. S. 869.

§ 6 (N.Y.Sur.) Devise of property in trust to pay the income to decedent's seven children, they to dispose of the capital by will, or in absence of will the same to go to their lineal descendants, if any, and if none to the survivors, is an unlawful suspension of alienation for a term of more than two lives in being.—*Morris v. City of New York*, 139 N. Y. S. 93.

§ 6 (N.Y.Sur.) A provision of a will, bequeathing certain of testator's estate in trust to invest and pay the income therefrom for five years to certain benefit associations, was invalid.—*In re Berry's Will*, 139 N. Y. S. 186.

§ 6 (N.Y.Sur.) An agreement between owners of real estate that none of them would bring an action for partition without the consent of the others does not suspend the power of alienation, and hence is a good defense to an action to partition.—*Buschmann v. McDermott*, 139 N. Y. S. 314.

§ 6 (N.Y.Sur.) Where a will devised the remainder in trust to pay the profits to testator's grandchildren during minority, and a proportionate share to any of the grandchildren or the representative of any grandchild living when the oldest grandchild attains majority, and giving the share of a grandchild dying before majority to its issue, or, if none, to remaining grandchildren, the gift to each grandchild was not severed instantly from the estate to be paid absolutely at his majority, with payment of the income during minority.—*In re Raab's Will*, 139 N. Y. S. 869.

A testamentary trust directing the division of the estate between testator's grandchildren, four of whom, between the ages of eight and two, were living at his death, upon the arrival at majority of any grandchild, and the issue of any dying before majority, and, if none, to the surviving grandchildren, *held* to suspend the power of alienation of realty contrary to Real Property Law, § 42.—*Id.*

§ 9 (N.Y.Sur.) Under the substantially direct provisions of Real Property Law, § 61, and Personal Property Law, § 16, a direction in a testamentary trust for the accumulation of an income for the benefit of minors not in being when the accumulation commenced was void.—*In re Raab's Will*, 139 N. Y. S. 869.

Rents and profits cannot be accumulated under a testamentary trust for the benefit of adults.—*Id.*

PERSONAL INJURIES.

See Appeal, §§ 1041, 1099; Carriers, §§ 280-320; Landlord and Tenant, § 164; Master and Servant, §§ 89-293; Municipal Corporations, §§ 763-821; Negligence; New Trial, § 35; Pleading, § 121; Street Railroads, § 113; Trial, § 251; Venue, §§ 8, 68.

PERSONAL PROPERTY.

See Property.

PETITION.

See Pleading.

PHOTOGRAPHS.

See Criminal Law, § 438; Injunction, § 21.

PHYSICIANS AND SURGEONS.

See Evidence, §§ 506, 510, 574; Witnesses, §§ 211, 214.

§ 13 (N.Y.Sur.) Where defendant, when he called in plaintiff, a physician in the same hospital, to finish an operation because defendant could not control a hemorrhage, plaintiff was deemed to have rendered such services from a sense of professional obligation, and cannot recover on an implied promise to pay for such services, though defendant received a nominal fee and himself paid for the operating room.—*Gilday v. Hennen*, 139 N. Y. S. 934.

PICTURES.

See Injunction, § 21.

PLANS.

See Street Railroads, § 13.

PLEADING.

See Action, § 47; Appeal, §§ 78, 1041; Assignments, § 131; Corporations, § 319; Costs, § 152; Courts, §§ 170, 202; Dismissal and Nonsuit; Divorce, § 107; Evidence, § 402; Indictment and Information; Interpleader; Judgment, §§ 163, 250, 948, 952; Mechanics' Liens, § 271; Municipal Corporations, § 689; Parties, §§ 80, 92; Partition, § 55; Payment; Quieting Title, § 34; Replevin, § 57; Sales, §§ 353, 416; Taxation, § 708; Wills, § 274.

I. FORM AND ALLEGATIONS IN GENERAL.

§ 8 (N.Y.Sur.) An allegation of an indebtedness in favor of plaintiff, without any facts to support it, is a mere conclusion of law, insufficient to sustain a cause of action.—*McCarthy v. Fitzgerald*, 139 N. Y. S. 950.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

§ 40 (N.Y.Sur.) In an action commenced by summons without complaint, *held*, that leave to serve a complaint, after a motion to dismiss for want thereof, should be denied, where plaintiff served no copy of the proposed complaint, no affidavit of merits, and gave no excuse for default.—*Stout v. White*, 139 N. Y. S. 77.

§ 52 (N. Y. Sup.) A paragraph alleging that certain premises were broken into and personalty stolen therefrom related to a distinct cause of action from another paragraph alleging that defendant, intending to cause it to be believed that plaintiff had stolen property from the premises, falsely stated that plaintiff was the

person who had broken into and robbed his house, and hence the paragraphs should be separately stated and numbered.—*Kenny v. Phyfe*, 139 N. Y. S. 324.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(C) Traverses or Denials and Admissions.

§ 120 (N.Y.Sup.) Defendants in a suit in equity, where the complaint was voluminous and pleaded evidence and conclusions, *held* not required to amend their answers, so as to specifically admit or deny the material allegations of the complaint.—*Glenn v. Union-Buffalo Mills Co.*, 139 N. Y. S. 70.

§ 120 (N.Y.Sup.) Where the allegations of the complaint, in an action on promissory notes and a collateral agreement, are not controverted by general or specific denial, they are not put in issue by statements in the answer merely inconsistent therewith.—*Myers v. Stein*, 139 N. Y. S. 762.

§ 121 (N.Y.Sup.) Under Code Civ. Proc. § 500, president of express company, sued for personal injuries, *held* entitled to deny any knowledge or information as to certain allegations of complaint, as against motion to require specific denial.—*Walsh v. Barrett*, 139 N. Y. S. 68.

§ 125 (N.Y.Sup.) An allegation, in a complaint by a trustee for creditors to sell personalty pledged by the trust instrument, that no proceedings at law or in equity had been taken by plaintiff for the enforcement of the agreement, which affected only personalty, was superfluous, and a denial thereof raised no issue.—*Myers v. Stein*, 139 N. Y. S. 762.

§ 129 (N.Y.Sup.) Allegation in complaint, not denied by the answer, *held* to be thereby admitted.—*Walsh v. Barrett*, 139 N. Y. S. 68.

V. DEMURRER OR EXCEPTION.

§ 193 (N.Y.Co.Ct.) A complaint alleging the existence of a contract, performance, or offer of performance by plaintiff, nonperformance by defendant, and resulting damage is not demurrable, though it states evidentiary, instead of ultimate, facts.—*Owen v. Brown*, 139 N. Y. S. 451.

A complaint is not demurrable because the facts are imperfectly, informally, or argumentatively averred, or because it lacks definiteness.—*Id.*

The fact that complainant asked for equitable relief in an action to recover damages for breach of contract would not in itself render the complaint demurrable.—*Id.*

§ 198 (N.Y.Sup.) One of several defendants may demur where the complaint states no cause of action against him.—*Kramer v. Barth*, 139 N. Y. S. 341.

§ 214 (N.Y.Sup.) A demurrer admits the truth of all the facts alleged and such inferences as may reasonably and fairly be drawn therefrom, but does not admit conclusions of law.—*McCarthy v. Fitzgerald*, 139 N. Y. S. 950.

§ 222 (N.Y.Sup.) Where an order overruling a demurrer required defendant to plead over within six days after service of a copy "of this

order," with notice of entry upon defendant's attorney, the service of the order as resented by defendant's attorney upon plaintiff's attorney will not set the time running.—*Kramer v. Barth*, 139 N. Y. S. 341.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

§ 248 (N.Y.Sup.) An amendment to a complaint, inserting additional allegations as to the extent of injuries sued for, does not change the cause of action, or substitute a new cause of action therefor.—*Kyle v. City of New York*, 139 N. Y. S. 1080.

§ 250 (N.Y.Co.Ct.) Where an action was commenced by the service of a summons, and the complaint stated a cause of action not within the jurisdiction of the court, plaintiff was entitled to leave to amend.—*Owen v. Brown*, 139 N. Y. S. 451.

§ 256 (N.Y.Sup.) Where the answer did not deny any of the averments of the complaint, and all of the defenses set up were insufficient in law, no amendment will be permitted.—*Myers v. Stein*, 139 N. Y. S. 762.

§ 258 (N.Y.Sup.) Where attorneys asserted a lien for fees, and were adjudicated a certain sum by default, which was subsequently opened, and an answer filed, and the matter sent to a referee, the court did not err in refusing to allow an amendment of the answer three years later to set up limitations, laches, and negligence.—*In re Prentice*, 139 N. Y. S. 1027.

§ 280 (N.Y.Sup.) In an action for money lent, the court properly refused to allow a supplemental answer pleading in bar a judgment for money borrowed, where it was not alleged that such other cause of action was a part of the same transaction or a single course of dealings between the parties.—*Mills v. Gold*, 139 N. Y. S. 846.

VIII. PROFERT, OYER, AND EXHIBITS.

§ 312 (N.Y.Sup.) That one suing on a written instrument under seal which called for payments on certain dates, a copy of which was attached to the complaint, referred to it in the complaint as a promissory note, did not justify its exclusion from evidence.—*Gamage v. Llewellyn*, 139 N. Y. S. 936.

IX. BILL OF PARTICULARS AND COPY OF ACCOUNT.

§ 317 (N.Y.Sup.) In a suit on a note against defendants' executors, defendants *held* not entitled to a bill of particulars as to promises made by the testator to pay, pleaded to toll the statute of limitations, and stating whether the promises were in writing, discovery of copies, and a deposit of the original note for inspection.—*Herrington v. Davitt*, 139 N. Y. S. 198.

§ 321 (N.Y.Sup.) A plaintiff, suing for the balance due on a contract for furnishing men and guards to defendant during a strike, need not furnish a bill of particulars, showing the names and addresses of the men and the number of hours each worked, until after completing an examination of the officers of defendant and an inspection of its books, the sole source of

information.—*Dougherty v. Southern Pac. Co.*, 139 N. Y. S. 1100.

§ 323 (N.Y.Sup.) Where a bill of particulars has not served within time, it was improper on motion to preclude the giving of evidence to extend the time for serving the bill without terms and without a motion by plaintiff to open his default.—*Craig v. Roach*, 139 N. Y. S. 317.

XI. MOTIONS.

§ 345 (N.Y.Sup.) Judgment for plaintiff on the pleadings held improperly granted, where the answer, after admitting plaintiff's incorporation, denied all the other allegations of the complaint.—*Marine & Contractors' Supply Co. v. Paltrowitz*, 139 N. Y. S. 43.

§ 345 (N.Y.Sup.) Where an answer contains denials of material allegations of the complaint, judgment for plaintiff on the pleadings is improperly granted.—*Gibbs v. Title Guaranty & Surety Co.*, 139 N. Y. S. 945.

§ 346 (N.Y.Sup.) A judgment for plaintiff can be granted on the ground that the answer is frivolous only where its frivolous character appears plainly on its face.—*Gibbs v. Title Guaranty & Surety Co.*, 139 N. Y. S. 945.

§ 350 (N.Y.Sup.) Where a party moves for judgment upon the pleadings, the allegations in his adversary's pleadings are to be accepted as true for the purposes of the motion.—*Simon v. Bierbauer*, 139 N. Y. S. 327.

§ 350 (N.Y.Sup.) A defendant, by moving for judgment on the pleadings, admits every material allegation of the complaint.—*McCarthy v. Fitzgerald*, 139 N. Y. S. 950.

Where defendant moves for judgment on the pleadings consisting of the complaint and a demurrer thereto, the court, in granting the motion, may permit plaintiff to plead over as if the cause had been brought on for hearing on the demurrer.—*Id.*

§ 362 (N.Y.Sup.) Paragraphs of an answer containing denials of the complainant's allegations cannot be stricken out as sham.—*Gibbs v. Title Guaranty & Surety Co.*, 139 N. Y. S. 945.

§ 367 (N.Y.Sup.) Where the allegations of the complaint leave it uncertain whether one or two causes of action are intended to be pleaded, and, if only one, which of the two, plaintiff will be ordered to make his complaint more definite and certain, or to separately state and number his causes of action.—*Madison Real Property & Security Co. v. Hutton*, 139 N. Y. S. 1104.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

§ 406 (N.Y.Sup.) An agreement by parties to try the proceedings upon the merits waives any defect in the petition.—*In re Steele*, 139 N. Y. S. 550.

PLEDGES.

See Constitutional Law, §§ 277, 309.

§ 31 (N.Y.Sup.) Where a pledgee sells collateral deposited as security for a note so as to be un-

able to deliver the collateral on payment of the note or of a judgment recovered thereon, he is guilty of "conversion."—*White v. Shonts*, 139 N. Y. S. 169.

§ 55 (N.Y.Sup.) In an action on a note secured by certain stock, the maker's right to the stock depended on her liability on the note or payment thereof, since, if she was not liable on the note, she could recover the stock in replevin.—*White v. Shonts*, 139 N. Y. S. 169.

POLICE.

See Municipal Corporations, § 185; Witnesses, § 387.

POLICE POWER.

See Constitutional Law, §§ 81, 89; Intoxicating Liquors, § 6; Master and Servant, § 10; Municipal Corporations, §§ 630, 631.

POLICY.

See Insurance.

POOR LAWS.

See Paupers.

POSSESSION.

See Quieting Title, § 23.

POST OFFICE.

See Criminal Law, § 97; Libel and Slander, § 146.

POWERS.

See Trusts, § 242.

I. CREATION, EXISTENCE, AND VALIDITY.

§ 1 (N.Y.Sur.) Technical powers in connection with personal property are authorities to do an act in relation to such property, or to create and revoke interests therein, or charges thereon, which the owner granting the power might himself lawfully perform.—*In re New York Life Ins. & Trust Co.*, 139 N. Y. S. 695.

II. CONSTRUCTION AND EXECUTION.

§ 25 (N.Y.Sur.) Donee of income of personal property under testamentary trust with power of appointment over, in default of which the principal went to the donor's next of kin, held to be merely the instrument through which donor's will was effected, and to have no estate in the property affected by his will.—*In re New York Ins. & Trust Co.*, 139 N. Y. S. 695.

A power to appoint to others than the donee of the power is a "power in trust," and not a "beneficial power." It is a mandate rather than the property of the donee.—*Id.*

§ 33 (N.Y.Sup.) Whether a disposition of real property is in execution of a power conferred by will is a question of intention; the conveyance being construed to effectuate the intent of the parties, unless inconsistent with settled

rules of law.—*Pepper v. Cutler*, 139 N. Y. S. 976.

Real Property Law, § 175, relating to the execution of powers, *held* inapplicable to a conveyance of the fee of real property by a widow under her husband's will giving the property to her in trust to use and sell for the benefit of herself and daughter; the widow having an undivided interest in the property.—*Id.*

Conveyance by a widow, both as executrix and individually, *held* a valid transfer of the property under a power contained in her husband's will.—*Id.*

§ 36 (N.Y.Sur.) A will of the donee of a power of appointment making no reference to the power would not at common law be an exercise of the powers.—*In re New York Life Ins. & Trust Co.*, 139 N. Y. S. 695.

Where a power is a purely beneficial power, or assets of the donee, the *lex loci domicilii* of the donee may govern the construction of the testamentary execution and distribution under the will.—*Id.*

In respect of powers of testamentary appointment over settled property in England or America, the law of the domicile of the donor of the power, and not that of the donee, determines in most cases whether there is sufficient testamentary execution of the donee's power of appointment.—*Id.*

Under a will of testatrix domiciled in Italy, and having a power of appointment over personal property in the hands of trustees in New York, executed while in New York, giving to her husband all her real and personal property, proved both in Italy and in New York, *held*, that the execution of the power was to be construed according to the law of New York.—*Id.*

Under Personal Property Law, § 18, which dispenses with the necessity of special reference to personal property embraced in a power of appointment, *held*, that a will of a lady giving all her property to her husband, without referring to her power to appoint one-half of personal property in the hands of trustees in New York, operated as an execution of such power.—*Id.*

PRACTICE.

See Courts; Criminal Law; Evidence; Judgment; Motions; Parties; Pleading; Trial.

PREFERENCES.

See Banks and Banking, § 317; Corporations, § 545.

PREJUDICE.

See Appeal, §§ 1033-1060; Criminal Law, §§ 1169-1173.

PRELIMINARY EXAMINATION.

See Criminal Law, §§ 231, 233.

PREMIUMS.

See Insurance, § 182.

PRESCRIPTION.

See Highways, §§ 6-17; Limitation of Actions.

PRESUMPTIONS.

See Appeal, § 927; Evidence, § 80.

PRINCIPAL AND AGENT.

See Attorney and Client; Banks and Banking, § 116; Brokers; Corporations, §§ 308-320, 522, 642; Evidence, § 263; Insurance, §§ 96-103, 136; Landlord and Tenant, § 109; Set-Off and Counterclaim, § 22; Subrogation.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

(A) Execution of Agency.

§ 69 (N.Y.Sup.) An agent may not sell to himself without his principal's consent.—*Post v. Thomas*, 139 N. Y. S. 6.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

§ 100 (N.Y.Sup.) Authority given an agent merely to execute a lease did not authorize him to thereafter change its terms.—*Everdell v. Carrington*, 139 N. Y. S. 119.

§ 106 (N.Y.Sup.) An agent, who merely had authority to execute a lease and receive rent at the end of the month as provided therein, had no implied authority to receive payment in advance.—*Everdell v. Carrington*, 139 N. Y. S. 119.

§ 120 (N.Y.Sup.) An agent's authority to receive payments of rent in advance could not be proved by showing prior similar payments to him, unless it were shown that the principal had knowledge of such prior payments.—*Everdell v. Carrington*, 139 N. Y. S. 119.

(C) Unauthorized and Wrongful Acts.

§ 147 (N.Y.Sup.) One dealing with an agent must ascertain the extent of his powers and bear the loss for his failure to do so.—*Everdell v. Carrington*, 139 N. Y. S. 119.

§ 154 (N.Y.Sup.) Where defendant's lease from plaintiff's agent only required payment of rent on the last day of the month, plaintiff could recover from defendant rent paid to the agent in advance, with interest thereon, under an unauthorized agreement with the agent.—*Everdell v. Carrington*, 139 N. Y. S. 119.

(D) Ratification.

§ 164 (N.Y.Sup.) A principal may adopt and acquiesce in the agent's purchase of the principal's property.—*Post v. Thomas*, 139 N. Y. S. 6.

(F) Actions.

§ 184 (N.Y.Sup.) Since a company which confirms and assumes as made in its behalf a contract by a commission merchant for goods becomes liable to the purchaser for a breach thereof, it may prove such assumption of the contract in an action for the price.—*Brookford Mills v. Baldwin*, 139 N. Y. S. 195.

PRINCIPAL AND SURETY.

See Bills and Notes, § 75; Guaranty; Indemnity; Replevin, § 124; Subrogation; Undertakings.

II. NATURE AND EXTENT OF LIABILITY OF SURETY.

§ 59 (N.Y.Sup.) The liability of sureties is strictissimi juris, and should not be extended by construction.—First Commercial Bank of Pontiac v. Valentine, 139 N. Y. S. 1037.

§ 66 (N.Y.Sup.) Code Civ. Proc. § 815, relative to liability on bonds or undertakings after bringing in of new parties, only preserves the liability unimpaired in favor of the party for whose benefit it was originally given.—First Commercial Bank of Pontiac v. Valentine, 139 N. Y. S. 1037.

IV. REMEDIES OF CREDITORS.

§ 147 (N.Y.Sup.) A creditor whose debt is due is subrogated to the benefit of securities and indemnities furnished by the principal to the surety.—Sexton v. Fensterer, 139 N. Y. S. 811.

Defendant, who guaranteed to put his bankers in funds before his drafts became due, upon which they guaranteed a foreign correspondent against loss on the payment thereof, *held*, upon payment to the correspondent of drafts accepted by it, but not charged to the bankers and against which the bankers had not been put in funds, to discharge both the bankers' obligation to the correspondent and defendant's guaranty to his bankers.—Id.

PRIORITIES.

See Mortgages, §§ 151, 175.

PRISONS.

See Criminal Law, § 1206.

PRIVILEGED COMMUNICATIONS.

See Libel and Slander, §§ 42, 49; Witnesses, §§ 211, 214.

PROBATE.

See Wills, §§ 203-346.

PROBATE COURTS.

See Courts, §§ 198, 202.

PROCESS.

See Appearance; Arrest; Contempt; Corporations, §§ 522, 668; Criminal Law, § 217; Dismissal and Nonsuit; Evidence, § 332; Execution; Injunction; Pleading, §§ 40, 250.

PROFITS.

See Corporations, § 151; Perpetuities, § 9.

PROHIBITION.

See Costs, § 240; Intoxicating Liquors.

PROMISSORY NOTES.

See Bills and Notes.

PROOF.

Of loss, see Insurance, §§ 559, 668.

PROPERTY.

See Dedication; Eminent Domain; Fixtures; Good Will; Mines and Minerals; Trade-Marks and Trade-Names.

§ 2 (N.Y.Sup.) A liquor tax certificate *held* to represent property, and to be itself personal property.—Bachmann-Bechtel Brewing Co. v. Gehl, 139 N. Y. S. 807.

PUBLIC ADMINISTRATORS.

See Executors and Administrators, § 24.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, §§ 277, 354

PUBLIC NUISANCES.

See Nuisance.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

PUBLIC USE.

See Dedication; Eminent Domain.

PUBLIC WATER SUPPLY.

See Waters and Water Courses, § 192.

PUNISHMENT.

See Criminal Law, §§ 1206-1217.

QUANTUM MERUIT.

See Work and Labor.

QUESTIONS OF LAW AND FACT.

See Trial, § 139.

QUIETING TITLE.

I. RIGHT OF ACTION AND DEFENSES.

§ 23 (N.Y.Sup.) Where tenants in common made mutual conveyances, the devisees of one of them, who with such devisees held open and notorious possession over 30 years, showed possession sufficient to maintain an action under Code Civ. Proc. § 1639, to determine a claim to real property.—Hamilton v. Hamilton, 139 N. Y. S. 1095.

II. PROCEEDINGS AND RELIEF.

§ 34 (N.Y.Sup.) A complaint under Code Civ. Proc. § 1639, to determine a claim to real property, *held* sufficient, regardless of certain immaterial allegations or an inappropriate prayer for relief.—Hamilton v. Hamilton, 139 N. Y. S. 1095.

QUO WARRANTO.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 55 (N.Y.Sup.) In an action to try title to an office, the party whose title is assailed must

show by what authority he holds the office.—
People ex rel. Wogan v. Rafferty, 139 N. Y.
S. 572.

RAILROADS.

See Carriers; Corporations, § 320; Evidence, §§ 122, 579; Infants, § 72; Limitation of Actions, § 55; Master and Servant, §§ 141, 190, 252, 286, 289; Municipal Corporations, §§ 685, 691; Street Railroads.

IV. LOCATION OF ROAD, TERMINI, AND STATIONS.

§ 47 (N.Y.Sup.) Under Railroad Law, § 9, prohibiting the public service commission from certifying that public convenience and necessity require the construction of a road as proposed in "said certificate of incorporation" until the directors publish a copy of the certificate, construed with sections 18, 24, and 89, and Public Service Commission Law, § 53, upon determining the question of convenience and necessity, the commission may consider any route not varying from that contained in the Articles of Incorporation, irrespective of that in the petition.—In re Directors of Frontier & W. R. Co., 139 N. Y. S. 627.

In granting a certificate of public convenience and necessity for constructing a railroad under Public Service Commission Law, § 53, the public service commission acts solely as guardian of the public interest, and such certificate does not control the precise route of the road.—Id.

§ 53 (N.Y.Sup.) A rule by the public service commission requiring the filing of a map of the proposed route of any railroad upon application for certificate of public convenience and necessity has not the effect of a statute, and does not limit the commission's power.—In re Directors of Frontier & W. R. Co., 139 N. Y. S. 627.

RATE.

See Interest, § 37.

RATIFICATION.

See Corporations, § 82; Principal and Agent, § 164; Wills, § 160.

RATS.

See Landlord and Tenant, § 172.

REAL ACTIONS.

See Partition; Quieting Title.

RECEIVERS.

See Assignments, §§ 14, 131; Execution, § 386.

IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

(B) Supervision and Instructions of Court.

§ 110 (N.Y.Sup.) Application by executor for summary order, directing the superintendent of banks to pay out of moneys in his hands as liquidator the deposit of petitioner's decedent, will be denied for want of jurisdiction.—In re Peters, 139 N. Y. S. 952.

RECEIVING STOLEN GOODS.

See Criminal Law, § 1206; Indictment and Information, § 191½.

§ 2 (N.Y.Sup.) Under Penal Law (Consol. Laws 1909, c. 40) §§ 1290, 1308, 1309, punishing the receiving of stolen property, and defining larceny and section 2186 making a child between 7 and 16 years of age guilty of juvenile delinquency for committing an act which, if committed by an adult, would be a crime, one criminally receiving goods from a child under the age of 16 years who appropriated the same in a manner to constitute larceny, if appropriated by an adult, is guilty of receiving stolen goods.—People v. Pollak, 139 N. Y. S. 831.

One inciting boys under 16 years of age to a vicious course of general conduct, and holding himself out to them as willing to purchase any silk which they may procure in any manner, is not a principal in a specific larceny by the boys of silk, so as to destroy the character of his act as a criminal receiver of the stolen silk.—Id.

RECOGNIZANCES.

See Witnesses, § 27.

RECORDS.

See Appeal, §§ 564–570, 1171; Evidence, §§ 322, 349; Highways, § 17; Mortgages, §§ 173, 175; Vendor and Purchaser, § 231.

REDEMPTION.

See Taxation, § 708.

REFERENCE.

See Attorney and Client, § 61.

I. NATURE, GROUNDS, AND ORDER OF REFERENCE.

§ 26 (N.Y.Sup.) Where the City Court of the city of New York had jurisdiction to try an action at law to which an equitable defense involving the taking of an account was interposed, it could, by consent, refer the action; and the mere fact that the order of reference was inaptly phrased did not affect its jurisdiction.—Oppenheimer v. Trebla Realty Co., 139 N. Y. S. 894.

III. REPORT AND FINDINGS.

§ 99 (N.Y.Sup.) In a representative action upon a surety bond for a private banker, a referee's conclusion of law that only the plaintiffs and the claimants therein were entitled to recover thereon, not carried into the judgment, which merely determined that such plaintiffs and claimants might recover, but not that others were not entitled to recover, held not res judicata as to plaintiff's right to recover in a subsequent action on the bond.—Santilli v. Illinois Surety Co., 139 N. Y. S. 656.

REFORMATION OF INSTRUMENTS.

See Mortgages, § 28.

REHEARING.

See New Trial.

RELEASE.

See Accord and Satisfaction; Brokers, § 74; Mines and Minerals, § 77; Payment; Wills, § 72.

I. REQUISITES AND VALIDITY.

§ 12 (N.Y.Sup.) A brokerage firm, carrying a stock pool account for two persons and executing a release of one, on the theory that the other was liable for his interest, though he had been actually discharged, *held* entitled to sue the former on the account; the release being without consideration.—*Post v. Thomas*, 139 N. Y. S. 6.

II. CONSTRUCTION AND OPERATION.

§ 29 (N.Y.Sup.) A release of one joint tortfeasor, unless expressly reserving the right to pursue the others, releases them.—*Casey v. Auburn Telephone Co.*, 139 N. Y. S. 579.

As regards the rule that release of one joint tortfeasor will release the others, it is immaterial that one claimed by the injured person to be liable, and who was released by him for a consideration, was in fact not liable; the party releasing thereby being estopped to claim such nonliability.—*Id.*

RELIGION.

See Guardian and Ward, §§ 29, 30.

RELIGIOUS SOCIETIES.

See Adoption; Parent and Child.

REMAINDERS.

See Life Estates; Perpetuities, § 4; Wills, §§ 473, 852.

REMOVAL OF CAUSES.

See Venue, §§ 68, 77.

REMOVAL OF CLOUD.

See Quieting Title.

RENT.

See Landlord and Tenant, §§ 90, 194-231; Perpetuities, § 9.

REPAIRS.

See Landlord and Tenant, §§ 152-157, 200, 211.

REPLEVIN.

See Pledges; Sales, § 479.

I. RIGHT OF ACTION AND DEFENSES.

§ 4 (N.Y.Sup.) Certain documents of value, such as deeds, etc., *held* subject to replevin, but that a canceled check could not be replevined.—

Bachmann-Bechtel Brewing Co. v. Gehl, 139 N. Y. S. 807.

Under the law providing for the replevin of chattels, a liquor tax certificate may be replevined.—*Id.*

IV. PLEADING AND EVIDENCE.

§ 57 (N.Y.Sup.) Under Liquor Tax Law, §§ 21, 22, 26, authorizing the sale of a liquor tax certificate to qualified persons, Laws 1911, c. 407, amending section 26, and Laws 1911, c. 263, providing for registration and proof of an assignment of a certificate as collateral security, *held*, in replevin for a certificate, that the complaint need not allege that plaintiff was not forbidden to traffic in liquors.—*Bachmann-Bechtel Brewing Co. v. Gehl*, 139 N. Y. S. 807.

VII. LIABILITIES ON BONDS AND UNDERTAKINGS.

§ 124 (N.Y.Sup.) Sureties on replevin bond, under Code Civ. Proc. § 1699, *held* not liable for the amount of a judgment in favor of a third person subsequently made a party defendant and awarded possession of the chattels.—*First Commercial Bank of Pontiac v. Valentine*, 139 N. Y. S. 1037.

RESCISSION.

See Sales, § 81.

RESERVATIONS.

See Vendor and Purchaser, § 230.

RES GESTÆ.

See Evidence, §§ 121, 122.

RESIDENCE.

See Domicile.

RES JUDICATA.

See Judgment, §§ 596-952.

RESOLUTIONS.

See Corporations, § 308.

RESTAURANTS.

See Innkeepers, § 11.

REVENUE.

See Taxation.

REVERSAL.

See Appeal, §§ 1169-1180.

REVIEW.

See Appeal.

REVOCATION.

See Dedication; Gifts, § 41; Trusts, § 59.

RISKS.

See Master and Servant, §§ 217, 220, 265, 288.

ROADS.

See Highways.

RULES.

See Master and Servant, §§ 141, 286.

RULES OF COURT.

See Appeal, § 564; Jury.

SAFE PLACE TO WORK.

See Master and Servant, §§ 101-103, 107, 118.

SALARY.

See Corporations, §§ 308, 312, 320; Municipal Corporations, § 213.

SALES.

See Appeal, § 1050; Bills and Notes, § 497; Brokers; Contracts, §§ 47, 117; Corporations, §§ 121, 320; Deeds; Evidence, § 441; Execution, § 410; Frauds, Statute of, §§ 83, 118, 125; Injunction, §§ 61, 113; Intoxicating Liquors; Landlord and Tenant, § 44; Limitation of Actions, § 195; Master and Servant, § 70; Mines and Minerals, § 99; Pleading, § 125; Pledges; Principal and Agent, §§ 69, 164; Set-Off and Counterclaim, § 21; Vendor and Purchaser.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 23 (N.Y.Sup.) Facts held to show a sufficient meeting of minds to constitute a contract for the sale of rubber.—Poel v. Brunswick-Balke-Collender Co., 139 N. Y. S. 602.

II. CONSTRUCTION OF CONTRACT.

§ 81 (N.Y.Sup.) Where one orders a belt, saying that he desired it by a certain day and the other party said he would try to have it ready then, but did not have it ready until the day following, the same being within a reasonable time after the order, the right of rescission did not exist.—Morse v. Canaswacta Knitting Co., 139 N. Y. S. 634.

§ 81 (N.Y.Sup.) A contract calling for the delivery of merchandise about December 20th, and for a shipment f. o. b. Boston, is complied with where the goods are shipped on December 22d.—Hughes v. Constantin, 139 N. Y. S. 865.

IV. PERFORMANCE OF CONTRACT.**(C) Delivery and Acceptance of Goods.**

§ 168½ (N.Y.Sup.) Where purchasers of rice reserved the right to examine it before acceptance, and did examine and reject it, title did not pass, so that they could not be compelled to accept the rice and recover by counterclaim damages for its defective quality, but could resist an action for its price on the ground of breach of contract.—Standard Milling Co. v. De Pass, 139 N. Y. S. 611.

§ 173 (N.Y.Sup.) Defendant, selling tomatoes to be packed, by contract giving the address of plaintiffs, the purchasers, providing for shipment "as soon as packed," and not providing for further shipping instructions, could not re-

fuse to deliver because no such instructions were promptly given.—Seeman v. Chas. M. Scott Packing Co., 139 N. Y. S. 944.

VI. WARRANTIES.

§ 272 (N.Y.Sup.) The law would imply the seller's agreement that rice sold was of a merchantable quality.—Standard Milling Co. v. De Pass, 139 N. Y. S. 611.

§ 288 (N.Y.Sup.) Where an oral contract for the sale of yarn contained an express warranty of quality equal to a sample, such express warranty survives acceptance of the goods.—Powell v. New England Cotton Yarn Co., 139 N. Y. S. 569.

VII. REMEDIES OF SELLER.**(E) Actions for Price or Value.**

§ 353 (N.Y.Sup.) Complaint in an action for price of lumber held insufficient, because it did not show that the lumber was sold by plaintiffs, or, if sold by another, that the claim had been assigned to them, or that defendant's promise to pay was made to them.—McCarthy v. Fitzgerald, 139 N. Y. S. 950.

VIII. REMEDIES OF BUYER.**(C) Actions for Breach of Contract.**

§ 416 (N.Y.Sup.) In an action for breach of a contract to sell goods for resale, it was error to exclude plaintiff's evidence that he endeavored to buy goods of the same character in the open market, though the complaint did not state the measure of damages to which such evidence would be pertinent.—Finkelstein v. Selwitz, 139 N. Y. S. 122.

§ 418 (N.Y.Sup.) A manufacturer, breaching his contract to furnish goods for resale, is liable for the difference between the market price at the time and place of delivery and the agreed price, if the goods are obtainable in the market, and, if not, for the difference between the contract price and the resale price, less expense saved.—Finkelstein v. Selwitz, 139 N. Y. S. 122.

For breach of a contract to manufacture and deliver merchandise bought for resale, the purchaser is entitled to recover as general damages the difference between the market price at the time and place of delivery and the contract price, though he fails to prove special damages.—Id.

(D) Actions and Counterclaims for Breach of Warranty.

§ 429 (N.Y.Sup.) Where the sale of a mare was conditional on payment of the price, an action for breach of warranty of soundness will not lie, where the purchase-money note was not paid at maturity.—Carpenter v. Chapman, 139 N. Y. S. 849.

§ 430 (N.Y.Sup.) If there was a warranty as to the condition of a mare sold and breach thereof, the mare dying, the seller could not recover the balance of the purchase-money note in the buyer's action for breach of warranty.—Carpenter v. Chapman, 139 N. Y. S. 849.

§ 440 (N.Y.Sup.) In an action for breach of an express warranty that yarn should be of a quality equal to a sample, proof that underwear manufactured therefrom was worth 50 cents per dozen less than if made from such

yarn as defendant was to furnish was not the proper mode of showing the difference in value, and hence the admission of such proof was error.—*Powell v. New England Cotton Yarn Co.*, 139 N. Y. S. 569.

§ 442 (N.Y.Sup.) Where an article is delivered to a buyer with an express warranty, the measure of the buyer's damages on breach of warranty is the difference between the value of the article if it had been as warranted and its actual value.—*Powell v. New England Cotton Yarn Co.*, 139 N. Y. S. 569.

IX. CONDITIONAL SALES.

§ 467 (N.Y.Sup.) Where there is no evidence of intent nor any disputed facts, the construction of the waiver in a contract providing that a purchaser waived all the benefits of the provisions of the Lien Law, the blank in which the contract was drawn having been printed when such law, which had then been repealed and reenacted in the Personal Property Law, was in force, is solely for the court.—*Saitch v. Kelley*, 139 N. Y. S. 534.

A contract drawn by a vendor which is designed to work a forfeiture of goods sold and money paid thereon on certain conditions is to be strictly construed against the vendor.—*Id.*

§ 479 (N.Y.Sup.) A seller in a conditional contract of sale may, in default of payment, exercise his right to take possession, and he is not deprived thereof merely because he attempted to exercise it by void process of replevin.—*Mendelson v. Irving*, 139 N. Y. S. 1065.

§ 481 (N.Y.Sup.) Under Personal Property Law, § 65, providing that a seller is liable for payments made for property sold conditionally, where he retakes the property and retains it exceeding a certain time without selling same, a seller who retook property and rented it for four months and appropriated the rent without applying it on the contract, was liable for a return of the payments.—*Crowe v. Liquid Carbonic Co.*, 139 N. Y. S. 587.

SAMPLES.

See Sales, § 440.

SATISFACTION.

See Accord and Satisfaction; Payment; Release.

SECONDARY EVIDENCE.

See Evidence, §§ 181, 182.

SELF-SERVING DECLARATIONS.

See Evidence, § 271.

SENTENCE.

See Criminal Law, §§ 1023, 1206, 1217.

SEPARATE TRIALS.

See Trial, § 3.

SEPARATION.

See Husband and Wife, § 300.

SERVANTS.

See Master and Servant.

SERVICES.

See Master and Servant, § 70; Work and Labor.

SET-OFF AND COUNTERCLAIM.

See Judgment, § 654; Jury; Sales, § 168½; Work and Labor, §§ 27, 30.

I. NATURE AND GROUNDS OF REMEDY.

§ 21 (N.Y.Sup.) The fact that defendant, sued for the conversion of horses, had sold them without compliance with the Lien Law, did not preclude him from proving a counterclaim, alleging that a certain amount was originally due from the plaintiff, and allowing credit for the sale price.—*Waters v. Lang*, 139 N. Y. S. 844.

II. SUBJECT-MATTER.

§ 22 (N.Y.Sup.) Manager of hotel, who wrongfully continued in the possession and management after discharge, *held* not entitled, when sued by the owner for the money collected, to recoup his losses on the hotel from the rents wrongfully collected for storerooms in the same building.—*Pakas v. Hurley*, 139 N. Y. S. 72.

§ 29 (N.Y.Sup.) A counterclaim in an action for the conversion of horses, alleging that a certain amount was originally due from the plaintiff, and allowing credit for the sale price, arose out of the contract under which the horses were delivered, and so was connected with the subject of the action, as defined by Code Civ. Proc. § 501, relating to the subject of a counterclaim.—*Waters v. Lang*, 139 N. Y. S. 844.

SETTLEMENT.

See Accord and Satisfaction; Account Stated; Executors and Administrators, §§ 507, 509; Payment; Release.

SHAM PLEADING.

See Pleading, § 362.

SHERIFFS AND CONSTABLES.

See Courts, § 169; Execution, § 450.

SIDEWALKS.

See Municipal Corporations, §§ 763, 818, 821.

SIGNATURES.

See Landlord and Tenant, § 22; Wills, § 303.

SLANDER.

See Libel and Slander.

SLEEPING CARS.

See Carriers, §§ 413, 417.

SPIRITUOUS LIQUORS.

See Intoxicating Liquors.

SPLITTING CAUSES OF ACTION.

See Action, § 53.

STATES.

See Constitutional Law, § 65; Criminal Law, § 1024; Intoxicating Liquors, § 6; Officers, §§ 2, 110; Weapons.

VI. ACTIONS.

§ 191 (N.Y.Sup.) The state can only be sued by its own consent.—Lippmann v. Mende, 139 N. Y. S. 298.

STATUTES.

See Frauds, Statute of; Limitation of Actions.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§ 35½ (N.Y.Sup.) The referendum provision of Bronx County Act, § 16, that the act should be inoperative unless a majority of the votes in the new county should be in its favor, held unconstitutional.—People ex rel. Unger v. Kennedy, 139 N. Y. S. 896.

§ 64 (N.Y.Sup.) Invalidity of Bronx County Act, § 16, providing that the act should be inoperative unless a majority of the votes cast in the county should be in its favor, held to affect a substantial part of the act, and to render the whole act unconstitutional.—People ex rel. v. Unger v. Kennedy, 139 N. Y. S. 896.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 181 (N.Y.Sup.) While the courts cannot so interpret a statute as to avoid inequalities

where its intention is plain, they may where there is room for interpretation construe it so as to avoid false consequences which cannot be deemed to have been intended by the Legislature.—People ex rel. Braeburn Ass'n v. Hankling, 139 N. Y. S. 436.

§ 184 (N.Y.Sup.) Statutes must be construed in view of the existing condition of the law and the evil aimed at.—People ex rel. Darling v. Warden of City Prison, 139 N. Y. S. 277.

§ 215 (N.Y.Sup.) In determining the meaning of a word used in a statute, the court is warranted in considering the scope and purpose of the act, its history, other statutes in pari materia, and judicial construction of similar statutes in other jurisdictions.—Lipstein v. Provident Loan Society of New York, 139 N. Y. S. 799.

§ 224 (N.Y.Sup.) In determining the proper construction of apparently conflicting statutes, the intent in their passage governs, which is to be gathered, not only from the language of the acts themselves, but from their relation to each other in the order of time of their enactment.—Dominick v. Stern, 139 N. Y. S. 59.

§ 226 (N.Y.Sup.) When the Legislature enacts a statute which is a transcript of an English act that has received a known and settled construction by the courts of that country, such construction is deemed to be within the intent of the lawmaking power.—Lipstein v. Provident Loan Society of New York, 139 N. Y. S. 799.

§ 231 (N.Y.Sup.) A construction of statutes based upon the order of their passage was not affected by the subsequent re-enactment thereof in the Consolidated Laws, in view of the statutory provision for the construction of the Consolidated Laws.—Dominick v. Stern, 139 N. Y. S. 59.

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STAY.

See Undertakings.

STIPULATIONS.

See Abatement and Revival, § 79; Attorney and Client, § 86; Pleading, § 406.

§ 14 (N.Y.Sup.) On motion, after plaintiff's death, against his representatives to vacate a judgment, court held to have power to make such papers as might be a pertinent part of the proceedings in a motion made before plaintiff's death, which did not abate because of a stipulation by plaintiff.—Hunt v. Hunt, 139 N. Y. S. 413.

STOCK.

See Corporations, §§ 82-155, 320.

STOCKHOLDERS.

See Corporations, §§ 151, 308, 320.

STOLEN GOODS.

See Receiving Stolen Goods.

STREET RAILROADS.

See Master and Servant, §§ 278, 285, 289; Nuisance, § 72; Railroads.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 13 (N.Y.Sup.) The confirmation in 1907 of a report of commissioners that a subway should not then be constructed in a certain street *held* not an adjudication that a subway should never be constructed in that street, so as to preclude a subsequent application.—In re Public Service Commission, 139 N. Y. S. 982.

Under Rapid Transit Act (Laws 1891, c. 4, as amended by Laws 1912, c. 226) § 4, requiring the general plan of construction of a subway, etc., to contain details showing the extent to which abutting property is affected, and section 6, requiring Public Service Commissions to prepare detail plans of construction in accordance with the general plan, the general plan need not show how deep an excavation will be necessary, or what detailed changes are required to properly construct the road.—Id.

The action of the Public Service Commission in amending the general plan of construction of a double-track subway, so as to show that the tracks were to be on one level, was a mere detail, not requiring the plans to be resubmitted to a new commission or the municipal authorities.—Id.

In so far as possible, the city should secure abutting owners for damage to abutting property because of defective plans for the construction of a subway or negligence in construction, or for damages from its construction upon the proposed plan.—Id.

§ 22 (N.Y.Sup.) Before a street railway may construct its road over a public highway, it must obtain the certificate of convenience and necessity from the Public Service Commission provided by Railroad Law, § 9, or the consent of the Commission, under Public Service Commission Law, § 53, or both, the consent of the local authorities, and the consent of the abutting owners, or the determination of commissioners in favor of the road, under Const. art. 3, § 18, and Railroad Law, §§ 171, 174.—Manhattan Bridge Three Cent Line v. Brooklyn Heights R. Co., 139 N. Y. S. 216.

§ 25 (N.Y.Sup.) The commissioner of bridges of New York City cannot authorize the operation of a street railroad over a public street not otherwise authorized in the manner prescribed by law.—Manhattan Bridge Three-Cent Line v. Third Avenue Ry. Co., 139 N. Y. S. 434.

§ 41 (N.Y.Sup.) Application, under Railroad Law, § 22, for the appointment of commissioners to determine the compensation for crossing

tracks of defendant railway at their intersection with Flatbush Avenue extension, where the consent of the requisite number of owners along Flatbush Avenue extension is shown, will be granted.—Manhattan Bridge Three Cent Line v. Brooklyn Heights R. Co., 139 N. Y. S. 216.

The consent of existing railroads having trackage on streets other than Flatbush Avenue extension, on routes coincident with those of plaintiff, is not necessary to plaintiff's right of crossing the defendant's tracks where they intersect that avenue.—Id.

II. REGULATION AND OPERATION.

§ 113 (N.Y.Sup.) Evidence that the city had contracted for the paving of a street adjacent to the tracks of defendant street railroad, by defects in which plaintiff was jolted from his wagon, and that the contractor agreed to repair it for 15 years, and the city had rendered a bill to the railroad company for its part of the expense, *held* admissible for the railroad company in an action for plaintiff's injuries.—Maloney v. City of New York, 139 N. Y. S. 794.

STREETS.

See Highways; Municipal Corporations, §§ 658-706, 796, 806.

STRIKING OUT.

See Pleading, § 362.

SUBROGATION.

See Principal and Surety, § 147.

§ 1 (N.Y.Sup.) Subrogation is based on the facts of each particular case, and is generally applied where one person is compelled for his own protection, or that of some interest which he represents, to pay a debt for which another is primarily liable.—Sexton v. Fensterer, 139 N. Y. S. 811.

§ 7 (N.Y.Sup.) A surety, who pays the debt of his principal, is subrogated to all the securities, liens, and equities held by the creditor against the principal, and is entitled to enforce them against the principal in a court of equity.—Sexton v. Fensterer, 139 N. Y. S. 811.

A surety for the drawer of a bill on payment is subrogated to the rights of the holder.—Id.

A prior surety, compelled to pay a debt, will be subrogated to the rights of the creditor against the subsequent surety.—Id.

§ 11 (N.Y.Sup.) Where an agent received money from the owner to pay assessments on property, and the agent's servant forged a check against funds of the agent, which was used to pay the assessments, the bank on which the check was drawn was not entitled to subrogation, on repaying the money to the agent's estate, to the lien of the city on the assessments.—Title Guarantee & Trust Co. v. Haven, 139 N. Y. S. 207.

SUBSCRIPTIONS.

See Corporations, § 82; Judgment, § 250.

SUIT.

See Action.

SUNDAY.

§ 29 (N.Y.Sup.) Under Penal Law, § 2152, forbidding theatrical performances on Sunday, and making every person aiding the performance guilty of a misdemeanor, *held*, on demurrer to information, that only managers and owners, and not actors, ticket sellers, and others laboring about the theater, were principals; the actors and laborers only being punishable under section 2145.—*People v. Hammerstein*, 139 N. Y. S. 644.

§ 29 (N.Y.Sup.) Under Penal Law, § 2152, forbidding theatrical performances on Sunday and making every person aiding the performance guilty of a misdemeanor, *held*, on demurrer to information, that both the performers, managers, and any persons assisting in the performance were principals committing the same offense by violation of the same statute.—*People v. Hammerstein*, 139 N. Y. S. 1075.

Penal Law, § 1937, providing an imprisonment for not more than one year, or a fine of not more than \$500, or both, by its express terms fixes the punishment for giving theatrical performances on Sunday; Penal Law, § 2152, forbidding such performance, not providing a specific punishment.—*Id.*

§ 29 (N.Y.Mag.Ct.) Evidence *held* to sustain conviction for violation of Penal Law, § 2152, making it unlawful to exhibit certain performances on Sunday.—*People v. Kingston*, 139 N. Y. S. 649.

In a prosecution under Penal Law, § 2152, prohibiting certain Sunday theatrical performances evidence *held* to show that defendant was manager of a prohibited performance.—*Id.*

Under Penal Law, § 2152, forbidding theatrical performances on Sunday, and making every person aiding the performance guilty of a misdemeanor, *held* on motion to dismiss the complaint that both the performers, managers, and any persons assisting in the performance were principals committing the same offense by violation of the same statute.—*Id.*

SUPPLEMENTAL PLEADING.

See Pleading, § 280.

SUPPLEMENTARY PROCEEDINGS.

See Execution, §§ 372-410.

SUPPORT.

See Husband and Wife, § 300.

SURETYSHIP.

See Principal and Surety.

SURRENDER.

See Landlord and Tenant, §§ 194, 231.

SUSPENSION.

See Attorney and Client, §§ 40-61.

TAXATION.

See Attorney and Client, § 182; Courts, § 512; Descent and Distribution, § 5; Executors and Administrators, § 523; Landlord and Tenant, § 149; Life Estates; Partition, § 16; Subrogation; Vendor and Purchaser, § 198.

III. LIABILITY OF PERSONS AND PROPERTY.**(D) Exemptions.**

§ 200 (N.Y.Sup.) Under Tax Law, §§ 251, 253, 260, providing that property within the state taxed by that act shall be exempt from other taxation, etc., a bond secured by a mortgage on real property partly within and partly without the state is taxable by the local assessors in an amount proportionate to the value of the real property outside the state.—*People ex rel. Braeburn Ass'n v. Hanking*, 139 N. Y. S. 436.

V. LEVY AND ASSESSMENT.**(G) Review, Correction, or Setting Aside of Assessment.**

§ 496 (N.Y.Sup.) Certiorari to review determination of board of taxes and assessments on an application for a reduction or cancellation of an assessment of bank shares, instituted November 29, 1910, *held* barred by the limitation contained in Laws 1909, c. 74.—*People ex rel. German-American Bank v. Purdy*, 139 N. Y. S. 180.

A remedy even for jurisdictional defects in the assessment of a tax may be barred by a statutory limitation.—*Id.*

X. REDEMPTION FROM TAX SALE.

§ 708 (N.Y.Sup.) An allegation, in an action to foreclose a transfer tax lien, that the premises may have escheated to the people, is not a detailed statement of facts showing the particular nature of the people's interest, as is required by Greater New York Charter, § 1035, as amended by Laws 1911, c. 65, to authorize making the people a party defendant.—*Lippmann v. Mende*, 139 N. Y. S. 298.

The complaint, in an action to foreclose a transfer tax lien, cannot be aided by answering affidavits subsequently filed on motion to strike a party defendant.—*Id.*

XI. TAX TITLES.**(B) Tax Deeds.**

§ 788 (N.Y.Sup.) On the production of a tax lease, it is presumed that the tax was legally imposed, and the proceedings and sale regular.—*Cromwell v. Nichols*, 139 N. Y. S. 1051.

TELEGRAPHS AND TELEPHONES.

See Eminent Domain, § 119.

II. REGULATION AND OPERATION.

§ 36 (N.Y.Sup.) Where a cable company agreed with the sender of a message to stop its transmission and negligently failed to do so, it was liable to the sender for damages thereby

sustained.—*Bertuch v. United States & Hayti Telegraph & Cable Co.*, 139 N. Y. S. 289.

A cable company, which agrees to stop the transmission of a message delivered to it, was not excused from its failure to stop the message by the sender's failure to tender tolls for an additional message required to effect the stoppage; such tolls not having been demanded.—*Id.*

§ 56 (N.Y.Sup.) Right to sue a cable company for failing to perform an agreement to stop a cipher cable message which the sender had delivered to it for transmission, whether in contract or tort, *held* in the sender and not in the addressee.—*Bertuch v. United States & Hayti Telegraph & Cable Co.*, 139 N. Y. S. 289.

§ 66 (N.Y.Sup.) A cable company, which agreed to stop the transmission of a message delivered to it, could not be held guilty of gross negligence in failing to effect such stoppage, where the only evidence of negligence related to a mistake or error of an operator at some distant post, but it was not shown whether such operator was an employé of the defendant or of a connecting line.—*Bertuch v. United States & Hayti Telegraph & Cable Co.*, 139 N. Y. S. 289.

§ 67 (N.Y.Sup.) Where a cable company agreed but negligently failed to stop a cipher cable message, the sender *held* entitled to recover only nominal damages whether suit was brought in contract or tort.—*Bertuch v. United States & Hayti Telegraph & Cable Co.*, 139 N. Y. S. 289.

The mere fact that a cable company knew that a cipher message related to a "business matter" did not charge it with knowledge of the nature of a message so as to render it liable for special damages for failure to stop its transmission on the order of the sender.—*Id.*

TENANCY.

See Landlord and Tenant.

TENANCY IN COMMON.

See Estoppel; Partition, § 48; Quieting Title, § 23.

TENDER.

See Corporations, § 121; Insurance, § 730; Judgment, § 199; Life Estates; Telegraphs and Telephones.

TERMINATION.

See Landlord and Tenant, §§ 44, 109, 116, 194, 231.

TERMS.

See Landlord and Tenant, §§ 90, 109; Officers, §§ 2, 49.

TESTAMENTARY CAPACITY.

See Wills, §§ 52-55, 324.

THEATERS AND SHOWS.

See Landlord and Tenant, § 152; Sunday.

TIME.

See Appeal, § 564; Execution, § 372; Judgment, § 163; Jury; Master and Servant, § 163; Mechanics' Liens, § 115; Mortgages, §§ 51, 186; Perpetuities, § 4; Pleading, §§ 222, 323; Sales, § 81; Trial, § 14.

TITLE.

See Evidence, § 265; Gifts, §§ 30, 41; Partition, § 16; Quieting Title; Quo Warranto; Sales, § 168½; Vendor and Purchaser, § 130.

TOOLS.

See Master and Servant, §§ 101, 102, 104, 252.

TORTS.

See Death, § 39; False Imprisonment; Libel and Slander; Municipal Corporations, §§ 763-821; Negligence; Nuisance; Release, § 29; Trover and Conversion.

§ 8 (N.Y.Sup.) A story of an adventure published in a newspaper, and falsely represented to have been written by plaintiff, a traveler and writer of reputation, calculated to draw readers to the paper, *held* an unauthorized use of his name for the "purposes of trade," entitling him to an action for damages under Civil Rights Law, § 51.—*D'Altomonte v. New York Herald Co.*, 139 N. Y. S. 200.

TOWNS.

See Counties; Municipal Corporations; Paupers.

TRADE-MARKS AND TRADE-NAMES.

IV. INFRINGEMENT AND UNFAIR COMPETITION.

(B) What Competition Unlawful.

§ 70 (N.Y.Sup.) Plaintiff, the "Lockport Canning Company," being first in the field in the city of Lockport, commonly known as Lock City, in the business of canning tomatoes, the use by defendant, engaging there in the same business, in competition with it, of the name "Lock City Canning Company," is calculated to deceive customers, and will be enjoined.—*Lockport Canning Co. v. Pusateri*, 139 N. Y. S. 640.

TRANSCRIPTS.

See Evidence, § 349.

TRESPASS.

See False Imprisonment.

TRIAL.

See Appeal, §§ 153, 171-221, 1033, 1060, 1170; Brokers, § 88; Carriers, §§ 280, 320; Costs; Criminal Law, §§ 874, 1038, 1170½; Dismissal and Nonsuit; Electricity; Insurance, § 668; Judgment, §§ 199, 250; Jury; Limitation of Actions, § 199; Master and Servant, §§ 43, 125, 285, 286, 288, 289, 293; Municipal Corporations, §§ 706, 821; New Trial;

Partnership, § 296; Reference, § 26; Sales, § 467; Stipulations; Venue; Wills, § 324; Witnesses; Work and Labor, § 30.

I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.

§ 3 (N.Y.Sup.) In an action on a note, defendant, having filed equitable defenses and an equitable counterclaim, held not entitled to a separate trial of the equitable issues before trial of the action on the note.—White v. Shonts, 139 N. Y. S. 169.

II. DOCKETS, LISTS, AND CALENDARS.

§ 14 (N.Y.Sup.) Where a plaintiff fails to show why a case which has been on the calendar for several years should be continued thereon, and the case is stricken, he must, to have the case restored, satisfy the court that the case is likely to be tried.—Frederick v. Oliver & Burr, 139 N. Y. S. 320.

Under Code Civ. Proc. §§ 977, 822, the court may on its own motion, on proper notice, strike a case from the calendar, where it has remained for an unreasonable time.—Id.

IV. RECEPTION OF EVIDENCE.

(A) Introduction, Offer, and Admission of Evidence in General.

§ 48 (N.Y.Sup.) Where most of a letter written by plaintiff to defendants manifestly had no probative force on any of the issues involved, its rejection when offered in its entirety was not error.—Borough Development Co. v. Harmon, 139 N. Y. S. 302.

(C) Objections, Motions to Strike Out, and Exceptions.

§ 76 (N.Y.Sup.) An objection to testimony, sought to be elicited by a question, on the ground that it calls for a conclusion, should be made before answer.—Malcomson v. Monaton Realty Investing Corporation, 139 N. Y. S. 405.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

§ 127 (N.Y.Sup.) A question by counsel for plaintiff to a witness as to whether he was connected with the insurance company that was in the case was reversible error, on the ground that it sought to prejudice the rights of the defendant to a fair and impartial trial.—Perlman v. I. Blyn & Sons, 139 N. Y. S. 1082.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

§ 139 (N.Y.Sup.) Plaintiff having made out a prima facie case presenting issues of fact for the jury, it was error to dismiss the complaint at the close of his case.—Pace v. D'Angelo, 139 N. Y. S. 844.

(C) Dismissal or Nonsuit.

§ 165 (N.Y.Sup.) In deciding motion for nonsuit, the plaintiff is entitled to the most favor-

able inferences which may be drawn from the facts proved.—Hirsch v. Lichtenstein, 139 N. Y. S. 4.

§ 165 (N.Y.Sup.) The court, on motion for nonsuit at the close of plaintiff's case, must give to plaintiff the most favorable inferences which the facts proved, assumed to be true, will justify.—Leddy v. Carley, 139 N. Y. S. 227.

VII. INSTRUCTIONS TO JURY.

(D) Applicability to Pleadings and Evidence.

§ 251 (N.Y.Sup.) In an action for injuries to a servant, resulting from the breaking of the tongue of a truck, where the pleadings raised no issue as to the grain of the wood in the tongue, an instruction submitting the question whether the wood was suitable in that respect was erroneous.—Limerick v. Holdsworth, 139 N. Y. S. 737.

§ 251 (N.Y.Sup.) Where a lessee in an action for rent showed, under objection without pleading it, an agreement to surrender the lease before its expiration for an agreed rebate, and plaintiff denied the agreement, the refusal to submit the issue to the jury was proper.—Parish v. Fishel, 139 N. Y. S. 1033.

IX. VERDICT.

(A) General Verdict.

§ 337 (N.Y.Sup.) Where the court instructed that, if defendant hitched his team to the fence by a proper strap tied to the outside horse, he was not liable for injuries by their breaking away, and the weight of the evidence showed they were so hitched, verdict against defendant was not sustainable on the theory that such hitching was found to be negligent.—Mumm v. Dance, 139 N. Y. S. 566.

(B) Special Interrogatories and Findings.

§ 352 (N.Y.Sup.) The submission of special interrogatories as to whether an electric light company exercised reasonable care in erecting and in maintaining its lamps, poles, and apparatus did not prejudice plaintiff because plural in form, since, if there was negligence as to any lamp or pole, the jury should have so answered.—Huscher v. New York & Queens Electric Light & Power Co., 139 N. Y. S. 537.

X. TRIAL BY COURT.

(B) Findings of Fact and Conclusions of Law.

§ 394 (N.Y.Sup.) A judgment will be reversed where the trial court does not comply with Code Civ. Proc. § 1022, requiring the court's decision to state separately the facts found and the conclusions of law.—Mattiaccio v. Illinois Surety Co., 139 N. Y. S. 980.

TROVER AND CONVERSION.

See Carriers, § 57; Evidence, §§ 121, 236; Pledges; Set-Off and Counterclaim, § 29.

I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.

§ 2 (N.Y.Sup.) An action in trover may be maintained for choses in action.—*Bachmann-Bechtel Brewing Co. v. Gehl*, 139 N. Y. S. 807.

TRUST COMPANIES.

See Banks and Banking, § 317.

TRUST DEEDS.

See Mortgages.

TRUSTEES.

See Bankruptcy, §§ 150, 156, 196.

TRUSTS.

See Abatement and Revival, § 8; Charities; Conversion; Eminent Domain, § 158; Perpetuities, §§ 4, 6, 9; Powers, § 25; Wills, §§ 81, 587, 688, 852, 853.

I. CREATION, EXISTENCE, AND VALIDITY.

(A) Express Trusts.

§ 20 (N.Y.Sup.) A will reciting that the testatrix had received all her property from her deceased husband, and that she devised it in accordance with his intention that the residue should be divided among his children, is not a declaration of trust of all the property received, within Real Property Law, § 242.—*Gabriel v. Gabriel*, 139 N. Y. S. 778.

§ 59 (N.Y.Sup.) The creator of a trust in personalty, whereby she grants to trustees her estate to receive the income and pay the same to her for life and deliver the corpus to persons as she may designate by will, is the only person beneficially interested within Personal Property Law, § 23, and she may revoke the trust in part.—*Sperry v. Farmers' Loan & Trust Co.*, 139 N. Y. S. 192.

§ 59 (N.Y.Sup.) The giving of a savings bank book to the donee, in connection with a deposit in the name of the donor as trustee for the donee, created an irrevocable trust, which was not revoked by the returning of the book at the request of the donor, in the absence of any evidence that the donor intended to revoke the trust and that the donee consented thereto.—*Stockert v. Dry Dock Savings Ins.*, 139 N. Y. S. 986.

Where a savings bank deposit is made in trust, whether irrevocably or tentatively only, it cannot be revoked by will.—Id.

IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

§ 242 (N.Y.Sup.) Provisions of a will creating a testamentary trust to be executed by a majority of the trustees, and vacancies to be filled with the consent of the cestui que trust, construed with Real Property Law, § 166, empowering the survivor of several vested with a power to execute such power, and held that, after the cestui's refusal to consent to the appointment of a new trustee, the two surviving trustees could convey real property belonging to the estate.—*Lane v. Hustace*, 139 N. Y. S. 784.

At common law powers coupled with an interest or annexed to the office of the trustee passed, if possible, with the trust, to be exercised by the successors or survivors of the original trustees.—Id.

In view of Code Civ. Proc. § 2818, as amended by Laws 1884, c. 408, providing that surviving trustees may execute a trust unless the trust instrument requires action by all the trustees, a will providing that a will might be executed by a majority of the trustees for the time being, whether they were survivors or those originally named, did not preclude an execution of the trust by the surviving two of three testamentary trustees.—Id.

VI. ACCOUNTING AND COMPENSATION OF TRUSTEE.

§ 298 (N.Y.Sur.) In an accounting by a testamentary trustee of personal property held in New York, over which testator's daughter had a power of appointment, held, that the surrogate might adjudicate a motion by the surviving husband of the donee to overrule and dismiss a defense of an adverse respondent.—In re *New York Life Ins. & Trust Co.*, 139 N. Y. S. 695.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

(B) Right to Follow Trust Property or Proceeds Thereof.

§ 349 (N.Y.Sup.) One deprived of his property by fraud may, if he can identify it, or trace the proceeds from its sale, impress a trust on it or the proceeds, though the wrongdoer, or one claiming title through him, is insolvent.—*Jaffe v. Weld*, 139 N. Y. S. 1101.

§ 358 (N.Y.Sup.) To follow trust funds into other property, and impress them with a trust, the funds must be clearly traced and distinctly proved to have been invested in other property.—*Jaffe v. Weld*, 139 N. Y. S. 1101.

Where a dealer drew drafts, to which forged bills of lading were attached, and plaintiff purchased the drafts, and the dealer obtained credit at a bank for currency drafts issued to facilitate the remittance of the money paid by plaintiff, and the dealer, by means of the credit, purchased goods subsequently transferred to defendant, plaintiff could not impress the goods in the hands of defendant with a trust.—Id.

UNBORN CHILDREN.

See Infants, § 72.

UNDERTAKINGS.

See Bankruptcy, § 195; Jury.

§ 6 (N.Y.Sup.) In action on undertaking given to secure stay of proceedings, plaintiff held not entitled to recover the amount of the judgment in the first action, without proving that the bankrupt judgment debtor was solvent when the stay was granted.—*Gibbs v. Title Guaranty & Surety Co.*, 139 N. Y. S. 945.

UNDUE INFLUENCE.

See Wills, §§ 153-166.

UNFAIR COMPETITION.

See Trade-Marks and Trade-Names.

UNLIQUIDATED CLAIMS.

See Interest, § 19.

USER.

See Highways, §§ 6, 7, 17.

USURY.**I. USURIOUS CONTRACTS AND TRANSACTIONS.****(A) Nature and Validity.**

§ 18 (N.Y.Sup.) A contract by which plaintiff advances money to defendant to satisfy claims for payment of which she is pressed, plaintiff to be repaid the amount advanced, with interest, plus the amount of discount obtained by plaintiff on the claim by reason of cash payments, is usurious.—*Merwin v. Robertson*, 139 N. Y. S. 723.

§ 53 (N.Y.Sup.) A transaction by which one makes a loan and receives a note for the full amount, but delivers only part of the money, retaining the balance as compensation for pretended services, makes the note usurious.—*Robertson v. Merwin*, 139 N. Y. S. 726.

§ 56 (N.Y.Sup.) A loan negotiated by an attorney from one of his clients to another, for which he charged the borrower a commission of \$500 without the knowledge of the lender, no part of which was paid to the lender, *held* not usurious.—*Jones v. Gay*, 139 N. Y. S. 158.

§ 85 (N.Y.Sup.) Where one of the joint owners of a fund made a loan therefrom, drawing and paying only part of the face of the note, taken running to one of the others, retaining the balance in the fund, on the fictitious claim of services to the borrower, all were affected by the usury.—*Robertson v. Merwin*, 139 N. Y. S. 726.

VACATION.

See Judgment, § 163.

VENDOR AND PURCHASER.

See Brokers; Deeds; Sales.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 16 (N.Y.Sup.) Where a written offer to sell land was duly accepted, and performance tendered by the purchaser before its withdrawal, the accepted offer became a contract binding on the vendor.—*Stewart v. Gillett*, 139 N. Y. S. 583.

III. MODIFICATION OR RESCISSION OF CONTRACT.**(A) By Agreement of Parties.**

§ 82 (N.Y.Sup.) Vendor *held* not relieved from his contract to convey land by a subsequent agreement as to the manner in which each party should perform his obligations or by the pur-

chaser's unaccepted compromise proposal.—*Stewart v. Gillett*, 139 N. Y. S. 583.

IV. PERFORMANCE OF CONTRACT.**(A) Title and Estate of Vendor.**

§ 130 (N.Y.Sup.) Show windows and a platform and steps giving access to a building, all of which may be easily removed, which extend some distance into the street, are not such encroachments thereon as to render the title unmarketable.—*Acme Realty Co. v. Schinasi*, 139 N. Y. S. 266.

The construction of a building with bay windows consisting of masonry, and extending from the ground in several places, and several other places starting at the second floor and running to the top of the building, and projecting a foot into the street, renders the building in the city of New York unmarketable.—*Id.*

(D) Payment of Purchase Money.

§ 174 (N.Y.Sup.) Purchaser *held* entitled to retain out of purchase money value of building which vendor while in default and in possession took down and removed.—*Stewart v. Gillett*, 139 N. Y. S. 583.

Purchaser *held* entitled to allowance on purchase price for his damages, where by the vendor's breach he was deprived of use of both the premises and the purchase money.—*Id.*

The purchaser's measure of damages for being wrongfully deprived of the use of the premises was the interest on the purchase money from the time he placed it at the vendor's disposal.—*Id.*

§ 175 (N.Y.Sup.) Where a vendor fails in his agreement to deliver a deed executed by his wife, the purchaser may retain the present value of the wife's inchoate right of dower in the land.—*Stewart v. Gillett*, 139 N. Y. S. 583.

V. RIGHTS AND LIABILITIES OF PARTIES.**(A) As to Each Other.**

§ 197 (N.Y.Sup.) A vendor, having agreed to protect a second mortgage on the property until February 1, 1904, *held* relieved from such obligation by the vendee's contract to sell a portion of the premises free of all incumbrances before any demand had been made for payment of the second mortgage.—*Utz v. Taylor*, 139 N. Y. S. 1025.

§ 198 (N.Y.Sup.) Vendor, and not purchaser, *held* chargeable with taxes while he received profits from land wrongfully withheld.—*Stewart v. Gillett*, 139 N. Y. S. 583.

(C) Bona Fide Purchasers.

§ 230 (N.Y.Sup.) A purchaser from one acquiring title under a mortgage foreclosure sale by deed referring for a description to prior deeds in the chain of title *held* chargeable with notice of reservations in the prior deeds.—*Tuscarora Club of Millbrook v. Brown*, 139 N. Y. S. 766.

§ 231 (N.Y.Sup.) The recording act is intended solely to protect a purchaser from an apparent owner against a prior deed or mortgage

which has not been recorded.—*Tuscarora Club of Millbrook v. Brown*, 139 N. Y. S. 766.

§ 242 (N.Y.Sup.) Where a mother obtained from her son a conveyance of his real estate to secure a debt, which the son paid, the mother thereafter had no title, and one claiming under her must show that she was authorized by the son to convey, or that he was a purchaser in good faith without notice.—*Tuscarora Club of Millbrook v. Brown*, 139 N. Y. S. 766.

VII. REMEDIES OF PURCHASER.

(A) Recovery of Purchase Money Paid.

§ 334 (N.Y.Sup.) A vendee held not entitled to recover a down payment on property belonging to a vendor and his wife as tenants by the entirety, because the contract was not signed by the wife, where the vendor offered to perform, and tendered a deed signed by himself and wife.—*Gaglione v. Giambrone*, 139 N. Y. S. 85.

VENUE.

I. NATURE OR SUBJECT OF ACTION.

§ 8 (N.Y.Sup.) An action for personal injuries negligently inflicted is transitory, and generally the place of trial should be in the county in which the cause of action arose.—*Jacina v. Lemmi*, 139 N. Y. S. 1034.

III. CHANGE OF VENUE OR PLACE OF TRIAL.

§ 68 (N.Y.Sup.) Where defendant, in an action for a personal injury, showed that all but one of his witnesses resided in the county where the accident occurred, and showed what they would testify to, the refusal to change the place of trial was erroneous; plaintiff, in his affidavit in opposition, not giving the names of the witnesses whom he proposed to call.—*Jacina v. Lemmi*, 139 N. Y. S. 1034.

§ 77 (N.Y.Sup.) A defendant, who, by inadvertence, served a cross-notice of trial, and who, before it was acted on by plaintiff, withdrew it, held not thereby deprived of his right to a change of the place of trial for the convenience of witnesses.—*Jacina v. Lemmi*, 139 N. Y. S. 1034.

VERDICT.

See Appeal, §§ 1002, 1003; Criminal Law, § 1023; Trial, §§ 337, 352.

VERIFICATION.

See Judgment, § 161.

VESTED REMAINDERS.

See Wills, §§ 630, 634.

VETERANS.

See Paupers.

VICE PRINCIPALS.

See Master and Servant, §§ 163-199.

VIEW.

See Eminent Domain, § 232.

VILLAGES.

See Municipal Corporations.

WAGES.

See Master and Servant, § 70.

WAIVER.

See Appeal, § 153; Appearance; Estoppel; Insurance, §§ 559, 579, 668; Landlord and Tenant, § 90; Master and Servant, § 220; Pleading, § 406; Sales, § 467.

WARDS.

See Guardian and Ward.

WAREHOUSEMEN.

See Interpleader, § 11.

WARRANTY.

See Sales, §§ 272, 288, 429-442.

WASTE.

See Wills, § 698.

WATERS AND WATER COURSES.

See Canals; Eminent Domain, § 230; Evidence, § 273; Judgment, § 743; Landlord and Tenant, § 149.

VII. CONVEYANCES AND CONTRACTS.

§ 154 (N.Y.Sup.) The right to pipe water from a spring granted by a 99-year lease held an easement in gross, and not appurtenant to an intervening house originally owned by the lessee.—*Coatsworth v. Hayward*, 139 N. Y. S. 331.

A grantee of an easement to use water from a spring to the extent of the capacity of a half-inch pipe between certain dwelling houses held entitled to permit the owner of an intervening house to use the water within the amount specified.—*Id.*

Right to use water drawn from a spring on other land conferred by a 99-year lease may be held separate from any particular piece of land, or conveyed as an appurtenance to land on which it is exercised.—*Id.*

Whether the right to the use of a water easement on certain land conveyed by the owner of the easement to her daughter passed by the deed as an appurtenance held to depend on the intent of the parties.—*Id.*

Facts held insufficient to show that the use of a water easement passed to complainant on the purchase of certain property on which the water had been used by the sufferance of the original owner of the easement.—*Id.*

§ 154 (N.Y.Sup.) Defendant, in an action to enjoin the use of waters of a certain spring, held to have acquired a right by prescription under a grant by the owner of the spring, which he had exercised for nearly 20 years.—*Hutchins v. Lavery*, 139 N. Y. S. 957.

§ 156 (N.Y.Sup.) The grantee of a right to use water on his farm held unable to convey a right

to a defendant to use such water on a farm not a part of the farm of such grantee.—*Hutchins v. Lavery*, 139 N. Y. S. 957.

IX. PUBLIC WATER SUPPLY.

(A) Domestic and Municipal Purposes.

§ 192 (N.Y.Sur.) Where city authorities allowed defendants to put water pipes in the street, but no contract was entered into, and defendants were not obliged to furnish water to any one unless they chose, the defendants had no right to keep the pipes in the street without the consent of the abutting property owners.—*Wightman v. Cottrell*, 139 N. Y. S. 564.

WAYS.

See Highways; Municipal Corporations, §§ 658-706.

WEAPONS.

§ 3 (N.Y.Sur.) The second amendment to the Constitution, providing that the right of the people to keep and bear arms shall not be infringed, merely operates on the federal government and did not grant such rights to the people of the states.—*People ex rel. Darling v. Warden of City Prison*, 139 N. Y. S. 277.

The state statute prohibiting the carrying of concealed weapons does not infringe any constitutional right of the citizen, being merely a police regulation.—*Id.*

Laws 1911, c. 195, amending Penal Law, § 1897, so as to make it a misdemeanor to have in one's possession a revolver, without a permit, is a valid exercise of the state's police power, though construed to prohibit the possession of a pistol in one's room, and not on his person.—*Id.*

§ 4 (N.Y.Sur.) Laws 1911, c. 195, amending Penal Law, § 1897, by inserting a provision making any person guilty of a misdemeanor who shall "have in his possession * * * any pistol * * * of a size which may be concealed upon the person," without a license, when construed with section 1914, added to the same chapter, prohibits one from having such pistol at any place, in his residence or elsewhere.—*People ex rel. Darling v. Warden of City Prison*, 139 N. Y. S. 277.

WILLS.

See Appeal, § 1050; Charities; Conversion; Courts, §§ 198, 202; Depositions; Descent and Distribution; Evidence, §§ 121, 506, 574; Executors and Administrators; Perpetuities, §§ 4, 6; Powers, §§ 25, 33, 36; Trusts; Witnesses, § 139.

I. NATURE AND EXTENT OF TESTAMENTARY POWER.

§ 2 (N.Y.Sur.) The modern law of wills being founded on the civil and canon law, such law, in the absence of modern law, is authoritative in probate courts.—*In re Van Ness' Will*, 139 N. Y. S. 485.

II. TESTAMENTARY CAPACITY.

§ 52 (N.Y.Sur.) Although an insane person, or one who was at times deprived of reason by

illness, may, in a lucid interval, make a will, the burden is on those upholding such a will to show that it was made in such lucid interval.—*In re Schmidt's Will*, 139 N. Y. S. 464.

§ 54 (N.Y.Sur.) When evidence is given in testamentary causes of aberrations or singular actions, it is always important as a standard of comparison to show the normal conduct and the intellectual character of the testator in times of conceded sanity.—*In re Schmidt's Will*, 139 N. Y. S. 464.

§ 55 (N.Y.Sur.) In an action to declare a codicil invalid for incapacity of the testator, evidence held to show that testator was at times competent and rational after an apoplectic stroke.—*In re Schmidt's Will*, 139 N. Y. S. 464.

In an action to declare a codicil invalid for incapacity of the testator, evidence held to show that, though testator was at times irrational, he was not so at the time of the execution of the will.—*Id.*

IV. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Testamentary Dispositions.

§ 72 (N.Y.Sur.) A paper is not valid as a will, where it was executed, not with the intention of passing any property, but merely as a sort of release to support executed assignments in favor of the sole beneficiary.—*In re Van Ness' Will*, 139 N. Y. S. 485.

§ 81 (N.Y.Sur.) A will may be entitled to probate, notwithstanding the invalidity of some of its provisions.—*In re Raab's Will*, 139 N. Y. S. 869.

The invalidity of a provision in a testamentary trust for the accumulation of an income during the minority of beneficiaries and until the division of the estate would not invalidate the rest of the trust.—*Id.*

§ 82 (N.Y.Sur.) If testator was of disposing mind, he could give all of his estate to his grandchildren without providing for his son.—*In re Raab's Will*, 139 N. Y. S. 869.

(C) Execution.

§ 114 (N.Y.Sur.) Attesting witnesses are required to see that a testator has capacity and that he executes it under free conditions and as required by law.—*In re Schmidt's Will*, 139 N. Y. S. 464.

(F) Mistake, Undue Influence, and Fraud.

§ 153 (N.Y.Sur.) Fraud and undue influence, sufficient to avoid a will, are distinct vices, though proof of the fraud may be made under general allegations thereof.—*In re Van Ness' Will*, 139 N. Y. S. 485.

§ 155 (N.Y.Sur.) Fraud and undue influence, sufficient to avoid a will, are distinct vices, though proof of the fraud may be made under general allegations thereof.—*In re Van Ness' Will*, 139 N. Y. S. 485.

Undue influence is unlawful coercion, which is an artificial state, whereby the testator is deprived of his free will by fraud or any other unlawful means.—*Id.*

§ 160 (N.Y.Sur.) A will procured by the undue influence of the young wife of an aged tes-

tator *held* not ratified by his subsequent declarations.—In *re Van Ness' Will*, 139 N. Y. S. 485.

§ 163 (N.Y.Sur.) Proof by the proponent of a formal compliance with the statute places the burden of going forward and making out proof of undue influence upon the contestants; but the ultimate burden of proving there was no undue influence rests upon the proponent.—In *re Van Ness' Will*, 139 N. Y. S. 485.

Undue influence, while susceptible of proof by circumstantial evidence, cannot be presumed.—*Id.*

While there is no presumption of testamentary incapacity by reason of the advanced age of a testator, yet when his senile state is established, a will giving all of his property to his wife casts the burden upon her of showing that it was his free and independent act.—*Id.*

§ 163 (N.Y.Sur.) Undue influence is an affirmative assault on the validity of a will, and the burden of proof is on the contestant, and does not shift throughout a probate proceeding; and this rule applies to an original proceeding in the Surrogate's Court.—In *re Falabella's Will*, 139 N. Y. S. 1003.

Freedom from restraint in the execution of a will cannot be presumed.—*Id.*

There is no presumption of fraud or undue influence in a probate cause from mere relations of confidence.—*Id.*

§ 164 (N.Y.Sur.) Where undue influence and actual fraud are set up against a will, no fact tending to prove such fraud is irrelevant, if it bears at all on that issue, and the inquiry should be given a wide range.—In *re Van Ness' Will*, 139 N. Y. S. 485.

Circumstantial evidence of undue influence, to be admissible, must be inconsistent with any other result than the undue influence charged.—*Id.*

Where it was claimed that a will was induced by undue influence, fraud, and conspiracy on the part of the young spouse of the aged testator, evidence of the marriage and acts leading up thereto, if connected with the making of the will, is admissible.—*Id.*

Evidence that a testator made slight, if any, provision for his only daughter, giving all of his estate to his third wife, who was much younger than himself, is material on the question of undue influence.—*Id.*

Evidence of a decree which fixed the rights of the testator in the property disposed of is admissible, it appearing that the sole beneficiary, who was the testator's young wife, was familiar with the decree under which he received a large sum of money.—*Id.*

The question whether the attorney who drew the will was familiar with the claims of third persons upon the testator, which were shown by a judgment, is material, where it was claimed that the attorney was a party to the fraud and conspiracy.—*Id.*

Where the sole beneficiary procured a writing which cast aspersions on the legitimacy of his only daughter, and threatened her with exposure in case of attack on the will, evidence thereof is admissible as an implied admission against the validity of the will; it appearing that the aspersions were without foundation.—*Id.*

§ 165 (N.Y.Sur.) When acts of undue influence are proved, declarations of the testator are competent to show the effect of such acts on his mind, and dispel or rebut any claim of imposition.—In *re Van Ness' Will*, 139 N. Y. S. 485.

§ 166 (N.Y.Sur.) A change of testamentary intention alone is not conclusive evidence of undue influence, though declarations of the testator are admissible to show what his intention was under a charge of undue influence.—In *re Schmidt's Will*, 139 N. Y. S. 464.

In an action to declare a codicil to a will invalid, evidence *held* insufficient to show undue influence.—*Id.*

Undue influence, invalidating a will, must be proved precisely or inferentially by irresistible inferences.—*Id.*

§ 166 (N.Y.Sur.) Undue influence, which will avoid a will, may be established either by direct or circumstantial evidence, which is sometimes termed "presumptive evidence."—In *re Van Ness' Will*, 139 N. Y. S. 485.

Where undue influence and fraud are alleged, it is not necessary to prove that the testator was at the time of making the will insane, to warrant denial of probate.—*Id.*

In an action for the probate of a will, contested on the ground of undue influence, evidence *held* insufficient to warrant probate, showing that it was not the will of testator.—*Id.*

Where the attorney who drew the will of an aged testator was under obligations to the sole beneficiary, who was the testator's young wife, that fact excites suspicion, and proof, other than the testimony of the attorney, that the will was the free act of the testator, is necessary to probate.—*Id.*

The purpose of the law in requiring attesting witnesses is primarily the security of the testator, and to protect him against force or fraud or undue influence; and hence, where attesting witnesses are not disinterested parties, their testimony is of little weight.—*Id.*

Testimony of a subscribing witness *held* insufficient to establish the validity of the instrument, by disproving fraud and undue influence.—*Id.*

Under Code Civ. Proc. § 2622, the surrogate must be satisfied of the genuineness of a will and the validity of execution before it is entitled to probate.—*Id.*

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(A) Probate and Revocation in General.

§ 203 (N.Y.Sur.) Probate is a proceeding in rem.—In *re Swartz's Will*, 139 N. Y. S. 1105.

§ 215 (N.Y.Sur.) In a probate proceeding, where it is sought to reject a part of a will on the ground of mistake, the matter is addressed to the powers of the surrogate sitting as a probate judge, and not to his power as a court of construction, under Code Civ. Proc. § 2624.—In *re Swartz's Will*, 139 N. Y. S. 1105.

A court of probate has no power, incidental to its general probate jurisdiction, to add words to a will, even if omitted by mistake.—*Id.*

§ 216 (N.Y.Sur.) The surrogate, as an incident of his probate jurisdiction, may refuse probate to part of a will, if fraud or mistake is

established.—In re Swartz's Will, 139 N. Y. S. 1105.

§ 220 (N.Y.Sur.) It is not too late for parties who have propounded a will to object to the probate of parts of the will on the ground of mistake.—In re Swartz's Will, 139 N. Y. S. 1105.

(E) Jurisdiction, Limitations, and Laches.

§ 248 (N. Y. Sur.) The Appellate Division serves as the real ordinary, and is vested with co-ordinate and original power over contested probates.—In re Falabella's Will, 139 N. Y. S. 1003.

§ 253 (N.Y.Sur.) While the powers of the surrogate as a court of probate are due primarily to Code Civ. Proc. § 2472, conferring jurisdiction "to take the proofs of wills and to admit wills to probate," yet, in the absence of more precise definition, such powers are referable to established precedents and to the Constitution.—In re Swartz's Will, 139 N. Y. S. 1105.

(G) Petitions, Objections, and Pleadings.

§ 274 (N.Y.Sur.) The proponent in a proceeding for probate must aver, in the first instance, testator's capacity and freedom from restraint.—In re Falabella's Will, 139 N. Y. S. 1003.

(H) Evidence.

§ 288 (N.Y.Sur.) Where a beneficiary under a will does not contest it, and is willing to take under it, she will be presumed to assent to its probate, if the mere execution is established by the proponent.—In re Van Ness' Will, 139 N. Y. S. 485.

§ 300 (N.Y.Sur.) The factum of a will being established by proof under oath of execution, the will is prima facie entitled to probate.—In re Swartz's Will, 139 N. Y. S. 1105.

§ 303 (N.Y.Sur.) Where three unimpeached witnesses swore that they saw testatrix sign the will, and contestant, husband of deceased, who was not present at the execution of the will, stated that, in his opinion, the subscription was not that of testatrix, subscription of the paper propounded was sufficiently shown.—In re Falabella's Will, 139 N. Y. S. 1003.

(I) Hearing or Trial.

§ 324 (N.Y.Sur.) Whether one who has had an apoplectic seizure, which deprived him of reason for a time, has testamentary capacity, is a question of fact.—In re Schmidt's Will, 139 N. Y. S. 464.

(J) Judgment or Decree.

§ 344 (N.Y.Sur.) Where a mistake in a will is of that character which may be corrected by a court of probate, only that part of the will entitled to probate will be annexed to the decree of probate.—In re Swartz's Will, 139 N. Y. S. 1105.

§ 346 (N.Y.Sur.) The factum of a will may be formally adjudged by the same decree which construes the will so found entitled to probate.—In re Swartz's Will, 139 N. Y. S. 1105.

VI. CONSTRUCTION.

(A) General Rules.

§ 436 (N.Y.Sur.) It is a general principle both of the international and municipal law that wills of personalty are to be construed and effect given them by the law of testator's domicile.—In re New York Life Ins. & Trust Co., 139 N. Y. S. 695.

The law as to the validity and effect of testamentary dispositions as depending upon the rules of private international law *held* not affected by Decedent Estate Law, § 47, or Code Civ. Proc. § 2694, which only declare the prior law, so that the law of the state with respect thereto stood as if neither section had been enacted.—Id.

§ 439 (N.Y.Sur.) While a will must be construed, if possible, so as to render it valid, yet the intent of the testator, when ascertained, controls.—Smith v. Smith, 139 N. Y. S. 124.

§ 440 (N.Y.Sur.) A court of equity will not correct an erroneous supposition of the testator, if he knew the contents of his will.—In re Swartz's Will, 139 N. Y. S. 1105.

While mistakes of draftsmen or engrossers, or those induced by fraud, may possibly be corrected in the Surrogate's Court in a proper case, the mistake of a testatrix concerning the legal effect or revocability of trust conveyances cannot be corrected.—Id.

§ 446 (N.Y.Sur.) The language of a will cannot be wrested from its natural import in order to preserve its validity.—In re Raab's Will, 139 N. Y. S. 869.

§ 447 (N.Y.Sur.) The surrogate must adopt a valid construction if the will is equally susceptible of a valid and an invalid interpretation, but cannot uphold a disposition clearly contravening a statute.—In re Raab's Will, 139 N. Y. S. 869.

§ 465 (N.Y.Sur.) A semicolon in a will will be construed as a comma to avoid importing to testator an unreasonable and unnatural intention, where the effect is to make the will reasonable and clear.—In re Rau's Estate, 139 N. Y. S. 525.

§ 473 (N.Y.Sur.) Bequest of vested remainder *held* not invalid, because limited to take effect at expiration of void trust.—In re Berry's Will, 139 N. Y. S. 186.

§ 487 (N.Y.Sur.) Evidence *held* to show that testator intended his niece to receive certain bank stock alone in case he died possessed of same.—In re Rau's Estate, 139 N. Y. S. 525.

§ 487 (N.Y.Sur.) Under Code Civ. Proc. § 2624, authorizing the surrogate to construe or determine the validity of testamentary disposition of personal property, he may, in a proper case, consider oral or extrinsic evidence.—In re Swartz's Will, 139 N. Y. S. 1105.

§ 488 (N.Y.Sur.) Evidence relative to execution of will and circumstances of estate *held* admissible to show whether testator intended by ambiguous clause to bequeath his niece \$6,000 in addition to 50 shares of bank stock where he died possessed of the stock.—In re Rau's Estate, 139 N. Y. S. 525.

§ 489 (N.Y.Sur.) While extrinsic evidence is not admissible where testator's intent is clear on the face of the will, it may be admissible to show who were the objects of testator's bounty.—In re Raab's Will, 139 N. Y. S. 869.

(B) Designation of Devisees and Legatees and Their Respective Shares.

§ 523 (N.Y.Sur.) Where no division of the property was to be made until a grandchild attained majority, when it was to be divided equally between the then living grandchildren and the issue of a deceased grandchild, the bequest was to a class, so that subsequently born grandchildren would be entitled to a share if living when the estate was divided.—In re Raab's Will, 139 N. Y. S. 869.

(D) Description of Property.

§ 587 (N.Y.Sur.) A farm devised in trust for 19 years, unless testator's wife and daughter die sooner, the income to be paid to them on expiration of the 19 years, the wife being then alive, falls into the general residuary clause, specifying both real and personal property, all of which is given the wife for life.—Anthony v. Van Valkenburgh, 139 N. Y. S. 599.

(E) Nature of Estates and Interests Created.

§ 614 (N.Y.Sur.) A devise in trust to rent for 19 years from date of the will, and pay the income to testator's wife and daughter for support of them and the survivor "during said 19 years or during the lives of" them and the survivor, is not for their lives, if they live beyond the 19 years, but for 19 years or such time as they live, if less than that.—Anthony v. Van Valkenburgh, 139 N. Y. S. 599.

(F) Vested or Contingent Estates and Interests.

§ 630 (N.Y.Sur.) Where the only words of gift are contained in the direction to divide or pay, the gift vests on the testator's death if such intention appears, and is future and contingent only when the only evidence of intention is found in such direction.—In re Kings County Trust Co., 139 N. Y. S. 454.

An interest devised to testator's widow held to vest at his death, requiring the payment thereof to her executor in the event of her death before the time for distribution.—Id.

§ 630 (N.Y.Sur.) Where a testamentary trust is to divide or pay over at a future time dependent upon the beneficiary's arrival at majority, the gift is not vested.—In re Raab's Will, 139 N. Y. S. 869.

§ 634 (N.Y.Sur.) A will held to give a surviving child of testator's son, who died before coming of age, a vested remainder in a portion of property held in trust for the life of her father.—In re Lincoln Trust Co., 139 N. Y. S. 682.

(H) Estates in Trust and Powers.

§ 688 (N.Y.Sur.) Where a trust providing for distribution among decedent's children, or the lawful issue of any deceased child, after five years, is invalid, the estate must be divided as that of an intestate.—Smith v. Smith, 139 N. Y. S. 124.

(I) Actions to Construe Wills.

§ 695 (N.Y.Sur.) Under Code Civ. Proc. § 2624, authorizing the surrogate to determine the validity, construction, or effect of a testamentary disposition of personal property, no trust or mistake need be involved in order to invoke such jurisdiction, and he may pass on the validity of legal as well as equitable titles.—In re Swartz's Will, 139 N. Y. S. 1105.

§ 698 (N.Y.Sur.) In the absence of a definition as to the extent of the surrogates' jurisdiction as a court of construction, the measure of such jurisdiction is to be found either in the jurisdiction of the courts invested with equitable powers, or that of the courts proceeding according to the course of the common law, or both.—In re Swartz's Will, 139 N. Y. S. 1105.

A court of law has no jurisdiction to correct a mistake in a devise; the exercise of its power over devises being confined to the single issue of devisavit vel non, and relating wholly to legal titles under wills or to matters in pais.—Id.

The power of courts of equity over wills is referable to the want of jurisdiction of courts of law, but more particularly to their jurisdiction over mistakes, which they have jurisdiction to correct in some instances. By a "court of construction," with reference to wills, a court of equity is meant.—Id.

The powers of equity to construe wills are referable more particularly to their jurisdiction over trusts, and where no trust is involved jurisdiction is generally to be declined; but for purposes of jurisdiction executors are regarded in equity as trustees.—Id.

Code Civ. Proc. § 2624, which authorizes the surrogate to construe or determine the validity and effect of a testamentary disposition of personal property, does not authorize him to construe clauses out of the will on the ground of mistake; any such relief having reference to his power as a probate judge.—Id.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(A) Nature of Title and Rights in General.

§ 734 (N.Y.Sur.) Where a general legacy is payable on the death of the residuary legatee, it bears interest only from that date.—In re McNamee's Will, 139 N. Y. S. 304.

§ 741 (N.Y.Sur.) Where income was bequeathed to a son for the benefit of himself and family, his wife could not sue to impress a lien thereon in her favor.—Oberndorf v. Farmers' Loan & Trust Co., 139 N. Y. S. 1090.

§ 745 (N.Y.Sur.) Evidence held not to show that a contract assigning plaintiff's interest as the residuary legatee in an estate was obtained by fraud or overreaching.—Colbert v. McCleary, 139 N. Y. S. 423.

(H) Void, Lapsed, and Forfeited Devises and Bequests, and Property and Interests Undisposed of.

§ 852 (N.Y.Sur.) A contingent remainder limited upon an invalid testamentary trust is invalid.—In re Raab's Will, 139 N. Y. S. 869.

§ 853 (N.Y.Sur.) Corporation to which a bequest was made, to take effect at the expira-

tion of a void trust, held entitled to take its request at the testator's death.—*In re Berry's Will*, 139 N. Y. S. 186.

WINDOWS.

See Vendor and Purchaser, § 130.

WITNESSES.

See Criminal Law, §§ 231, 1170½; Depositions; Evidence; Execution, § 386; Libel and Slander, §§ 7, 121; Perjury; Venue, § 77; Wills, §§ 114, 166.

I. ATTENDANCE, PRODUCTION OF DOCUMENTS, AND COMPENSATION.

§ 27 (N.Y.Sup.) Under Code Cr. Proc. § 616, as amended by Laws 1895, c. 98, witnesses for the prosecution are entitled to the same fees and mileage as witnesses in a civil action in the same court.—*People v. Sharp*, 139 N. Y. S. 905.

A witness unable to comply with the requirements, under Code Cr. Proc. § 618b, to deposit \$500 or enter recognizance to appear, is not entitled to witness fees for the time he was detained in jail, but only for the days he was in actual attendance on the trial.—*Id.*

II. COMPETENCY.

(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

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§ 140 (N.Y.Sup.) In an action for assault, though the question of a right of way was involved, where the jury's determination did not involve that question, a witness other than either of the parties was not rendered incompetent, under Code Civ. Proc. § 829, prohibiting persons interested from testifying as to transactions with a decedent.—*Blass v. Linsley*, 139 N. Y. S. 540.

§ 144 (N.Y.Sup.) A plaintiff, suing an executrix for money had and received, is not competent to testify to the employment at a weekly salary and the agreement that testator should retain a specified part thereof for plaintiff.—*Brady v. Donohue*, 139 N. Y. S. 851.

§ 150 (N.Y.Sup.) Where one having a deposit in a bank dies, leaving an order to the plaintiff for the deposit, but the title to the gift did not pass, the bank's interest in the deposit is an interest derived from, through, or under the deceased person, within Code, § 829, and the plaintiff could not testify to transactions between himself and the deceased.—*Foley v. New York Savings Bank*, 139 N. Y. S. 915.

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§ 390 (N.Y.Sup.) Where an officer, testifying for accused, stated that complainant had told him that he did not know who committed the crime, and that he had a telephone conversation with an assistant district attorney, the testimony of the assistant district attorney that he called up the officer, who stated he was looking for accused, who committed the act complained of in self-defense, was admissible to impeach the officer's credibility.—*People v. Longebodi*, 139 N. Y. S. 721.

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